

**A CODE OF EVIDENCE**

for

**THE STATE OF NEW YORK  
submitted to the 1991-1992 Session of the  
Legislature**

by

**Governor MARIO M. CUOMO  
prepared by**

**THE NEW YORK STATE LAW REVISION COMMISSION**

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The Honorable Mario M. Cuomo  
Governor of the State of New  
York Executive Chamber The  
Capitol

Albany, New York 12224

Dear Governor Cuomo:

We are pleased to submit the 1991 proposed Code of Evidence with accompanying commentary. As you are aware, in 1990, for the first time, the Code of Evidence was introduced as a Governor's program bill. That bill was the product of a working group that included Your Counsel, the First Assistant Counsel to the Senate Majority, Legislative Counsel to the Speaker, and the members of the Law Revision Commission.

A joint legislative - commission hearing on the bill was held in New York City on July 24, 1990. Based on the submissions at that hearing, the working group returned to the Code. This 1991 draft of the Code is the result of their efforts. The commentaries are based on those contained in the 1982 draft with substantial modifications to reflect the 1990-91 drafting process. That process was predicated upon a decision to continue present law unless there was good reason for change. The new commentaries were prepared by myself and reviewed by the Commission. In this regard, we wish to acknowledge the significant research, secretarial and other support, provided by Dean David G. Trager of Brooklyn Law School, without which the project could not have been completed.

The drafting process has been long and arduous but guided and propelled by the essential soundness of a Code of Evidence. In short, justice is best served by placing the common law and various statutory rules of evidence in a readily-accessible, easily-understandable, comprehensive and authoritative volume



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New York State March 21, 1991

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## Law Revision Commission Letter to Governor Cuomo

thereby enabling litigants and judges to start from the same point, guided by the same set of rules.

This particular codification is all the more sound because of the Code's general fidelity to New York common law principles and statutory provisions with only limited, well-reasoned, expressly-stated changes. The limited changes are neither drastic nor dramatic and are designed to: (1) modernize, e.g. the best evidence rule; (2) clarify, e.g. the rules governing expert testimony; (3) assure reliability and fairness, e.g. introductory requirements to the hearsay exceptions and various notice provisions; and (4) gently push the law along its path, e.g. permitting character testimony in certain civil cases and providing for limited judicial development of unenumerated hearsay exceptions. By expressly stating as a rule of construction that, absent an expressed intent to do so, the Code should not be read to change settled decisional law, we have sought to limit substantially, and hopefully eliminate entirely, unintended changes in New York law.

Of course, any codification must be carefully crafted to avoid undesirably freezing the law, while at the same time avoiding the provision of so much flexibility that there is in effect no code. These concerns are adequately addressed by this Code. Indeed, codification is all the more desirable because the plain language of the Code will make it all the more difficult for parties, by hook or by crook, to persuade a judge, or for a judge sua sponte to disregard a clearly applicable Code provision. Nor is there any legitimate concern about a lack of flexibility in this particular codification.

With respect to flexibility, many specifically phrased common law evidentiary principles, for example, hearsay exceptions and character testimony, have become so firmly rooted that little, if any, change has occurred in recent time. Thus, codification of these principles will neither change nor freeze the law in any meaningful or undesirable way. Of course, even explicit language must still be interpreted and under the Code, like the common law, that responsibility continues to rest with the judiciary.

In contrast to specifically phrased common law principles, many other common law evidentiary doctrines, for example relevancy and exclusion for undue prejudice, are but general statements of the law. Codification of these broad principles will require judicial interpretation but that

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interpretation should prove no different than interpretation of  
the

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same principles under the common law process. The Code, in other areas, such as exceptions to privileges and unenumerated exceptions to the hearsay rule, also provides flexibility for judicial development. By way of emphasis not repetition, flexibility will, where appropriate, still require case by case adjudication, not unlike the common law, which is so necessary to the process of evidentiary development.

The judicial role in interpreting recodified existing evidentiary statutes, for example, privileges and the hearsay exception for prior testimony, will be no different under the Code than the judicial role in interpreting the existing statutes. True, the Code precludes judicial creation of new privileges beyond those provided by statute or privileges constitutionally required. Nevertheless, so limiting the judiciary reflects the view, explicitly recognized by the Court of Appeals itself, that creating a non-constitutionally-based privilege raises fundamental questions of policy that are the prerogative of the Legislature, not the judiciary.

Thus, the Code neither injudiciously freezes the law of evidence nor does it undesirably provide for too much flexibility. Rather, with considerable benefit, it simply marks a new starting point for future judicial development.

That, in addition to judicial development, codification places the power to amend the Code in legislative hands is no different from the process under the many long-existing evidentiary statutes. Yet, there have been few legislative changes in present statutory evidence law, and certainly fewer, if any, of these changes have been truly "political" in nature. This history demonstrates that there is no legitimate reason to believe that every significant evidence ruling will become a political football involving proposed amendments to the Code. The Legislature would not tinker with the Code just to nullify an arguably incorrect evidence ruling. Rather, under the Code, as is the case under present evidentiary statutes, lower court decisions of this kind will be addressed through the appellate process. Moreover, the occasional Court of Appeals decision interpreting the Code provides no reason whatsoever to fear the amendment process.

Doubtless, clean-up and other changes in the future will be required. The creation of an advisory committee under article twelve of the Code is designed to guarantee a sound amendment process.

Law Revision Commission Letter to Governor Cuomo

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Finally, with regard to the codification of well-settled New York law, this 1991 version is different from its 1982 predecessor and sister-state codifications which seem to focus on the federal rules of evidence in an attempt to conform state law to the federal rules. In sum, the 1991 Code is much more a New York Code of Evidence and with its commentary, a Code which the Commission is most pleased to submit for consideration by you and the Legislature.

Respectfully,

Robert M. Pitler  
for the  
Commission





**PROPOSED CODE OF EVIDENCE**  
**FOR**  
**THE STATE OF NEW YORK**

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## ARTICLE 1—GENERAL PROVISIONS

### Section

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**Comment**

This Article sets forth several basic provisions concerning the applicability and interpretation of the Code of Evidence, including provisions governing the admissibility of evidence in general. The Article largely codifies present law. *But see* §§ 104(b)(1), 104(b)(3)(B). Prior drafts contained a section 103 which addressed various principles governing appellate review of evidentiary questions. That provision has been eliminated because it would, without adequate justification, have treated evidentiary questions differently than other issues and because appellate principles governing preservation are better left to statutes governing appeals (*see, e.g.*, CPL § 470.05) and decisional law,

**§ 101. Short title; application**

**(a) Short title.** This chapter shall be known as the "code of evidence" and may be cited as "CE".

**(b) Application of the Code of Evidence.** Except as otherwise provided by this chapter or other statute, this Code of Evidence shall apply to: (1) all civil and criminal trials; (2) all proceedings in family court; (3) all proceedings in surrogate's court; (4) all hearings conducted pursuant to section 710.60 of the criminal procedure law; and (5) except where its application would be inappropriate, all other proceedings in the courts of this state. Where another statute prescribes a rule governing admissibility of evidence or the conduct of a trial, hearing or other judicial proceeding, the provisions of that statute shall be controlling.

**(c) Application of privilege provisions of this chapter.** Except as otherwise provided by statute, the privileges provided in article five of this chapter shall apply at all stages of all actions, proceedings, and hearings in the courts of this state and shall apply in any action, hearing, investigation, inquest, or inquiry (whether conducted by a court, administrative agency, hearing officer, arbitrator, legislative body, or any other person authorized by statute) in which, pursuant to statute, testimony can be compelled to be given.

**(d) Family court proceedings.** For purposes of this chapter, proceedings under articles four, five, six, eight and ten of the family court act shall be governed by the rules applicable to "civil actions" and proceedings under articles three and seven of such act shall be governed by the rules applicable to "criminal actions or proceedings".

Comment

(a) Title.

Subdivision (a) is self-explanatory. It is similar to comparable sections in other recent statutory revisions and codifications. *See, e.g.*, CPLR 101; CPL 1.00; EPTL 1-1.1; SCPA 101.

(b) Application of the Code.

The Code of Evidence applies, except as otherwise provided by statute, to: all civil and criminal trials, proceedings in family court, proceedings in surrogate's court, hearings conducted pursuant to section 710.60 of the Criminal Procedure Law, and all other proceedings, including the grand jury, in the courts of this state except where its application would be inappropriate. The intent is to codify and restate present practice regarding the applicability of rules of evidence. *See* CPLR 101; CPL 60.10; *Matter of Leon RR*, 48 N. Y.2d 117, 421 N.Y.S.2d 863 (1979); *Matter of Syhestri*, 44 N.Y.2d 260, 405 N.Y.S.2d 424 (1978).

It is to be noted that subdivision (b) makes the Code of Evidence applicable only to trials, proceedings, and hearings in the courts of the state. Thus, the Code of Evidence is inapplicable in proceedings that are not conducted in the courts, such as administrative proceedings, legislative proceedings, or arbitration proceedings, unless another statute provides otherwise or the parties involved choose to apply the Code of Evidence. *See* State Administrative Procedure Act § 306(1); *Professional Staff Congress/City University of New York v. Board of Higher Education*, 39 N.Y.2d 319, 323, 383 N.Y.S.2d 592, 594 (1976). Various provisions, in the Code of Evidence and elsewhere, make the Code of Evidence applicable to a certain extent in nonjudicial proceedings. *See, e.g.*, CE 101(c) (provisions of the Code of Evidence relating to privileges are applicable in all actions and proceedings of every kind in which testimony can be compelled); State Administrative Procedure Act § 306(1) (rules governing privileges are applicable to hearings conducted by agencies subject to the Act); Vehicle and Traffic Law § 240 (rules governing privileges are applicable to hearings for the adjudication of charges of parking violations).

The last sentence of the subdivision is designed to assure that specific evidentiary rules contained in other statutes, not repealed by enactment of the Code, continue to govern questions of admissibility. Thus, the subdivision does not affect any other statute establishing or relaxing rules of evidence. Nor does the Code of Evidence alter statutes that relax the rules of evidence in

certain actions and proceedings. *See, e.g.*, CPL 400.30 (exclusionary rules of evidence inapplicable in hearings determining the amount of fines); CPL 710.60(4) (hearsay admissible in suppression hearings); TJJCA § 1804 (rules of evidence inapplicable in small claims hearings). Nor does the Code alter statutes which set forth the rules of evidence to be followed in certain actions and proceedings.

*See, e.g.*, CPL 180.60 (proceedings upon felony complaint); CPL 190.30 (grand jury proceedings); CPL 400.21 (second felony offender hearing); CPL 410.70 (revocation of probation hearings); Family Court Act § 624 (proceeding to terminate custody of a child); Family Court Act § 834 (proceedings involving family offenses); Family Court Act § 1046 (child protective proceedings). Nor does the Code alter statutes which set forth specific rules of evidence. *See, e.g.*, CPL 240.45 (disclosure of prior statements and criminal history of witnesses); DRL § 144 (admissions in action for annulment); Family Court Act § 531 (corroboration in paternity proceedings); Family Court Act § 915 (confidentiality of statements made in conciliation proceedings); Judiciary Law § 148-a (recommendation of medical malpractice panel admissible in medical malpractice action); Mental Hygiene Law § 77.25(b) (appointment of conservator shall not be evidence of competency or incompetency of the conservatee).

(c) Application of privileges.

This subdivision provides that the privileges recognized in Article 5 of the Code of Evidence are applicable in all stages of all judicial actions, proceedings, and hearings as well as in nonjudicial proceedings in which testimony may be compelled. Privileges are given this wide scope of applicability because the inducement to free communication deriving from the assurance of exclusion in judicial proceedings shall be seriously vitiated by the knowledge that the communication may nevertheless be admissible in legislative or arbitration hearings. This provision is consistent with CPLR 4503 (attorney-client). There is no reason that justifies treating the other privileges differently. It is important to note that the spousal privilege, like other privileges, is not a "universal gag rule" and where no privileged testimony is offered, then information from a spouse may be used for many purposes including the obtaining of a search warrant. *See People v. Scull*, 37 N.Y.2d 833, 378 N.Y.S.2d 30 (1975).

The exception clause is necessary because the legislature has recognized that the policies underlying privileges are not paramount in all situations and in some instances must yield to other policies which seek the disclosure of all relevant evidence. *See, e.g.*, Family Court Act § 1046(a) (vii) (privileges may not be involved in child protective proceedings); Public Health Law § 3373

(for purposes of article 33 of the Public Health Law, communications made to a physician are not protected by the physician-patient privilege).

The subdivision is consistent with the relatively sparse existing authority on the applicability of evidentiary privileges in nonjudicial proceedings. *See, e.g.,* CPLR 3101(b), 4503; State Administrative Procedure Act § 306(1); *cf. New York City Council v. Goldwater*, 284 N.Y. 296, 302, 31 N.E.2d 31 (1940); *Hirshfield v. Hanley*, 228 N.Y. 346, 349, 178 N.Y.S. 895 (1920); *see also Williams v. Buffalo General Hospital*, 28 A.D.2d 111, 280 N.Y.S.2d 699 (3d Dep't 1967).

(d) Family court proceedings.

This subdivision recognizes, as does present law and practice, that certain proceedings in family court (juvenile delinquency and persons in need of supervision), because of the high burden of proof and because adjudication may lead to involuntary confinement, are governed by evidentiary principles applicable in criminal cases. *See* Family Court Act §§ 342.2, 744; *see also In Re Gault*, 387 U.S. 1, 87 S.Ct. 1428 (1967); *Matter of Cecilia R.*, 36 N.Y.2d 317, 367 N.Y.S.2d 770 (1975).

§ 102. Purpose and construction

The purpose of this chapter is to secure fairness in administration and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and trials, proceedings, and hearings justly determined. This chapter shall not be construed to have changed settled decisional law or statutory principles of evidence unless there is an express and unequivocal indication of legislative intent to do so. That intent is not to be found simply because a provision of this chapter is phrased in language that is different from settled decisional law or statutes. Where this chapter does not prescribe a rule governing the admissibility of evidence or the conduct of a trial or other judicial proceeding, the court shall be governed, except as otherwise required by the constitution of the United States or of this state or statute, by the principles of the common law as they may be interpreted in the light of reason and experience.

Comment

The first sentence of the section sets forth the goals of the Code of Evidence. The provisions of the Code should be construed to accomplish these purposes. In addition, the "just determination" of proceedings encompasses the elimination of unjustifiable expense and delay. *See* CE 611(a). A court is not, however, authorized to preempt a legislative function and rewrite a provision of the Code of Evidence under consideration. *Cf. Wagner v. Comblum*, 36 A.D.2d 427, 321 N.Y.S.2d 156 (4th Dep't 1971). The sentence codifies present law. *See, e.g., Fleury v. Edwards*, 14 N.Y.2d 334, 341, 251 N.Y.S.2d 647, 651 (1964) (Fuld, J., concurring). It is similar to other provisions in other statutory codifications and revisions expressing or implementing the policy objective of securing just, speedy, and inexpensive conduct of litigation. *See, e.g., CPLR 104; Penal Law § 5.00; UCC § 1-102.*

The second sentence sets forth one of the major principles guiding interpretation and construction of the Code. That principle continues well-settled decisional law and statutory evidentiary rules unless there is an express legislative indication to work a change. By and large that intention is to be

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found in the commentary. As the section states, simply because the Code formulates settled decisional law or an existing statute in different language should not lead one to conclude that there is an intent to change the law. Thus, although the Proposed Code follows the general format and at times the language of the Federal Rules of Evidence, this does not mean that there is any general intent to adopt the Federal Rules or the cases interpreting those rules. Rather the starting point of interpretation and construction is the language used read in light of existing well-settled New York principles. The phrase "well- settled decisional law" is designed to make clear that an isolated trial court decision should not control the construction of a particular provision. On the other hand, a Court of Appeals holding should be controlling in construction absent an unequivocal indication of intent to nullify that holding. Along the spectrum between the isolated case and the Court of Appeals holding lie other cases which will require the judiciary to determine whether an evidentiary principle is well-settled decisional law and, if so, whether the Code was intended to change that principle.

Of course, the Code should not be construed as freezing existing New York law when language lends itself to judicial construction. Indeed, a few provisions are expressly subject to "decisional law" which means that future definition and development will be under the judicial common law process. *See, e.g.*, CE 104(b)(3), 302, 803(b)(4). A few other provisions are expressly intended to allow for future judicial development of principles. *See, e.g.*, CE 504(c), 505(b), 506(b), 507(d), 508(b), 509(b), 514(b), and 803(c). Leaving these few issues to decisional law development is not inconsistent with a codification but simply reflects recognition of the special role of judicial development in those particular areas. Finally, the last sentence of the section continues decisional law development for matters not covered by the Code.

With respect to uncovered matters, although the Code of Evidence includes provisions governing most evidentiary issues, it does not prescribe for every possible question regarding admissibility of evidence or conduct that may arise during the course of a trial. There are, for example, no provisions governing: a judge's power to marshal or comment on the evidence in civil cases, *see* Prince, Richardson on Evidence § 126 (10th ed.); *cf* CPL 300.10(2); *People v. Culhane*, 45 N.Y.2d 757, 408 N.Y.S.2d 489, *cert. denied*, 439 U.S. 1047, 99 S.Ct. 723 (1978); judicial notice of "legislative facts," *see* Comment to CE 201(a); presumptions in criminal cases, *see* Comment to CE 301; choice of law when privileges are claimed for multi-state situations; impeachment of alibi witnesses, *see* *People v. Dawson*, 50 N.Y.2d 311, 428 N.Y.S.2d 914 (1980); instructions about missing witness, *see, e.g.*, *People v. Paylor*, 70 N.Y.2d 146, 518 N.Y.S.2d 102 (1987);

impeachment by evidence of conduct inconsistent with the witness's testimony, *but see* CE 809 (impeachment of hearsay declarant by inconsistent conduct). In such instances, the second sentence of CE 102 provides that the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience. The sentence does not, however, authorize the courts to circumvent

the rules enacted by the legislature. In particular, it should be noted that CE 501(b) precludes common law development of new privileges and CE 802 does the same for new hearsay exceptions, except as permitted by the unenumerated hearsay exception provision of section 806.

### §103. 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.

#### Comment

This section, by permitting error to be predicated only upon evidentiary rulings that affect a substantial right of a party, continues present law. *See, e.g.,* CPL 470.05. The section also directs attention to the "requirements of law," *i.e.,* statutes and cases, for the preservation principles governing the necessity of an objection and its nature, *i.e.,* specific or general. Earlier drafts of the section sought to particularize many of those principles and change at least one. On balance, however, since the Code is primarily directed to the trial process and given the unique appellate questions involved, it seems best to leave all issues involving preservation to existing statutes and the common law process. That the section is even in the Code is to benefit attorneys who practice in both state and federal court by having, whenever possible, the Code number parallel that of their federal rules counterpart even though there are major differences in substance and approach between the state and federal codifications. *See* Comment to CE 102, *supra*.

### § 104. Preliminary questions

(a) Questions of relevance. Preliminary questions as to the relevance of offered evidence shall be determined by the court. When the relevance of the offered evidence depends upon the fulfillment of a condition of fact, the court shall admit it after, or may admit it subject to, introduction of evidence sufficient to support a finding of the fulfillment of the condition.

(b) Other preliminary questions. This subdivision governs determination of preliminary questions other than those governed by subdivision (a) of this section.

(1) Preliminary questions for the court. Preliminary questions as to the admissibility of offered evidence, the qualifications of a person to be a witness, and the applicability of a privilege or an exception to a privilege shall be determined by the court. In a jury trial such preliminary questions shall not, except as otherwise provided by statute, be submitted to the jury for its determination. The jury shall not be informed of any factual determination made by the court in deciding preliminary questions.

(2) Evidence in determining preliminary questions.

(A) General rule. Except in accordance with section 710.60 of the criminal procedure law, in making its determination of a preliminary question under this subdivision, the court is not bound by the other provisions of this chapter other than the provisions with respect to privileges.

(B) Admissions. When the preliminary question concerns the admissibility of an authorized admission pursuant to paragraph three of subdivision (b) of section 803 of this chapter, the court may not consider the content of the statement being offered in determining authority to speak or the existence of the employment or the agency.

(C) Co-conspirator's statements. When the preliminary question concerns the admissibility of a statement of a co-conspirator pursuant to paragraph four of subdivision (b) of section 803 of this chapter, the court may not consider the content of the statement being offered in determining the existence of the conspiracy or the participation of the declarant or the accused in the conspiracy.

(D) Privileges. When the preliminary question concerns the applicability of a privilege, other than the privilege against self-incrimination, or the applicability of an exception to such a privilege, other than the privilege against self-incrimination, and the court is unable to make the determination without disclosure of the communication or matter claimed to be privileged, the court may require the person from whom disclosure is sought or the person claiming the privilege, or both, to disclose the communication or matter claimed to be privileged out of the hearing of all persons except the person claiming the privilege and such other persons as the person claiming the privilege is willing to have present.

(3) Determining preliminary questions: burdens; order of proof.

(A) Burden of proof, findings of fact and conclusions of law. Except as otherwise provided by statute or the common law, the burden of showing that evidence is admissible or a witness is qualified shall be upon the party offering the evidence or calling the witness, but the burden of showing that a communication or matter is privileged shall be upon the person claiming the privilege. Unless a higher burden is required by statute or decisional law, the court's determination shall be based upon a preponderance of evidence. Whenever an inquiry is made or a hearing held, the court shall state on the record findings of fact and conclusions of law.

(B) Admission subject to connection. The court may admit offered evidence subject to later introduction of evidence sufficient to satisfy the burdens imposed by this paragraph but may do so with respect to a co-conspirator's statement offered by the prosecution in a criminal case under paragraph four of subdivision (b) of section 803 of this chapter only upon an offer of proof establishing the existence of the conspiracy, the defendant's participation in the conspiracy and that the offered statements were made during the course and in furtherance of the conspiracy.

(c) Hearing of jury. Hearings on preliminary questions shall be conducted out of the hearing or presence of the jury when required by statute, or in the interests of justice, or when an accused is a witness if the accused so requests.

(d) Testimony by accused. The accused in a criminal case does not become subject to cross-examination as to other issues in the case by testifying with respect to a preliminary question.

(e) Weight and credibility. This section does not limit the right of a party to introduce evidence relevant to weight or credibility before the trier of fact.

#### **Comment**

**This section comes into play when a party objects to the introduction of offered evidence. The provisions recognize that the applicability of the rule of evidence upon which the objection is based will depend upon the determination of whether the requirements of the rule have been satisfied, *i. e.*, the resolution of preliminary questions.**

**The section sets forth the role of the court in determining preliminary questions as well as rules that must be observed by the court in the course of those determinations. Under the section the rules vary depending on whether the preliminary question is essentially concerned only with whether the offered evidence has**

probative value or whether the preliminary question involves consideration of technical rules of admissibility and exclusion grounded on factors besides probative value. The probative value preliminary question—usually described as a question of "relevancy"—is governed by subdivision (a); the admissibility beyond probative value type of question—often called questions of "competency"—is governed by subdivision (b). The section largely codifies present practice. *See People v. Marks*, 6 N.Y.2d 67, 188 N.Y.S.2d 465 (1959), *cert. denied*, 362 U.S. 912, 80 S.Ct. 662 (1960); *Poppe*

*v. Poppe*, 3 N.Y.2d 312, 165 N.Y.S.2d 99 (1957); *Meiselman v. Crown Heights Hospital*, 285 N.Y. 389, 34 N.E.2d 367 (1941); *Kearney v. New York*, 92 N.Y. 617 (1883); Prince, Richardson on Evidence § 117 (10th ed.); Fisch, Evidence § 26 (2d ed.).

(a) Preliminary questions of relevance.

"Relevance" in subdivision (a) means, consistent with CE 401, the "tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Subdivision (a) therefore governs preliminary questions involving only the issue of whether the evidence has probative force. These are the questions posed in applying CE 401 (relevancy defined), 402 (relevant evidence admissible unless barred by statute or constitution), CE 602(a) (whether a witness has personal knowledge), CE 607 (whether matter is relevant to credibility of a witness), CE 901(a) (whether the evidence is authentic or otherwise identified), and CE 1008 (certain questions regarding writings and their contents), *see* Comments to CE 602(a), 607, 901(a), and 1008. By express reference in CE 404(b)(3), the burden of proof governing preliminary questions concerning the probative value of uncharged crimes evidence in a criminal case is governed by subdivision (b)'s preponderance of evidence standard and not the lesser standard of subdivision (a). This reflects present New York law, *see People v. Robinson*, 68 N.Y.2d 541, 510 N.Y.S.2d 837 (1986), and is in contrast to the federal rules which treat the issue under subdivision (a). *See Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496 (1988).

The sections to which subdivision (a) applies all provide, explicitly or implicitly, for admission of testimony or evidence upon introduction of evidence "sufficient to support a finding" that their requirements are met. Thus, the court's function in ruling on admissibility is only to decide whether there is a reasonable basis for the jury to decide that the evidence has probative force. Once the evidence is admitted, the jury then decides its effect and value, *see* Comments to CE 602(a), Article 9, and 1008. The function of the court concerning the resolution of these preliminary questions is thus very different from its function in resolving the preliminary questions governed by subdivision

(b) of the section, *see* Comment to CE 104(b). Questions of the probative force of evidence are not finally determined by the court because the jury has been thought capable of making the ultimate determination, *see McCormick*, Evidence § 53 (3d ed.); Morgan, *Functions of Judge and Jury in Preliminary Questions of Fact*, 43 Harv. L. Rev. 164 (1929).

For example, when a party objects to offered evidence on the ground of irrelevance, *e.g.*, CE 401, the court decides only whether the jury could find the evidence probative. If so, the jury then decides what weight, if any, to give the evidence. Similarly, if a question arises as to whether a witness has the requisite personal knowledge, *e.g.*, CE 602(a), it is for the court to determine only whether there has been a sufficient showing upon which a jury could find personal knowledge.

The subdivision further provides that if the relevance of the offered evidence is dependent upon the existence of a second fact, the court's function is to determine whether there is sufficient evidence for a jury decision as to the existence of the second fact. It is for the jury to determine whether or not the second fact is established and the effect and value of the offered evidence. In this regard, where the admissibility of evidence depends upon one or more additional facts, the order of proof is within the discretion of the court, *see* CE 611(a).

For example, when an oral statement is relied upon to prove notice to X, such evidence is relevant only if X heard it. The court will admit the statement if there is a sufficient showing upon which the jury could find notice to X. Whether X had notice of the statement is a question for the jury to decide. Similarly, when an issue arises concerning the authenticity of offered documentary evidence, *e.g.*, CE 901(a), the court admits the evidence if there is a sufficient showing of authorship (or genuineness), and the jury is then free to decide for itself whether that condition (authorship or genuineness) is fulfilled, and helpful to it, *see* Comment to Article 9.

In making its determination regarding questions governed by this subdivision, the court considers only admissible evidence. Since the jury ultimately determines these questions and it, of course, can use only admissible evidence, it is sensible to restrict the court to use only admissible evidence.

(b) Other preliminary questions.

This subdivision governs resolution of all preliminary questions other than those governed by subdivision (a). It therefore covers application of all evidence rules except those grounded solely on considerations of probative value. Examples are: whether the prejudicial effect of offered evidence significantly outweighs its probative value, *e.g.*, CE 403; whether a witness is capable of expressing himself so as to be understood by the trier of fact or of understanding the nature of an oath or affirmation, *e.g.*, CE 602(b), CE 602(c); whether a witness is qualified to testify as an expert, *e.g.*, CE

702; whether a communication between husband and wife is privileged, *e.g.*, CE 505; or whether a hearsay statement is admissible as an exception to the hearsay rule, *e.g.*, CE 803, 804. By express reference in CE 404(b)(3) the burden of proof governing preliminary questions concerning the probative value of uncharged crimes evidence in a criminal case is governed by this subdivision (b) and not subdivision (a) as is the case under the federal rules. *See Huddleston v. United States*, 485 U.S. 681, 108 S.Ct. 1496 (1988). This reflects present New York law. *See People v. Robinson*, 68 N.Y.2d 541, 510 N.Y.S.2d 837 (1986).

In determining preliminary questions under this subdivision, the court may state its reason and if an inquiry is made or a hearing held, paragraph (3)(B) requires the court to state findings of fact and conclusions of law. These requirements are designed to assure that the trial court uses the appropriate standard and that there is an adequate record to review the *nisi prius* determination. In the grand jury setting where the prosecutor serves as legal advisor (*see* CPL 190.25[6]) and must make rulings similar to those required of the court under this subdivision (*see* CPL 190.30[6]), the subdivision, like present law, requires that the prosecutor use the appropriate standard and make an adequate record. *See People v. Groff*, 71 N.Y.2d 101, 104, 524 N.Y.S.2d 13, 14 (1987), *People v. Gorgone*, 47 A.D.2d 347, 366 N.Y.S.2d 647 (1st Dep't 1975).

When offered evidence, even though it has probative value, is objected to pursuant to a rule of evidence, the applicability of which depends upon the existence of a condition, a preliminary question governed by this subdivision will be present. Examples of such questions are: does the witness possess sufficient knowledge or skill to testify as an expert, *See* CE 702; was a third party present during the conversation between husband and wife, *see* CE 505; was the declarant under the stress of excitement caused by a startling event when he made his statement, *see* CE 803(c)(1).

(b) (1) Preliminary questions for the court.

Pursuant to paragraph (b)(1), the court alone determines these questions, including any necessary factual or legal determinations as to the existence of a condition. *See People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976); *Meiselman v. Crown Heights Hospital*, 285 N.Y. 389, 34 N.E.2d 367 (1941); *Poppe v. Poppe*, 3 N.Y.2d 312, 165 N.Y.S.2d 99 (1957); *People v. Marks*, 6 N.Y.2d 67, 188 N.Y.S.2d 465 (1959); *People v. Culhane*, 45 N.Y.2d 757, 408 N.Y.S.2d 489, *cert. denied*, 439 U.S. 1047, 99 S.Ct. 723 (1978). Except where otherwise provided by statute, as in CPL 710.70 (voluntariness of defendant's pre-trial statements), these questions are not submitted to the jury for its



determination. *Id.* For example, if a hearsay statement is offered, and a claim is made that it is admissible under the statement against interest exception to the hearsay rule, CE 804(b)(3), the court must decide whether the requirements of the exception are satisfied. Thus, the court must determine whether the declarant is unavailable and whether the statement is against the declarant's interest. The jury does not concern itself with these issues once the statement is admitted. With respect to conspirators' hearsay statements in furtherance of a conspiracy, this paragraph changes the practice of some trial courts that submitted the evidentiary question to the jury. *See People v. Malagon*, 50 N.Y.2d 954, 431 N.Y.S.2d 460 (1980); *People v. Bell*, 48 N.Y.2d 913, 425 N.Y.S.2d 52 (1979).

It is to be noted that the third sentence of paragraph (1) ensures that when the preliminary question and the ultimate question for the jury overlap, the jury will not be prejudiced in reaching its determination. For example, in a prosecution for conspiracy when the court has admitted statements under the coconspirator exception to the hearsay rule, *see* CE 803(b)(4), the jury will not know that the court has determined that a conspiracy existed when it admitted the statements.

(b) (2) Evidence in determining  
preliminary questions.

(b) (2) (A) General rule.

In resolving nonrelevancy preliminary questions, paragraph (b)(2) provides as a general rule that the court is not bound by the provisions of the Code of Evidence. Thus, the court may consider affidavits or other hearsay statements in making its determination. The exclusionary rules of evidence reflect a concern over the capabilities of a jury to make technical legal and factual distinctions. The same considerations are not present when the decision as to such a preliminary question is to be made by the court and, therefore, the court is not bound by the exclusionary rules.

Paragraph (2) also imposes several restrictions upon the court in the course of determining the questions governed by the subdivision. First, in a suppression hearing conducted pursuant to CPL 710.60, which is a hearing to determine the admissibility of certain evidence whose admission is challenged on constitutional grounds, the court must apply the rules of evidence except as that statute otherwise provides. This continues current law and practice.

(b) (2) (B) Admissions.

When the preliminary question involves authorized admissions (803[b][3]), the facts of authority and agency or employment may not be proved by the hearsay declarations of the agent or employee. This restates present law. *See* Prince, Richardson on Evidence § 253 (10th ed.).

**(b) (2) (C) Conspirator's statements.**

When the preliminary question involves the application of the "coconspirator exception," CE 803(b)(4), the court may not consider the statement being offered in determining the existence of the conspiracy and the participation of the defendant and the declarant therein. This continues the present New York requirement that there be independent evidence of the foundation facts, *People v. Salko*, 47 N.Y.2d 230, 238, 417 N.Y.S.2d 894, 895 (1979), and is in contrast to the recently declared federal rules which permit consideration of the hearsay statements. *See Bourjaily v. United States*, 483 U.S. 171, 107S.Ct. 2775 (1987).

**(b)(2)(D) Privileges.**

The court must apply the rules of privilege in order to preserve the confidentiality of certain communications and matters, *see* Comment to CE 101(c). This principle is, however, limited by the last sentence of the paragraph under which a restricted disclosure of the privileged communication or matter may be permitted when necessary. Its provisions recognize that in some situations it will be necessary for the court to hear or examine the communication or matter claimed to be privileged in camera in order to resolve intelligently whether the communication or matter is privileged or whether an exception to the privilege is applicable. Such a need can arise in situations involving those privileges or exceptions to privileges that require the application of a balancing test, or considerations of protecting the public against crime or fraud. *See United States v. Zolin*, 488 U.S. 907, 109 S.Ct. 257 (1989). Often, of course, evidence of surrounding circumstances will be sufficient, thus avoiding the need even for an in camera disclosure.

**(b) (3) Determining preliminary questions.**

**(b) (3) (A) Burden of proof.**

Subparagraph (3)(A) prescribes who has the burden on preliminary questions governed by the subdivision, what weight of evidence is necessary to satisfy the burden, and what order of proof shall be followed. The first sentence restates the traditional rule that the proponent of a witness or evidence generally has the burden of

establishing' the witness's qualifications to testify or the admissibility of the evidence, except when a claim of privilege is made; in that event, the burden is on the person claiming the privilege. The exception recognizes that in some instances a statute or decisional law may allocate the burden differently and those statutes and decisions are intended to be retained. *See, e.g., Matter of Brown v. Ristich*, 36 N.Y.2d 183, 366 N.Y.S.2d 116 (1975) (mental capacity of witness); *People v. Berrios*, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971) (unlawful search and seizure); *see generally* Prince, Richardson on Evidence §§ 389, 390, 550, 561 (10th ed.); Fisch, Evidence § 22 (2d ed.); McCormick, Evidence § 70 (3d ed.); Pitler, NY Criminal Practice § 10.69. The second sentence prescribes the burden of proof as a preponderance of evidence, except where a higher burden is prescribed by statute or decisional law, *e.g., People v. Huntley*, 15 N.Y.2d 72, 255 N. Y.S.2d 838, on remand, 46 Misc.2d 209, 259 N.Y.S.2d 369 (1965) (admissibility of confessions "beyond a reasonable doubt"); *People v. Whitehurst*, 25 N.Y.2d 389, 306 N.Y.S.2d 673 (1969) (prosecution has a "heavy burden," to establish voluntariness of a person's consent , to a search). *People v. Robinson*, 68 N.Y.2d 541, 510 N.Y.S.2d 837 (1986). (to admit an uncharged crime as evidence of the defendant's identity of the crime charged, defendant's commission of the uncharged crime must be established by clear and convincing evidence). Since the jury will not consider the question (compare its consideration of relevancy questions, Comment to CE 104[a]), there is no reason for the court to admit the evidence unless persuaded that it is more likely than not that the conditions of admissibility are satisfied. After an inquiry or hearing, the court must state on the record its findings of fact and conclusions of law.

(b) (3) (B) Proof subject to connection.

Like its counterpart in subdivision (a), this subparagraph allows preliminary questions to be determined subject to "connecting up." Continuing to permit the introduction of co-conspirator's statements, subject to proof of the conspiracy, defendant's participation in it and that the statements were made in the course of and in furtherance of the conspiracy {*see People v. Lakomec*, 86 A.D.2d 77, 81 n.3, 449 N.Y.S.2d 71, 74 n.3 [3d Dep't 1987]}, will avoid jury confusion and inconvenience to the witness. *See Berger & Weinstein*, 1 Weinstein's Evidence 1 104(05). Requiring an offer of proof provides an adequate guarantee that the evidentiary predicates will indeed be introduced. In the event that the predicates are not established, the trial court must fashion an appropriate remedy, including but not limited to striking the trial testimony and giving a cautionary instruction or granting a mistrial if one is requested, or consented to, by the defendant. In requiring that the conspiracy predicates be established by a preponderance of the evidence, the

Code makes a slight shift from present law that requires only a *prima facie* showing which imposes less of a burden than that required by a preponderance standard. *People v. Salko*, 47 N.Y.2d at 238, 417 N.Y.S.2d at 425, *supra*-, *People v. Bell*, 48 N.Y.2d 913, 915, 425 N. Y.S.2d 52, 54 (1979). The reason for the change is that *prima facie* is a standard dependent upon a judge determining that whether there is sufficient evidence on its face would enable a trier of fact, *i.e.*, the jury, to conclude that a preponderance standard has been satisfied. *See People v. Peetz*, 7 N.Y.2d 147, 149, 196 N.Y.S.2d 83, 85 (1959). Since the Code has eliminated the practice of submitting the evidentiary issue to the jury, the *prima facie* standard too has been eliminated.

(c) Hearing of jury.

Subdivision (c) recognizes that in many instances the court will have to conduct some form of a hearing when determining preliminary questions. It states when such hearings are to be held outside the hearing or presence of the jury. The subdivision is premised on the recognition of the potential for prejudice to parties in both civil and criminal cases from evidence which will be produced at the hearing.

Under its provisions, a court must hold the hearing outside the hearing or presence of the jury when required by statute. *See, e.g.*, CPL § 710:60. Furthermore, when the interests of justice so require, the court shall conduct the hearing outside the hearing or presence of the jury . *See People v. Coniglio*, 19 Misc.2d 808, 361 N.Y.S.2d 524 (Sup. Ct. Queens Co. 1974); Additionally, the subdivision provides that where an accused is a witness, he has the right, upon his request, to be heard outside the hearing or presence of the jury. This seems an appropriate protection for an accused's right not to testify generally in the case.

(d) Testimony by an accused.

The first sentence of the subdivision makes clear that, by testifying at the hearing, the accused does not completely waive the right to claim the privilege against self-incrimination. Under its provisions, the accused may be cross-examined only as to credibility and the matters testified to on direct examination, *compare* CE 611(b). Thus, in a hearing on a preliminary question the accused may not be cross-examined as to guilt of the crime charged unless the accused asserts his or her innocence on direct examination. *See People v. Huntley*, 46 N.Y.2d 209, 259 N.Y.S.2d 369 (1965), *ajffd*, 27 A.D.2d 904, 281 N.Y.S.2d 970 (1st Dep't), *ajffd*, 21 N.Y.2d 659, 288 N.Y.S.2d 912 (1967);

Prince, Richardson on Evidence § 550 (10th ed.).

The admissibility at trial of an accused's testimony on a preliminary question involving a constitutional right as substantive evidence or for impeachment purposes involves constitutional questions. See *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967 (1968); cf. *Walder v. United States*, 347 U.S. 62, 74 S.Ct. 354 (1950); *Harris v. New York*, 401 U.S. 222, 91 S.Ct. 643 (1970); compare *People v. Maerling*, 64 N. Y.2d 134, 485 N. Y.S.2d 23 (1984), with *People v. Walker*, 67 N.Y.2d 776, 500 N. Y.S.2d 643 (1986), affirming on the opinion below, 110 A.D.2d 730, 487 N.Y.S.2d 613 (1985). Accordingly, the constitutional issues of permissible substantive or impeachment use are left for judicial resolution as are the nonconstitutional issues which involve similar, and perhaps related, questions.

(e) Weight and credibility.

Subdivision (e) makes clear that the court's determination of admissibility does not preclude the parties from introducing evidence relevant to weight and credibility before the trier of fact. See *People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976); Prince, Richardson on Evidence § 389 (10th ed.).

§ 105. Limited admissibility

When evidence that is admissible as to one party but not as to another or for one purpose but not for another is admitted, the court may, or upon request shall, restrict the evidence to its proper scope and instruct the jury accordingly at the time the evidence is admitted, and may, or upon request shall, so instruct as part of the court's charge to the jury. This section shall not preclude the court from excluding the evidence Or taking any other action it deems appropriate when a limiting instruction will not adequately protect a party.

### Comment

This section recognizes that as a general rule evidence should be received if it is admissible as to any party or for any purpose even though it may be inadmissible as to another party or for another purpose. In such circumstances, the section provides for instructing the jury as to the limited purpose for which the evidence may be considered. The aim of the section is, insofar as possible, to assure that evidence admitted for a limited purpose will not be improperly applied beyond that purpose by the jury. Its provisions codify present law. *See People v. Marshall*, 306 N.Y. 223, 117 N.E.2d 265 (1954); *Wolfe v. Madison Ave. Coach Co.*, 171 Misc. 707, 13 N.Y.S.2d 741 (Sup. Ct., App. Term, 1st Dep't 1939); Prince, Richardson on Evidence §§ 6, 232 (10th ed.).

Under the section, the court is obligated upon request to give an instruction to the jury restricting the jury's use of the evidence to its proper scope. Additionally, the section authorizes the court to give an instruction even if no request is made. This provision recognizes that there are some instances where it would be in the interests of justice for the court to give the instruction. *See People v. Patterson*, 48 A.D.2d 933, 369 N.Y.S.2d 534 (2d Dep't 1975); *Wolfe v. Madison Ave. Coach Co.*, *supra*.

The time at which the instruction is given may be particularly important for the instruction's effectiveness, *see People v. Marshall*, *supra*. Thus, the section provides that the jury may be instructed when the evidence is admitted or as part of the general charge or at both times.

The last sentence of the section recognizes that in some instances a limiting instruction will not be sufficient to protect a party adequately. In these situations, the section does not preclude the court from excluding the evidence, *see* CE 403, or taking other action, for example, editing the proffered evidence or ordering a severance. *See People v. Jackson*, 22 N. Y.2d 446 , 293 N. Y.S.2d 265 (1968); *People v. Boone*, 22 N.Y.2d 476, 293 N.Y.S.2d 287 (1968), *cert denied sub nom. Brandon v. New York*, 393 U.S. 991, 89 S.Ct. 464 (1968); *People v. La Belle*, 18 N.Y.2d 405, 276 N.Y.S.2d 105 (1966).

## § 106. Completing a writing or recording

When a writing or recorded statement or part thereof is introduced by a party, an adverse party may offer or may require the proponent at that time to introduce any other part or any other writing or recorded statement which is necessary for purposes such as understanding, assessment, explanation or clarification. When a writing or recording is admissible for impeachment purposes only, completing matter is admissible only to rehabilitate the witness and not as substantive evidence, unless the completing matter is admissible for substantive purposes - independent of its admissibility under this section.

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### Comment

This section provides when completing matter can be contemporaneously introduced with the other evidence. It is applicable, however, only to writings or recorded statements. Issues involving oral statements, which had been dealt with in earlier code drafts, are left for common law development.

*See* Richardson § 227 (10th ed.) The underlying rationale for section 106 is twofold. First, it avoids the danger of mistaken first impressions when evidence is taken out of context. *See People v. Baker*, 23 N.Y.2d 307, 296 N.Y.S.2d 745 (1968); *Grattan v. Metropolitan Life Ins. Co.*, 92 N.Y. 274 (1883).

Second, it avoids the sometimes inadequate remedy of requiring the adverse party to wait until later in the trial to repair a case, *see Crawford v. United States*, 212 U.S. 183, 29 S.Ct. 260 (1909). The section codifies present law. *See People v. Torre*, 42 N.Y.2d 1036, 399 N.Y.S.2d 203 (1977); *Grattan v. Metropolitan Life Ins. Co.*, *supra*; Prince, Richardson on Evidence §§ 227, 523, 552 (10th ed.).

Under the subdivision's provisions, when any writing or recorded statement or part thereof is introduced, and the requirements of subdivision (a) are complied with, an adverse party may offer or require the proponent to introduce completing matter of that writing or recorded statement when necessary for purposes of understanding, completion, assessment, explanation or clarification. Courts however, must be careful that such purposes are in fact present and that the probative value of completion does not outweigh its prejudicial effect. CE 403; *see, e.g., People v. Ely*, 68 N.Y.2d 520, 529-31, 510 N.Y.S.2d 532, 536-37 (1986); *People v. Ward*, 62 N.Y.2d 816, 477 N.Y.S.2d 602 (1984). In determining whether a contemporaneous introduction of the completing matter is necessary, the court should take into consideration the relative effectiveness of immediate supplementation and later introduction as a means of curing the misleading impression, and the degree to which the introduction of the additional material will interfere with the proponent's orderly presentation of his case. The last sentence of the section makes clear that completing matter used to rehabilitate a witness is admissible for rehabilitative purposes only and substantive use of completing matter is permissible only when the writing itself is otherwise admissible for a substantive purpose. *See People v. Ramos*, 70 N.Y.2d 639, 518 N.Y.S.2d 783 (1987).



**§ 107. Orders in the interest of justice for failure to comply with notice or production provisions**

Whenever this chapter authorizes a court to provide relief in the interest of justice for a failure to give notice or to produce evidence, the order issued should be designed to cure the prejudice suffered by the party seeking the order. Such orders include but are not limited to:

granting a continuance, the giving of an adverse inference instruction, the exclusion or striking of testimony, or the granting of a mistrial.

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**Comment**

Section 107 provides that sanctions for the failure to produce evidence or give notice required by various Code provisions must be fashioned to cure the prejudice suffered from the failure. Of course, if no prejudice is suffered then no sanction is required. Tailoring relief in this fashion is consistent with New York law. *See People v. Kelly*, 62 N.Y.2d 516, 478 N.Y.S.2d 834 (1984); *People v. Martinez*, 71 N.Y.2d 937, 528 N.Y.S.2d 813 (1988). The section is limited to CE notice and disclosure provisions and has no application whatsoever to provisions in other statutes which have not been incorporated into the Code. *See, e.g.*, CPL §§ 240.45(l)(a), 710.30(1). Notably, these CPL sections have been interpreted as requiring exclusion or other remedies without regard to the prejudice suffered. *See, e.g., People v. Jones*, 70 N.Y.2d 547, 523 N.Y.S.2d 53 (1987); *People v. O'Doherty*, 70 N.Y.2d 479, 522 N.Y.S.2d 498 (1987), *People v. McMullin*, 70 N.Y.2d 855, 523 N.Y.S.2d 455 (1987). Those interpretations remain unaffected by this section, which requires more tailored remedies.

**ARTICLE 2-JUDICIAL NOTICE AND DETERMINATION OF LAW**  
Section

201. Judicial notice of adjudicative facts
- (a) Scope of section
  - (b) Kinds of adjudicative facts which may be judicially noticed
  - (c) When judicial notice is mandatory
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202. Determination of law
- (a) Scope of section
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  - (c) Determinations to be made if sufficient information available
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  - (e) Evidence to be received
  - (f) Determination included in court's findings or charged to jury; review as matter of law

**Comment**

**Article 2 covers the subjects of judicial notice of adjudicative facts and determination of law. For the most part, its provisions codify and restate present decisional and statutory law. *But see* 201(c)&(g), 202(b), (c)&(g).**

Judicial notice of adjudicative facts is generally defined as the process by which a court accepts an adjudicative fact "as true without the offering of evidence by the party who should ordinarily have done so." 9 Wigmore, Evidence § 2567 (Chadbourn rev, 1981). The basic objective of judicial notice is to accommodate the strong public policy for judicial convenience and efficiency. *See* Thayer, A Preliminary Treatise on Evidence at the Common Law 308. Proving facts with evidence involves time and expense. Judicial notice of facts is simpler, easier, and more convenient. Both the court and the litigants benefit from the increased efficiency when a court notices facts and thereby makes proof of them unnecessary. The provisions of this Article are designed to facilitate the achievement of these goals while at the same time assuring procedural fairness when judicial notice is employed.

"Determination of law" refers to the process by which a court decides what is the content of the law to be applied in the case being tried. Under present practice this process is called "judicial notice of law." The determination of law is a more appropriate term, since the term judicial notice is customarily applied to the determination of

facts. As observed, "[m]uch of the difficulty the bench and bar has had with this area might have been eliminated had the term judicial notice never been used . . . ." 5

Weinstein-Kom-Miller, N.Y. Civ. Prac. 1 4511.02; *see also* Currie, *On the Displacement of the Law of the Forum*, 58 Colum. L. Rev. 964 (1958). The provisions of this Article make clear that when an issue arises as to the content of the applicable law, the issue will not be treated as an issue of fact, to be proved like other facts. Rather, the issue is to be decided by the court as an issue of law. The process by which the court is to determine the applicable law is designed to minimize the chance of procedural unfairness to any of the litigants.

### § 201. Judicial notice of adjudicative facts

**(a) Scope of section.** This section governs only judicial notice of adjudicative facts. "Adjudicative facts" are the facts which but for this section would be determined by the trier of fact.

**(b) Kinds of adjudicative facts which may be judicially noticed.** To be judicially noticed, an adjudicative fact must be one not subject to reasonable dispute in that it is either: (1) generally known within the community where the trial court sits; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

**(c) When judicial notice is mandatory.** The court shall take judicial notice of an adjudicative fact if requested by a party and supplied with the information required by subdivision (b) of this section.

**(d) When judicial notice is discretionary.** The court may take judicial notice of an adjudicative fact, whether requested or not.

**(e) Notice and opportunity to be heard.** Before taking judicial notice, the court shall afford each party reasonable notice and an opportunity to be heard outside the presence of the jury as to the matter to be noticed and the propriety of taking judicial notice.

**(f) Time of taking notice.** Judicial notice may be taken at any stage of the action or proceeding.

**(g) Instructing jury.** In a civil case, the court shall instruct the jury to accept as conclusive any adjudicative fact judicially noticed. In a criminal case, the court shall instruct the jury that it may accept as established any adjudicative fact judicially noticed.

#### Comment

**(a) Scope of section.**

Subdivision (a) provides that this section covers only judicial notice of "adjudicative facts." Limiting judicial notice to adjudicative facts is consistent with present law. Prince, *Richardson on Evidence* § 54 (10th ed.). As defined, adjudicative facts are the kind of facts decided by juries. Thus, facts about the parties, their activities, motives, and intent, and the facts that give rise to the controversy are adjudicative facts. *See* Prince, *Richardson on Evidence* § 54 (10th ed.); Davis, *Judicial Notice*, 55 Colum. L. Rev. 945 (1955).

CE 201 does not govern judicial notice of legislative facts. Legislative facts are those a court takes into account in determining the constitutionality or interpretation of a statute or the extension or restriction of a common law rule upon grounds of policy. *See* *Brown v. Board of Education*, 347 U.S. 483, 74 S.Ct. 686 (1954); *Hawkins v. United States*, 358 U.S. 74, 79 S.Ct. 136 (1958); *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966); Prince, *Richardson on Evidence* § 54 (10th ed.). They will frequently involve social, economic, or political facts not generally known or readily ascertainable by resort to sources of unquestioned accuracy. *See* 2 Davis, *Administrative Law* at 353. It is exceedingly difficult, if not inappropriate, to set limits to, or to provide a formal procedure for, judicial notice of legislative facts. For these reasons, CE 201 is limited to adjudicative facts, leaving the subject of judicial notice of legislative facts to decisional law.

Subdivision (a) thus requires a determination whether a fact is adjudicative or legislative. Once it is determined that the fact is an adjudicative fact, subdivisions (b), (c), (d), (e), (f), and (g) become operative.

(b) Kinds of adjudicative facts  
which may be judicially  
noticed.

Subdivision (b) limits judicial notice of adjudicative facts to facts incapable of serious dispute in that they are either "generally known within the community where the trial court sits" or "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." The subdivision codifies present law. *See* *People v. Alicea*, 25 N.Y.2d 685, 306 N.Y.S.2d 686 (1969); *Hunter v. New York, Ontario & Western R. R. Co.*, 116 N.Y. 615, 23 N.E. 9 (1889); Fisch, *Evidence* § 1049

(2d ed.); McCormick, Evidence § 329 (3d ed.); Prince, Richardson on Evidence § 9 (10th ed.).

Illustrative of the adjudicative facts that may be noticed under this subdivision are: the usual proportions of the human body, *e.g.*, *Hunter v. New York, Ontario & Western R. R. Co.*, *supra*; the identity of the principal governmental officials in this state, *e.g.*, *People v. Reese*, 258 N.Y. 89, 179 N.E. 305 (1932); the ordinary period of human gestation is 280 days, *e.g.*, *Suzanne J. v. Russell K.*, 46 A.D.2d 935, 362 N.Y.S.2d 37 (3d Dep't 1974); hardening of the arteries may exist for many years without serious effects, *e.g.*, *McGrail v. Equitable Life Assur. Soc.*, 292 N.Y. 419, 55 N.E.2d 483 (1944); radar is an accurate method for measuring speed, *e.g.*, *People v. Dusing*, 5 N.Y.2d 126, 181 N.Y.S.2d 493 (1959); the time of the rising and setting of the sun and moon, *e.g.*, *Montenes v. Metropolitan Street Ry Co.*, 77 App. Div. 493 (2d Dep't 1902); and February 9, 1967 occurred on a Thursday, *e.g.*, *Ammirata v. Weidy*, 34 A.D.2d 717, 309 N.Y.S.2d 788 (3d Dep't 1970) *affd.*, 28 N.Y.2d 564, 319 N.Y.S.2d 610 (1971). By contrast, illustrative of adjudicative facts that may not be noticed under this subdivision are: value of stolen car in grand larceny prosecution, *e.g.*, *People v. Alicea*, 25 N.Y.2d 685, 306 N.Y.S.2d 686, *supra*; a mortgage having an unusual acceleration clause, tendered by the vendor, was the standard type employed by title companies in New York, *e.g.*, *Ansorge v. Belfer*, 248 N.Y. 145, 161 N.E. 450 (1928).

In no case may a judge take judicial notice of an adjudicative fact because he, as an individual, happens to be certain of it. *See People v. Dow*, 3 A.D.2d 979, 162 N.Y.S.2d 960 (4th Dep't 1957); *In Re Bommer*, 159 Misc. 511, 288 N.Y.S. 419 (1936); *Gibson v. Von Glafm Hotel Co.*, 185 N.Y.S. 154 (1920). As one commentator has observed, "[p]t 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." Prince, Richardson on Evidence § 11 (10th ed.).

(c) When judicial notice is mandatory.

Subdivision (c) requires the court to take judicial notice if requested by a party and supplied with the information required by subdivision (b). There is some indication in the cases that a court in its discretion may refuse to take judicial notice. *See Hunter v. New York, Ontario & Western R. R. Co.*, *supra*; *Walton v. Stafford*, 14 App. Div. 310, 43 N.Y.S. 1049 (1st Dep't 1897), *affd.*, 162 N.Y. 558, 57 N.E. 92 (1900). The rule as set forth in this subdivision is preferable. If the court is furnished with sufficient information to establish that the fact is not subject to reasonable dispute, there is no reason to permit the court to refuse to take judicial notice.

(d) When judicial notice is discretionary.

Subdivision (d) vests the court with discretionary authority to take judicial notice even though not requested by a party. The theory is that if judicial notice is a means of increasing judicial convenience and efficiency, the parties should not be able to impose unnecessary burdens on the court. Thus, even without a request, a court may take judicial notice. Procedural fairness is assured by subdivision (e).

(e) Notice and opportunity to be heard.

The opportunity to be heard is a mainstay of procedural fairness. See *Garner v. Louisiana*, 368 U.S. 157, 173, 82 S.Ct. 248, 256-257 (1961); *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 304-305, 57 S.Ct. 724, 730-731 (1937). This subdivision protects this right. Thus, in order to be fair, a party is entitled to be heard before judicial notice is taken. If prior notification is not given, a request for an opportunity to be heard as to the propriety of taking judicial notice can be made after judicial notice has been taken. This notice requirement is consistent with notice requirements contained in other sections of the Code. See CE 608(b)(4), 608(c)(1) & (2); 609(b)(1) & (2); 806; 810; 902(b); 1003(b); 1006. The scope of a hearing on the issue of judicial notice rests in the discretion of the court, subject to CE 103(c).

(f) Timing of taking notice.

Subdivision (f) recognizes that the circumstances under which the taking of judicial notice may be appropriate are not limited to any particular stage of the judicial process. It codifies present law. See *Hunter v. New York, Ontario & Western R. R. Co.*, 116 N.Y. 615, 23 N.E. 9, *supra* (judicial notice taken on appeal); Fisch, Evidence § 1049 (2d ed.). This subdivision, however, is not intended to change the decisional law requirement that, at least in criminal cases, a trial judge may not take judicial notice after the close of testimony to salvage the proof of an essential element by a prosecution expert. See *People v. Jones*, 73 N.Y.2d 427, 432-33, 541 N.Y.S.2d 340, 343 (1989).

(g) Instructing the jury.

There is disagreement among the authorities as to the effect which should be given to a fact which is judicially noticed. Compare Morgan, *Judicial Notice*, 57 Harv. L. Rev. 269 (1944) (fact noticed is conclusive and rebuttal evidence is not admissible), with 9 Wigmore, Evidence § 2567 (Chadbourn rev. 1981) (rebuttal evidence admissible); see generally Fisch, Evidence § 1069 (2d ed.); Prince, Richardson on Evidence § 13 (10th ed.). Subdivision (g) adopts the position that in a civil case, the court shall instruct the jury to accept as conclusive a fact judicially noticed. Considered in connection with

**subdivision**

(e) , this view is sensible. By virtue of subdivision (e), a party has the right to be heard on the propriety of taking judicial notice, and on the tenor of the matter to be noticed. Once the court decides, having afforded the adversary the right to be heard, that the fact is not subject to reasonable dispute, the taking of judicial notice of that fact should be deemed conclusive.

In a criminal case, however, the subdivision provides that the jury should be instructed that it may, but is not required to, accept as established any fact judicially noticed. The different treatment of cases under the section is justified on two different grounds. The first justification is the basic rule that a verdict of guilty may not be directed by the court, and, therefore, the court may not instruct the jury that any fact essential to conviction has been established as a matter of law. *See People v. Walker*, 198 N.Y. 329, 91 N.E.

806 (1910). The second justification is the recognition that in a criminal case, the jury, as a practical matter, has the power to dispense mercy and, to that end, may find for the accused even if the evidence against him is unassailable. This second justification is not as persuasive as the first since the Court of Appeals has recently held that a trial court does not abuse its discretion by telling the jury that it must convict if it finds that the evidence establishes defendant's guilt beyond a reasonable doubt. *See People v. Goetz*, 73 N.Y.2d 751, 536 N.Y.S.2d 45 (1988), *cert. denied*, 489 U.S. 1053, 109 S.Ct. 1315 (1989).

**§ 202. Determination of law**

(a) **Scope of section.** This section governs the determination of matters of law.

(b) **Mandatory determinations.** The court shall determine without request the content of:

- (1) the common law, constitutions, and public statutes of the United States and of this state;
- (2) the official compilation of codes, rules, and regulations of the United States and of this state, except those which relate solely to the organization or internal management of an agency; and
- (3) all local laws, charters, ordinances and county acts of this state.

(c) **Determinations to be made if sufficient information available.** Except as otherwise provided by subdivision (b) of this section, the court may, and if requested and supplied with sufficient information by a party shall, determine the content of the law of all domestic and foreign jurisdictions and of their political subdivisions, departments, agencies, bureaus, and officers.

(d) **Notice and opportunity to be heard.** A party requesting a determination pursuant to subdivision (c) of this section shall give timely notice of such request to all other parties. Before the court makes a determination pursuant to subdivision (c) of this section, a party shall be entitled to an opportunity to be heard.



(e) Evidence to be received. In determining matters of law, the court may consider any testimony, document, information, or argument on the subject, whether offered by a party or discovered through its own research.

(0 Determination included in court's findings or charged to jury; review as matter of law. Any determination made pursuant to this section shall be included in the court's findings or charged to the jury. Such findings or charge shall be subject to review on appeal as a matter of law.

#### Comment

##### (a) Scope of section.

Subdivision (a) provides that this section regulates the process by which determinations are to be made of the law applicable to the facts and proceedings in the case being tried.

##### (b) Mandatory determinations.

Subdivision (b) provides that a court must determine, even though not requested by a party: (1) the common law, constitutions, and public statutes of the United States and of New York; (2) the official compilation of codes, rules, and regulations of the United States and of New York, other than those that relate solely to the organization or internal management of an agency; and (3) local laws, charters, ordinances and county acts of New York. The term "local laws" is defined in §§ 2(9), and 32(5) of the Municipal Home Rule Law. *See* Prince, Richardson on Evidence § 21 (10th ed.). The subdivision codifies present law, with two exceptions.

First, under present law, a court is not required to determine the official compilation of codes, rules, and regulations of the United States. Since this body of law is readily available in the Code of Federal Regulations and the Federal Register, there is no sufficient reason not to require the court without request to determine it.

Second, under present law, a court must determine without request the common law, constitutions, and public statutes of other states, territories, and jurisdictions of the United States (CPLR 4511). As a practical matter, many courts do not have the necessary material available to make this burden workable. *Cf. Government Employees Ins. v. Sheerin*, 65 A.D.2d 10, 410 N.Y.S.2d 641 (2d Dep't 1978). Therefore, the Code has limited the situations in which a court is required without request to determine the law to those situations in which it is practicable.

##### (c) Determination to be made if sufficient information available.

Subdivision (c) governs the determination of those laws that do not come within the scope of subdivision (b). Under its provisions a court may, and if requested and supplied with sufficient information shall, determine all other public and private law of all domestic and foreign jurisdictions and of their political subdivisions, departments, agencies, bureaus, and officers.

The subdivision restates with two exceptions the provisions of CPLR 4511(b). First, whereas under CPLR 4511(b) the court's authority to determine private acts and ordinances is limited to those of New York and of the United States, under subdivision (b) the court has the power to determine private acts, ordinances, etc., of every state, territory, or jurisdiction of the United States and foreign jurisdictions. This is a desirable change. There is no reason why such a body of law should be treated as a matter of fact to be proved as any other fact. Secondly, the subdivision omits the notice provisions contained in 4511(b). These provisions are unnecessary in light of CE 202(d).

**(d) Notice and opportunity to be heard.**

Subdivision (d) guarantees a party notice and an opportunity to be heard when a party requests a determination pursuant to subdivision (c). Procedural fairness demands no less. This notice requirement is consistent with notice requirements contained in other sections of the Code. *See, e.g.*, CE 608(b)(4); 608(c)(1)&(2); 609(b)(1)&(2); 806 ; 810; 902(b); 1003(b); 1006. The scope of a hearing on the issue of determination of law rests in the discretion of the court, subject to CE 103(c).

With respect to the law of foreign jurisdictions, the separate requirement of CPLR 3016(e), which requires that a party relying on the law of a foreign jurisdiction to state that law in his pleading, must be noted. *See, generally*, Siegel, Practice Commentary to CPLR 3016 (McKinney's 1974); McLaughlin, Supplementary Practice Commentary to CPLR 4511 (McKinney's 1990).

**(e) Evidence to be received.**

Subdivision (e) specifies the evidence that a court may consider in making its determination of the content of the applicable law. It clearly indicates that a court may consult a wide variety of sources of information in determining questions of law and that this information will not have to be formally introduced into evidence. The court in its discretion, however, may require formal proof, including expert testimony, of the foreign law.

The subdivision restates without substantive change the first sentence of CPLR 4511(d). The second sentence of CPLR 4511(d) dealing with

authentication is not restated as it is unnecessary in view of CE 902;  
*see also* Comment to CE 803(c)(5)(B).

(J) Determination included in  
findings or charge to jury;  
review as a matter of law.

Subdivision (f) provides that a trial court's determination as to the applicable law will be reviewable on appeal as a question of law rather than a question of fact. Additionally, it specifies that any determination of law shall be included in the court's findings or charged to the jury.

The subdivision restates without substantive change CPLR 4511(c).



## ARTICLE 3—PRESUMPTIONS

### Section

301. Applicability of article

302. Presumptions

#### Comment

**This article deals with presumptions in civil cases. Present law in this area has been characterized as confusing, inconsistent, and in need of reform. See Fisch, Evidence § 1193 (2d ed.). The provisions of this Article are designed to provide a uniform guide to the application in civil cases of presumptions created by statutes and the courts.**

### § 301. Applicability of article

This article governs only trials, proceedings, and hearings in civil cases.

#### Comment

**This Article is limited to civil cases and would by virtue of section 101(d) not apply to proceedings under articles 3 and 7 of the Family Court Act. Since the application and burden-shifting effect of presumptions in criminal cases have been subjected to constitutional restrictions by the United States Supreme Court, see *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450 (1979); *Ulster County Court v. Allen*, 442 U.S. 140, 99 S.Ct. 2213 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881 (1975), presumptions in criminal actions have not been dealt with in the Code of Evidence.**

### § 302. Presumptions

A presumption is a rule of law requiring that if one (the "basic") fact or set of facts is established, the trier of fact must find that another (the "presumed") fact also exists unless the trier

of fact is persuaded that the presumed fact does not exist. The standard of persuasion shall be a preponderance of evidence, unless a higher burden is required by statute or decisional law.

## Comment

This section provides a uniform guide to the application of all presumptions. In this regard, it must be recognized that it is applicable only to "true" or "mandatory" presumptions, *i.e.*, rules of law "requiring the court, once it concludes that the 'basic' fact is established, to assume the existence of the 'presumed fact' until the presumption is rebutted and becomes inoperative." Weinstein, Mansfield, Abrams and Berger, *Evidence Cases and Materials* 1179 (8th ed.). "Conclusive" and irrebutable presumptions, *see* Prince, Richardson on Evidence § 57 (10th ed.), as well as rules authorizing but not requiring inferences to be drawn from one fact or set of facts to another, *see* N. Y. Pattern Jury Instructions 7:56, are, therefore, excluded from its coverage.

The main source of the notorious difficulties and disparities concerning the effect of presumptions is the many different kinds of considerations that underlie their creation and the varying strength of those considerations. 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 five or seven year death-from-unexplained-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.

Ideally, the effect assigned to each presumption should be tailored to the particular considerations which produced it. For example, strong evidence of the contrary of the presumed facts would generally be required to rebut presumptions resting largely on natural probability as that of receipt of a letter duly mailed. On the other hand, even rebuttal evidence of a high probative worth may fail to outweigh a presumption, such as that of legitimacy, resting on strong social policy rather than on, or in addition to, natural probability.

The problem is that it would be a virtually insuperable task to attempt to identify the bases of each of the countless specific presumptions scattered through the substantive statutory and case law of New York. Most of them in fact rest on combinations of the

factors enumerated above. Moreover, such individualization would run counter to the policy "to do formal, procedural justice by having a uniform rule that is easily administered regardless of its effect in the particular case." Gausewitz, *Presumptions In A One-Rule World*, 5 Vand. L. Rev. 324, 331 (1952). Accordingly, the Code sets forth a single rule applicable to all presumptions, a view favored by many commentators. See McCormick, Evidence § 345 (3d ed.); Morgan, *Some Problems of Proof* 74-81; Cleary, *Presuming and Pleading: An Essay on Juristic Immaturity*, 12 Stan. L.

Rev. 5 (1959); Morgan and Maguire, *Looking Backward and Forward at Evidence*, 50 Harv. L. Rev. 909 (1937); but see Comment, *Presumptions According to Purpose: A Functional Approach*, 45 Alb. L. Rev. 1079 (1981).

Subdivision (a) adopts the so-called "Morgan view," giving presumptions the effect of shifting the burden of proof, rather than just the burden of going forward, from the beneficiary of the presumption to his opponent. It thus rejects the competing "classical" or "Thayer" view, under which a presumption serves only to shift provisionally the burden of going forward regarding the existence or non-existence of the presumed fact (PF) to the opponent of the presumption's beneficiary. Under the Thayer view, the presumption is eliminated from any further consideration in the case once sufficient evidence of the contrary of the presumed fact (NPF) has been introduced to support a reasonable jury finding of NPF. At this point the presumption is deemed rebutted and the burden of producing evidence of PF shifts back to its ex-beneficiary. Since the only function of the presumption is to locate burdens of going forward which are no concern of the jury, the jury will not be told about the presumption. Moreover, it is the court rather than the jury which determines whether the presumption has been rebutted by the introduction of evidence sufficient to support a reasonable jury finding of NPF. And since any testimonial evidence on a proposition ordinarily suffices for this purpose, it lies easily within the power of a party or interested witness willing to stretch the truth to vitiate the presumption completely, no matter how strong the natural probability or procedural or substantive social policies that underlie it. It matters not that the court disbelieves the testimony, and whether the jury would have may never be known. In the Code's view, the Thayer approach gives too little effect to presumptions. If a policy is strong enough to call a presumption into existence, it is hard to imagine it so weak as to be satisfied by the bare recital of words on the witness stand or the reception in evidence of a writing. And if the judicial desire for the result expressed in the presumption is buttressed by either the demands of procedural convenience or is in accord with the usual balance of probability, it makes no sense to allow so valuable a presumption to be destroyed by the introduction of evidence



without actual persuasive effect.

Adoption of the Morgan theory in the section rests not only on agreement with these views, but also on the fact that it accords more closely with the operation of presumptions under existing practice. Present practice is more in accord with Morgan than Thayer in three respects:

First, many cases require a greater quantum of proof of NPF to rebut the presumption than the classical Thayer view would. The formulation most commonly used—"substantial evidence"—is taken to mean something more than what is required to support a reasonable jury finding, and the New York cases are rife with explicit formulations of a heavier burden of rebuttal. *Cf.* Prince, Richardson on Evidence § 58 (10th ed.).

A second way in which present law gives presumptions greater effect than the Thayer approach is by frequently allowing and even requiring that the jury be instructed about the presumption. New York Pattern Jury Instruction 4:57, for example, relating to suits on life insurance policies, informs the jury of the existence of the presumption against suicide and that they "should consider that presumption and the evidence in the case." *See also* PJI 1:63 (General Instruction—Burden of Proof—Effect of Presumption"); PJI 3:32 (Intentional Torts—Defamation—Defenses—Qualified Privilege—Generally).

The third and most important departure from the Thayer approach is the substantial body of authority holding that it is for the jury rather than the court to decide whether the presumption has been rebutted by evidence of NPF, especially if that evidence is testimonial and rests on the witness's credibility. *See* Canudo, *Evidence Laws of New York* 14; Prince, *Richardson on Evidence* § 58 (10th ed.); *Bomhurst v. Massachusetts Bonding & Ins. Co.*, 21 N.Y.2d 581, 289 N.Y.S.2d 937 (1968); *cf.* Comment to PJI 7:48 (Will Contests—Testamentary Capacity—In General): "Whether contestant's evidence, if believed, tends to rebut the presumption of capacity is a matter of law for the court. Whether contestant's evidence is to be believed is, of course, a question of fact for the jury. . . ."

In most cases the practical effect of the present rule submitting the credibility of the opponent's rebuttal evidence to the jury is the same as requiring him to prove NPF by a preponderance of the evidence. *See* Note, 23 N.Y.U. L. Rev. 455, 464 (1946). Thus, subdivision (a) provides that the standard of persuasion for rebuttal shall be a preponderance of the evidence, unless a higher burden is required by law. The "unless" clause recognizes that under present law, some presumptions can be rebutted only by a quantum of evidence that is more than the preponderance of the evidence standard otherwise required. *See* Prince, *Richardson on Evidence* §§ 59, 65, 97 (10th ed.); Canudo, *Evidence Laws of New York* 15-16. This existing body of law is preserved under the "unless" clause and left to future decisional law is whether for special reasons other existing presumptions are to carry with them a higher burden of rebuttal. *See* Commentary to CE 102. The standard most often used in these instances is "clear and convincing." Illustrative of the presumptions that would come within the "except" clause, and that can only be rebutted by clear and convincing evidence, are: a person is legitimate, *see* Prince, *Richardson on Evidence* § 59 (10th ed.); a marriage ceremony shown to have been performed was properly and legally performed, *see* Prince, *Richardson on Evidence* § 64 (10th ed.); and persons living and cohabiting as husband and wife and reputed to be such are validly married, *see* Prince,

Richardson on Evidence § 64 (10th ed.); and a transaction is void in circumstances where unfair advantage in the transaction is probable; *see Gordon v. Bialystoker Center*, 45 N.Y.2d 692, 412 N.Y.S.2d 593 (1978).

By squarely placing the burden of proof upon the party who seeks to rebut the presumption, subdivision (a) should mitigate the need to resort to the

other two previously mentioned methods of "beefing up" presumptions—by tinkering with formulations of the required quantum of rebuttal evidence and instructing the jury to "consider" the presumption along with the evidence.

This section is applicable to all presently recognized presumptions. Statutory presumptions include: Aband. Prop. Law § 1201 (presumption that if rightful owners have not made claim to any money or property for a period of ten successive years, they have died without disposing of such property, and that such property has been abandoned.); Ag. & Mkts. Law § 52 (presumptions in regard to cream and skim milk); ABC Law § 152 (presumption that any person knowingly possessing or controlling one or more gallons of illicit alcoholic beverages had intent to barter, exchange, sell, or give those beverages to another); Civ. Serv. Law § 210 (presumption that a public employee absent from work without permission is engaged in a strike); Correc. Law § 753 (presumption of rehabilitation in regard to offenses specified is created by certificate of relief from disabilities or of good conduct); En. Con. Law § 71-0917 (presumption that fish, shell-fish, Crustacea or game were taken unlawfully, when possessed at a time when there is no open season anywhere in the state for species possessed, and that such wildlife was taken by the possessor); *see also* EPTL § 3-2.1; Exec. Law § 809; Fam. Ct. Act § 249-a; Gen. Bus. Law § 279-f; Gen. City Law § 20; Gen. Oblig. Law § 3-315; Mil. Law § 131.10; Pers. Prop. Law § 251; Pub. Health Law § 4501; Real Prop. Law § 233; RPAP Law § 991; Real Prop. Tax Law § 1020; Relig. Corp. Law § 7-a; Retire. & Soc. Sec. Law § 445; Soc. Serv. Law § 104-a; SCPA § 1711; Tax Law § 473; Transp. Law § 18; UCC § 3-416; Uniform Dist. Ct. Act § 2602; Veh. & Traf. Law § 417. Common law presumptions include: presumption against suicide, *see Mallory v. The Travelers Ins. Co.*, 47 N.Y. 52 (1871); presumption of sanity, *see Jones v. Jones*, 137 N.Y. 610 (1893); presumption of death after five year's absence, *see Butler v. Mutual Life Ins. Co.*, 225 N.Y. 197, 121 N.E. 758 (1919); presumption as to regularity, *see Matter of Marcellus*, 165 N.Y. 70 (1900); and presumption of mailing and delivery, *see News Syndicate Company, Inc. v. Gatti Paper Stock Corp.*, 256 N.Y. 211, 176 N.E. 169 (1931); *see generally* Prince, Richardson on Evidence §§ 59-92 (10th ed.).



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## **ARTICLE 4—RELEVANCY AND ITS LIMITS**

Section

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Comment

Article 4 is composed of rules which relate to the "relevancy" of an offer of evidence. For the most part these rules codify present New York law with some limited changes of varying significance. *See* 404(a)(2), 404(b)(1)&(2), 405(a), 405(c)(1), 406(b), 408 , 410, 422.

Under the Article, evidence is relevant if it has any tendency to make the existence of a fact of consequence more or less probable than it would be without the evidence. As a general proposition, relevant evidence is admissible and irrelevant evidence is inadmissible. The Article thus recognizes that the threshold test for the admissibility of evidence is the test of relevancy, and that, regardless of other rules of evidence, evidence cannot be admitted unless it meets that test. The Article also recognizes that relevant evidence may, however, be inadmissible either for reasons of public policy or because the evidence is too unreliable to be presented to the trier of fact.

**§ 401. Definition of relevant evidence**

Relevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the action more probable or less probable than it would be without the evidence.

Comment

This section defines the term "relevant evidence." The definition recognizes that relevancy is not an inherent characteristic of an item of evidence but exists only as a relation between an item of evidence and a fact that may be properly proved in an action. Whether the evidence is relevant is a question for the court to decide pursuant to CE 104(a).

Under the definition, the evidence to be relevant must tend to prove a fact that is material to the litigation. What is material to the litigation will necessarily turn upon the applicable substantive law within the framework of the pleadings and the theory of the action. The fact to which the evidence is directed need not be an ultimate fact or a vital fact, or be in dispute. It suffices that the fact is of some consequence to the disposition of the litigation.

The definition further provides that relevancy also depends

**upon whether the evidence has "any tendency to make the existence" of the fact of consequence "more probable than it would be without the evidence." Thus, it is not necessary that the evidence by itself prove the fact for which it is offered or make the fact more probable than not. A minimal probative tendency is all**

that is required. Of course, even where probative value is established, the evidence still might be excluded under other provisions in the Code of Evidence, state and federal constitutions, and the consolidated laws. *See* CE 402.

The section codifies present law. *See People v. Stevens*, 76 N.Y.2d 833, 560 N.Y.S.2d 119 (1990); *People v. Scarola*, 71 N.Y.2d 769, 530 N.Y.S.2d 83 (1987); *People v. Alvino*, 71 N.Y.2d 233, 525 N.Y.S.2d 7 (1987); *People v. Lewis*, 69 N.Y.2d 321, 325, 514 N.Y.S.2d 205, 207 (1987); *People v. Mountain*, 66 N.Y.2d 197, 495 N.Y.S.2d 944 (1985); *see also People v. Basora*, 75 N.Y.2d 992, 557 N.Y.S.2d 263 (1990); *People v. De George*, 73 N.Y.2d 614, 543 N.Y.S.2d 11 (1989); *People v. Davis*, 43 N.Y.2d 17, 400 N.Y.S.2d 735 (1977); *People v. Yazum*, 13 N.Y.2d 302, 246 N.Y.S.2d 626 (1963).

There are some older cases in New York which announce the test that evidence is relevant only when it makes the desired inference "highly probable"

{*see People v. Nitzberg*, 287 N.Y. 183, 187, 38 N.E.2d 490, 492-493 [1941]}, or when it makes the desired inference "a more probable and natural one than the other explanations, if any." *See Engel v. United Traction Co.*, 203 N.Y.

321, 324, 96 N.E. 731, 732 (1911). These cases created unrealistic standards which a New York court normally makes no effort to apply, *see Prince*, *Richardson on Evidence* § 4 (10th ed.), and which clearly were not applied in *Yazum*, and are no longer the law as seen from the cases cited in the immediately preceding paragraph.

## § 402. Relevant evidence generally admissible

All relevant evidence is admissible, except as otherwise provided by the constitution of the United States or of this state, or this chapter or other statute. Evidence that is not relevant is not admissible.

### Comment

This section sets forth two fundamental rules: only relevant evidence is admissible, with certain exceptions, and irrelevant evidence is not admissible. These rules are basic to the law of evidence, as they are the cornerstone on which any rational system of evidence rests.

The section recognizes that not all relevant evidence is admissible. Relevant evidence may be excluded under the federal

and state constitutions, other evidentiary rules contained in the Code of Evidence, or other provisions in the consolidated laws.

The section codifies present law. As stated by the Court of Appeals in *Ando v. Woodberry*, 8 N.Y.2d 165, 167, 203 N.Y.S.2d 74, 75 (1960): "[T]he principle, basic to our law of evidence, [is] that 'All 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 § 10 at 293 (3d ed.). 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. "

### § 403. Exclusion of relevant evidence on grounds of prejudice, confusion, waste of time, or unfair surprise

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger that its admission would create undue prejudice to a party; or would confuse the issues and mislead the jury; or would prolong the trial to an unreasonable extent without any corresponding advantage to the offering party; or would unfairly surprise a party and no remedy other than exclusion could cure the prejudice caused by the surprise.

#### Comment

This section provides that the court may exclude relevant evidence when the court determines that the dangers of admitting the evidence outweigh in some substantial way the probative value of the evidence. The section thus recognizes, as one commentator has put it, that "relevance does not ensure admissibility. There remains the question of whether its value is worth what it costs." McCormick, Evidence § 185 at 544 (3d ed. 1984). Whether evidence should be excluded under this section is for the court to determine pursuant to CE 104(b).

The importance of this section cannot be underestimated as it is superimposed on all of the code sections as well as evidentiary principles for which no specific provision is made. *See* CE 102. Thus, even if evidence is relevant and satisfies a specific provision or other rule, the section's balancing test may still lead to exclusion.

The section codifies present law. *See People v. Ely*, 68 N.Y.2d 520, 510 N.Y.S.2d 532 (1986); *People v. Conyers*, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981); *People v. Davis*, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977), *cert. denied*, 435 U.S. 998, 98 S.Ct. 1653 (1978); *Radosh v. Shipstad*, 20 N.Y.2d 504, 285 N.Y.S.2d 60 (1967); *People v. Feldman*, 296

N.Y. 127, 71 N.E.2d 433 (1947); *People v. Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490 (1941); *People v. Harris*, 209 N.Y. 70, 102 N.E. 546 (1913); *cf. People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981).

The section sets forth the factors that may require the exclusion of relevant evidence. Undue prejudice in this context means more than simply damage to the adversary's case. It generally refers to evidence that appeals to the jury's sympathies, arouses its sense of horror, or provokes its instinct to punish, which evidence can lead a jury to rest its decision on an improper basis, commonly an emotional one. As to confusing the issues or misleading the jury, these terms have been aptly described as follows: "[I]n attempting to dispute or explain away the evidence thus offered, new issues will arise as to the occurrence of the instances and the similarity of conditions, new witnesses will be needed whose cross-examination and impeachment may lead to further issues; and that thus the trial will be unduly prolonged, and the multiplicity of minor issues will be such that the jury will lose sight of the main issue, and the whole evidence will be only a mass of confused data from which it will be difficult to extract the kernel of controversy." 2 Wigmore, Evidence § 443 (Chadbourn rev. 1979). Additionally, "confusion or misleading" encompasses the possibility of a jury overvaluing the probative value of a particular item of evidence, for example, a scientific test or experiment, for any reason other than the emotional reason associated with undue prejudice. *See* Comment to CE 901(b)(9). Evidence that prolongs the trial to an unreasonable extent refers to evidence which in the context of the case is merely repetitious or extremely time consuming without any corresponding advantage to the offering party.

The mere fact that relevant evidence may have a tendency to cause undue prejudice, confuse the issues or mislead the jury, or prolong the trial to an unreasonable extent does not require its exclusion. The section creates a balancing test. The probative value of the evidence is balanced against these factors. By requiring a determination that probative value be "substantially" outweighed by one or more of the factors before relevant evidence will be excluded, the section favors the admission of relevant evidence. Obviously, however, where probative value is slight, and the danger of undue prejudice, etc., is great, exclusion of the evidence would be warranted. In this respect, it must be noted that the section does not permit exclusion of evidence because the court does not find it credible.

Consistent with present law, but unlike prior code drafts, unfair surprise is a ground for excluding relevant evidence (*People v. Davis*, 43 N.Y.2d at 27, 400 N. Y.S.2d at 740, *supra*); however, exclusion is appropriate only if no other remedy can cure the prejudice

suffered as the result of the surprise. Thus, if a continuance would allow the opponent a fair opportunity to meet the evidence, the continuance should be granted rather than have the evidence excluded, unless granting the continuance would prolong the trial to an unreasonable extent given the need for and probative value of the evidence.

Again, it is important to note that the section sweeps across most of the other rules of evidence. The section thus provides a mechanism for excluding evidence that otherwise would be admissible under another rule.

**§ 404. Evidence of character and of other crimes not generally admissible to prove conduct**

**(a) Character evidence generally.** Evidence of a person's character or trait of character is not admissible for the purpose of proving that such person acted in conformity therewith on a particular occasion, except:

**(1) Character of accused in a criminal case.** Evidence of a pertinent trait of character of an accused offered by the accused, or by the prosecution to rebut the character evidence offered by the accused.

**(2) Character of a party in a civil case.** Evidence of a pertinent character trait of a party offered by that party in a civil case, in which the underlying cause of action is predicated upon knowing or intentional conduct of that party that also violates the penal law, or offered by the adverse party to rebut the same.

**(3) Character of witness.** Evidence of the character of a witness as provided in sections 607, 608 and 609 of this chapter.

**(b) Other crimes, wrongs or acts.** Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that such person acted in conformity therewith on a particular occasion. It may, however, be admissible for other purposes, such as proving motive, opportunity, intent, preparation, common scheme or plan, knowledge, identity, or absence of mistake or accident.

**(1) Notice.** Upon request of the opposing party, the proponent of evidence pursuant to this subdivision shall make known to all parties the proponent's intention to offer such evidence and its particulars sufficiently in advance of offering the evidence to provide them with a fair opportunity to meet it.

**(2) Criminal cases—notice.** After a request in a criminal case, when the prosecution or the accused intends to offer evidence pursuant to this subdivision,

notification shall be made immediately prior to the commencement of jury selection, except that the court may, in its discretion, order such notification and make its determination within a period of three days, excluding Saturdays, Sundays and holidays, prior to the commencement of jury selection.

(3) **Time of determination and burden of proof.** At the request of the accused, or the prosecution, the determination of the admissibility of such evidence shall whenever practicable be made before the commencement of trial or hearing. The burden of proof

governing the determination of a preliminary factual question under this subdivision shall be governed by paragraph three of subdivision (b) of section 104 of this chapter.

(4) Remedy. To remedy the prejudice from the failure to give notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

#### Comment

##### (a) General rule.

Subdivision (a) governs the admissibility of evidence of a person's character, *i.e.*, propensity or disposition to engage in a certain type of conduct, to prove that the person behaved in conformity with that character on a particular occasion. It is not concerned with evidence offered to prove a person's character when that character is as a matter of substantive law directly in issue. *See* CE 405(b). Under the subdivision, evidence of a person's character is generally inadmissible in both civil and criminal cases to prove that the person acted in conformity therewith on the occasion in question, subject to certain exceptions set forth in paragraphs (1), (2) and (3). This is in accord with present law. *See, e.g., People v. Lewis*, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987). The general prohibition is supported by several reasons. Character evidence is generally of minimal probative value. Additionally, it may be highly prejudicial in that such evidence may distract the trier of fact from the main issue of what occurred on the particular occasion and induce the trier of fact to punish a "bad" person because of his character, regardless of the evidence in the case. *See People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981); *People v. Zackowitz*, 254 N.Y. 192 (1930); *Fisch*, Evidence § 174 (2d ed.). Moreover, the danger that introduction of character evidence may require extended collateral inquiry generally outweighs whatever probative value the evidence may possess. *Prince*, *Richardson on Evidence* §§ 151, 158 (10th ed.).

The general prohibition would thus continue the New York prohibition on proof of a homicide victim's violent personality as proof that the victim was the first aggressor. *See People v. Rodawald*, 177 N.Y. 408, 70 N.E. 1 (1904); *see also Matter of Robert S.*, 52 N.Y.2d 1046, 438 N.Y.S.2d 509 (1981); *People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976); *contra* Fed. Rules of Evidence 404(b)(3). In this regard it must be recognized that this section does not govern the admissibility of evidence of the victim's quarrelsome or violent character, including threats against the defendant that is offered to prove the defendant's state of mind. This evidence simply raises issues of relevancy under CE 401 and CE 403. *See People v. Rodawald*, *supra*; *see also Matter of Robert S.*, *supra*; *People v. Miller*, *supra*; *People v. Gaimari*, 176 N.Y. 84, 68 N.E. 112



(1903); *Stokes v. People*, 53 N.Y. 164 (1873); Prince, *Evidence (1976 Survey of New York Law)*, 28 Syracuse L. Rev. 475 (1976).

(1) Accused in a criminal case.

Paragraph (1) permits a defendant in a criminal case to introduce evidence of a pertinent trait of character for the purpose of raising an inference that the defendant would not be likely to commit the offense charged. "Pertinent trait" means a trait which is relevant in the context of the crime charged. Evidence of traits which have no bearing upon the question whether the defendant committed the crime charged may be excluded as not pertinent. For example, in a prosecution for larceny by embezzlement the defendant may introduce evidence of a good character trait for honesty, but not evidence of a good character trait for sobriety or peaceableness.

The paragraph makes clear that the prosecution may not prove the defendant's bad character unless and until the defendant has introduced evidence of good character. See *People v. Mullin*, 41 N.Y.2d 475, 393 N.Y.S.2d 938 (1977); *People v. Blanchet*, 83 A.D.2d 905, 442 N.Y.S.2d 140 (2d Dep't 1981). Generally, this will occur when the defendant has introduced affirmative evidence of good character by calling other witnesses to testify to it. See *People v. Richardson*, 222 N.Y. 103, 118 N.E. 514 (1917); *People v. Hinksman*, 192 N.Y. 421, 85 N.E. 676 (1908); Prince, *Richardson on Evidence* § 154 (10th ed.). In this regard, it is to be noted that by simply taking the witness stand and testifying, the defendant does not open the door to an attack on character (see *People v. Hinksman*, 192 N.Y. 421, 85 N.E. 676 [1908]), except to the extent that evidence of a bad character trait for veracity may be used to attack defendant's credibility as a witness. See CE 608(a); *People v. Nuzzo*, 294 N.Y. 227, 62 N.E.2d 47 ('945); Fisch, *Evidence* § 174 (2d ed.). When the defendant introduces evidence of good character, the prosecution may then in rebuttal introduce evidence of the defendant's bad character, or evidence of a conviction, provided that such evidence is pertinent to the character trait attributed to the defendant in his character witness's testimony. For example, in a larceny prosecution, where the defendant has introduced evidence of a good character for honesty, the prosecution may in rebuttal prove a prior conviction for larceny, forgery, or perjury, but not one for assault.

The paragraph codifies and restates present decisional and statutory law. See *People v. Bouton*, 50 N.Y.2d 130, 428 N.Y.S.2d 218 (1980); *People v. Van Gaasbeck*, 189 N.Y. 408, 82 N.E. 718 (1907); CPL 60.40(2); Prince, *Richardson on Evidence* §§ 150, 152 (10th ed.); Fisch, *Evidence* § 174 (2d ed.). The exception it creates to the general rule of exclusion of character evidence is based on two reasons. First, the risk of prejudice and unfairness present when the

prosecution attempts to show the defendant's bad character is absent when it is the defendant who seeks to establish his or her own good character traits. *See Michelson v. United States*, 335 U.S. 469, 475-476, 478-479, 69 S.Ct. 213, 218, 219-220 (1948). Second, character evidence may sometimes prove vital to a defendant and the fact-finding process. *See People v.*

*Aharonowicz*, 71 N.Y.2d 678, 529 N.Y.S.2d 736 (1988); *People v. Trimarchi*, 231 N.Y. 263, 131 N.E. 910 (1921).

(2) Party in a civil case. '

Paragraph (2) represents a change in New York law. Present law prohibits a party in a civil case to offer proof of that party's good character as evidence that the party did not engage in the conduct in question. *See, e.g., McCone v. Howard*, 202 N.Y. 181, 95 N.E. 642 (1911); *Beach v. Richtmeyer*, 275 A.D. 466, 90 N.Y.S.2d 332 (3d Dep't 1949). The reason for the rule is that the evidence is said to be of slight probative value and might obscure the issues. Prince, Richardson on Evidence § 158 (10th ed.). The rule, of course, is different in criminal cases. *See* Comment to (a) General rule, *supra*. Nonetheless, some civil cases, for example fraud, are quasi-criminal in nature with the potential for destruction of the party accused's reputation and possible economic ruin. These dangers are sufficiently akin to criminal conviction to call for a rule that, subject to section 403, permits the party accused, in civil cases based upon knowing or intentional conduct that violates the penal law, to offer proof of good character provided, of course, that the adverse party is given an opportunity to rebut that character testimony. *See* Fisch, Evidence § 173 (2d ed.); McCormick, Evidence § 192 (3d ed. 1984).

(b) Other crimes, wrongs and acts.

Subdivision (b) sets forth what is generally known as the Molineux rule. *See People v. Molineux*, 168 N.Y. 264 (1901). The rule represents a balance between the probative value of proof of other crimes, wrongs, or immoral acts and the danger of prejudice from such proof to the accused. *See People v. Hudy*, 73 N.Y.2d 40, 538 N.Y.S.2d 197 (1988); *People v. McKinney*, 24 N.Y.2d 180, 299 N.Y.S.2d 401 (1969). When proof of other crimes, wrongs, or immoral acts is offered for no other purpose than to raise an inference that the accused is likely to have committed the crime charged, it is simply inadmissible given the danger that the jury may convict the accused because of past behavior, and not because it is convinced beyond a reasonable doubt of the accused's guilt charged. *See People v. Hudy*, 73 N.Y.2d 40, 538 N.Y.S.2d 197, *supra*; *People v. Lewis*, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987); *People v. Ventimiglia*, 52 N.Y.2d 350, 438 N.Y.S.2d 261, *supra*; *People v. Zackowirz*, 254 N.Y. 192, 172 N.E. 466, *supra*.

Neither present law nor the subdivision has any application when character is as a matter of substantive law directly in issue, *i. e.*, it is an essential element of the charge, claim, or defense in the case. In those situations proof of character by specific acts is not designed to show that a person has acted in conformity with a particular character trait; rather the specific act is designed to show the trait itself which is a material issue to be proven. Proving an essential act of character by specific acts is expressly authorized by section 405(b).

Like present decisional law, the subdivision provides that whenever evidence of another crime, wrong, or immoral act is offered for a relevant purpose other than to show criminal disposition, it may be admissible. *See People v. Roe*, 74 N.Y.2d 20, 544 N.Y.S.2d 297 (1989); *People v. Satiro*, 72 N.Y.2d 821, 530 N.Y.S.2d 539 (1988); *People v. Ingram*, 71 N.Y.2d 474, 527 N.Y.S.2d 363 (1988); *People v. Alvino*, 71 N.Y.2d 233, 525 N.Y.S.2d 7 (1987); *People v. McKinney*, 24 N.Y.2d 180, 299 N.Y.S.2d 401, *supra*, Prince, Richardson on Evidence 170 (10th ed.). The subdivision sets forth several situations where evidence of other crimes, wrongs or immoral acts may be admissible. This enumeration is "merely illustrative" (*People v. Vails*, 43 N.Y.2d 364, 368, 401 N.Y.S.2d 479, 481 [1977]), and not intended to be "exhaustive" of the possible range of relevancy. *People v. Santarelli*, 49 N.Y.2d 241, 248, 425 N.Y.S.2d 77, 81 (1980); *People v. Jackson*, 39 N.Y.2d 64, 68, 382 N.Y.S.2d 736, 738 (1976). After determining that the evidence in question is relevant beyond mere propensity to a material issue, the trial court must then weigh the probative value against prejudicial effect to determine admissibility. *See People v. Ventimiglia*, 52 N.Y.2d at 359, 438 N.Y.S.2d at 264, *supra*. Preliminary factual questions concerning the uncharged crime, for example, the identity of the defendant as the perpetrator of that uncharged crime, is a question for the court to determine pursuant to CE 104(b). *See* Comment to (b)(3), Pretrial determination, *infra*.

Finally, consistent with present law, the subdivision is applicable in both criminal and civil cases. *See Matter of Brandon*, 55 N.Y.2d 206, 488 N.Y.S.2d 436 (1982); *Altman v. Ozdoba*, 237 N.Y. 218, 142 N.E. 591 (1923); *McLaghlin v. National Mohawk Valley Bank*, 139 N.Y. 514 (1893); Prince, Richardson on Evidence § 184 (10th ed.).

(b) (1) & (b) (2) Notice.

These subparagraphs represent a change in the law by requiring that the offering party, upon request of the other side, give notice of intention to offer uncharged crimes evidence. This change is consistent with the Court of Appeals mandate that uncharged crimes issues be decided before the evidence is offered at trial. *See People v. Ventimiglia*, 52 N.Y.2d at 362, 438 N.Y.S.2d at 265266, *supra*. The

notice requirement in criminal cases is phrased in almost identical terms to the language in CPL 240.43 governing notice of uncharged crimes for impeachment purposes.

**(b) (3) Pretrial determination.**

Subparagraph (3), in accord with the preference expressed in *People v. Ventimiglia, supra*, permits either side to request a pretrial hearing and for the trial court to hold a hearing or inquiry whenever practicable. At times, the trial judge may not, until all of the evidence has been heard, be in a position to decide admissibility. This section provides discretion to postpone pretrial

determinations until a more appropriate time. This same paragraph makes clear that resolutions of preliminary questions concerning the uncharged crime is governed by section 104(b). This means that factual issues involved in determining the admissibility of uncharged crimes must be resolved under a preponderance of evidence standard unless a higher burden of proof is imposed by the courts. For example, in *People v. Robinson*, 68 N.Y.2d 541, 510 N.Y.S.2d 837 (1986), the Court of Appeals held that to prove defendant's identification as perpetrator of the crime charged by proof of his commission of an uncharged crime, defendant's identity as the person who committed the uncharged crime must, if not conceded or previously adjudicated, be established by clear and convincing evidence. See *Barker, Evidence (1987 Survey of New York Law)*, 39 Syracuse L. Rev. 323. This higher standard continues under the Code. Once the preliminary facts are established, the burden is on the opponent to demonstrate why the prejudicial effect outweighs the probative value of the evidence. See *People v. Ventimiglia*, 52 N.Y.2d at 359, 438 N.Y.S.2d at 264, *supra*.

**(b)(4) Remedies.**

Paragraph 4 provides that the remedy for untimely notice is governed by section 107, which requires a remedy tailored to cure the prejudice suffered by the late notice.

§ 405. Methods of proving character

(a) Reputation or opinion. Whenever evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion subject to the requirements of section 701 of this chapter.

(b) Specific instances of conduct. Whenever 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, proof may also be made of specific instances of that person's conduct.

(c) Inquiry into specific acts and proof of prior convictions.

(1) Specific acts. On cross-examination of a character witness, a good faith inquiry upon a reasonable basis is allowable into relevant specific instances of conduct; provided, however, a character witness on behalf of an accused or a party may not be asked on cross-examination whether the witness's testimony would be different if the witness knew that the defendant or party committed the crime or act at issue in the instant trial.

(2) Prior convictions. Whenever an accused or a party offers evidence of a pertinent character trait, pursuant to paragraph one or two of subdivision (a) of section 404

of this article, the prosecution or the adverse party may offer to prove any conviction of the accused or the party for an offense the commission of which would tend to negate any character trait or quality attributed to the accused or the party in the character testimony offered by the accused or the party.

#### Comment

This section specifies three methods by which character may be proved in cases where character evidence is admissible: (1) by testimony as to reputation; (2) by testimony in the form of opinion; (3) by evidence of specific instances of conduct. The method which may be used will depend upon the status of character in the case.

It is to be noted that CE 405 is not the only section which governs proof of character. Other sections of the Code of Evidence specify methods for proving character. See CE 404(a)(1); CE 608; CE 609.

#### (a) Reputation or opinion.

When character is being used circumstantially as a basis for inferring that a person behaved in conformity therewith on the occasion in question, it may be proved by reputation or opinion testimony. Reputation refers to the "aggregate tenor of what others say or do not say" about a person. *People v. Bouton*, 50 N.Y.2d 130, 139, 428 N.Y.S.2d 218, 222-223 (1980). When a witness testifies as to reputation, the witness must be able to demonstrate that he is familiar with the person's reputation in the relevant community. *See People v. Bouton, supra; People v. O'Regan*, 221 A.D. 331, 223 N.Y.S. 339 (2d Dep't 1927). There is no requirement that the witness be personally acquainted with the person about whom testimony is being given or that the character witness has first-hand knowledge of any facts. The testimony is admissible as an exception to the hearsay rule. CE 803(c)(20). When the witness testifies in the form of opinion, the opinion must be rationally based on the perception of the witness.

While New York courts have held that character may be proved by reputation evidence, they have not permitted it to be proved by testimony in the form of opinion. *See People v. Van Gaasbeck*, 189 N.Y. 408, 82 N.E. 718 (1907); Prince, *Richardson on Evidence* §§ 149-150 (10th ed.); *see also People v. Barber*, 74 N.Y.2d 653, 543 N.Y.S.2d 365 (1989). This difference is not justifiable since testimony in the form of reputation is frequently, in essence, testimony as to opinion. The section recognizes this fact.

(b) Character as a substantive element.

This subdivision permits proof of character by specific instances when, as a matter of substantive law, character is an essential element of a crime, charge, claim or defense. Use of specific instances of conduct as proof of character or disposition is in accord with present law. *See Park v. N. Y. Central & H. R. R. Co.*, 155 N.Y. 215, 49 N.E. 674 (1898); *People v. Calvano*, 30 N.Y.2d 199, 331 N.Y.S.2d 430 (1972); *People v. Mann*, 31 N.Y.2d 253, 336 N.Y.S.2d 633 (1972); Fisch, *Evidence* § 177(C) (2d ed.). Thus, in a personal injury action where the plaintiff claims that the defendant was negligent in hiring or retaining an incompetent employee, the employee's prior incompetence may be established by specific acts of incompetence. *Park v. N. Y. Central & H. R. R. Co.*, *supra*. Similarly, a criminal defendant, by raising the defense of entrapment (an essential element of which is a lack of predisposition), puts in issue that defendant's disposition to commit the crime charged. This entitles the prosecutor to offer proof of predisposition by evidence that the defendant committed the same crime on previous occasions. *See People v. Calvano*, *supra*. Importantly, character or predisposition must be an essential substantive element, not simply evidence of a substantive element. Thus, under this subdivision, a homicide defendant cannot, in support of a claim of self-defense, introduce specific acts evidencing the victim's violent character as proof that the victim was the first aggressor. This is so because, even though whether the victim was the first aggressor is an essential element of self-defense, the character trait for violence is not an element of self-defense. Rather, that violent character is merely evidence of the first aggressor element. Of course, when defendant is aware of those violent acts they are admissible under general relevancy principles, but not this subdivision, to prove the reasonableness of defendant's conduct. *See People v. Miller*, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976).

Evidence of specific instances of conduct to prove a character trait is not generally admissible as a basis for inferring that a person acted upon the occasion in question in conformity with that trait. *See CE 404(b)*. This is because such evidence has the capacity to create prejudice, to cause undue confusion of the issue, and to unduly prolong trials. *See 1 Wigmore, Evidence* § 194 (3d ed.); *cf. People v. RodawaUl*, 111 N.Y. 408, 70 N.E. 1 (1904). The limited exception provided in subdivision (b) is justified because in those situations where character is directly in issue, it deserves a thorough inquiry. *See McCormick, Evidence* § 187 (3d ed.). Permitting proof of character by reputation or opinion when character is in issue may change present law. *See Park v. N.Y. Central & H. R. R. Co.*, *supra*; *Brennan v. Commonwealth Bank & Trust Company*, 65 A.D.2d 636, 409 N.Y.S.2d 266 (3d Dep't 1978). Nonetheless, evidence of reputation or

opinion should be admissible in appropriate circumstances. *See* McCormick, Evidence § 187 (3d ed.).

(c) (1) Inquiry into specific acts.

Whether character testimony is given in the form of reputation or opinion, subparagraph (b)(1) specifically authorizes cross-examination with respect to relevant specific instances of conduct of the person about whom testimony has been given. Relevant specific acts refers to acts which have a bearing upon the character trait to which the character witness's testimony was directed. This inquiry is permitted because it is not directed toward proving the conduct, but toward evaluating the weight of the character witness's testimony. For example, in a prosecution for larceny, where the accused has introduced testimony of a character witness to the effect that the accused enjoys a good reputation for honesty, the prosecutor may ask on cross-examination whether the witness has heard or knows that the accused was convicted of forgery, but not whether the witness has heard or knows that the accused was convicted of driving while intoxicated.

Regardless of whether the character witness testifies on direct examination as to reputation or opinion, the witness may be asked whether he "has heard" or whether "he knows" of particular relevant specific acts of conduct of the person about whom he or she has testified. *See* McLaughlin, *New York Trial Practice*, N.Y.L.J., July 10, 1981, p. 1, col. 1). This changes present law under which cross-examination is limited to questioning whether the witness has heard about derogatory reports or rumors. *See* *People v. Lediard*, 80 A.D.2d 237, 438 N.Y.S.2d 540 (1st Dep't 1981), This change is consistent, for the same reasons, with permitting the character witness to testify on direct in terms of opinion as well as reputation.

The cross-examination must be conducted with a good faith basis for the questions. *See* *People v. Alamo*, 23 N.Y.2d 630, 298 N.Y.S.2d 681 (1969), *cert. denied*, 396 U.S. 879, 90 S.Ct. 156 (1969); McCormick, Evidence § 191 (3d ed.). Additionally, the inquiry is subject to CE 403. Where the credibility of the character witness is being attacked through proof of that witness's character, CE 608 and 609 are applicable.

The second sentence of subparagraph (b)(1) continues the rule that a character witness may not be asked if his or her opinion would be different if the witness knew that the party committed the crime or act charged. *See* *People v. Lediard*, 80 A.D.2d at 242, 438 N.Y.S.2d at 542, *supra*; *People v. Thompson*, 75 A.D.2d 630, 427 N.Y.S.2d 303 (2d Dep't 1980); Prince, Richardson on Evidence § 153 at 61-62 (Cumulative Supplement 1985).



**(c) (2) Proof of criminal conviction.**

**Under present law (CPL 60.40[2]), where a criminal defendant puts character in issue, the prosecution may provide a prior conviction relevant to the character trait attributed to the account. Subparagraph (b)(2) continues this rule**

and makes it applicable in those limited situations when character evidence is offered in a civil case. *See* CE 404(a)(2).

#### § 406. Habit; routine practice

(a) **Admissibility.** Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

(b) **Method of proving.** Habit or routine practice shall be proved by testimony in the form of an opinion, otherwise admissible under sections 701 or 702 of this chapter, or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.

#### Comment

##### (a) Habit or routine practice.

Subdivision (a) provides that evidence of a person's habit or the routine practice of an organization (the equivalent behavior on the part of a group) is relevant to prove that conduct on a particular occasion was in conformity therewith. The subdivision codifies present law in commercial and professional cases. Thus, an attorney who drew and witnessed a will, but who cannot recall the circumstances of its execution, may testify that he or she is in the habit of drawing wills and is careful always to have them executed according to statute. *In re Will of Kellum*, 52 N.Y. 517 (1873). Similarly, in a coram nobis proceeding where the issue is whether the judge on arraignment had advised defendant of his or her right to counsel, the judge may testify to the court's unvarying practice to advise an accused of his or her right to counsel. *People v. Bean*, 284 App. Div, 922, 134 N.Y.S.2d 483 (3d Dep't 1954), *cert. denied*, 348 U.S. 974, 75 S.Ct. 537 (1955); *see also Gardam & Son v. Batterson*, 198 N.Y. 175, 91 N.E. 371 (1910) (proof of mailing by showing routine practice); *Peninsula National Bank v. Hill*, 52 Misc.2d 903, 227 N.Y.S.2d 162 (App. Term 2d Dep't 1966), *aff'd*, 30 A.D.2d 643, 292 N.Y.S.2d 820 (2d Dep't 1968) (habit of process server admitted). The subdivision also codifies present law in negligence and wrongful death actions. *See Halloran v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 393 N.Y.S.2d 341 (1977); *compare Rigie v. Goldman*, 148 A.D.2d 23, 543 N.Y.S.2d 983 (2d Dep't 1989) (evidence of custom and practice of advising patients of risks of dental surgery admissible in dental malpractice action based upon lack of informed consent), *with Glusaskas v. Hutchinson*, 148 A.D.2d 203,

206, 544 N.Y.S.2d 323, 324-325 (1st Dep't 1989) (doctor's self-serving and self-laudatory description of routine practice in performing surgery not admissible in medical-surgery malpractice action); Prince, *Evidence*, (1977 Survey of New York Law), 29 Syracuse L. Rev. 553, 553-556. Commentators are in general agreement that such evidence is highly probative. See 1 Wigmore, *Evidence* § 92 (Tillers rev. 1983); Prince, Richardson on Evidence § 185 (10th ed.); Lewan, *The Rationale of Habit Evidence*, 16 Syracuse L. Rev. 39 (1964); *Miller v. Hackley*, 5 Johns. 375 (1810). The uniformity of a person's response to habit is far greater than the consistency with which one's conduct conforms to a general character or disposition. A sensible person investigating whether X did a particular act would be greatly helped in the inquiry by evidence as to whether X was in the habit of doing the particular act. See McCormick, *Evidence* § 195 (3d ed.). In view of the probative value of habit or routine practice evidence, this section is technically unnecessary as such evidence would be admissible under CE 401, 402. The section is intended to ensure that such evidence is admissible, subject, of course, to other provisions of the Code of Evidence, e.g., CE 403. See *Rigie v. Goldman*, supra.

Character evidence of a person is not admissible to prove that he or she acted on a particular occasion in conformity therewith. CE 404. On the other hand, under this section, evidence of habit is admissible for such purpose. Distinguishing between character and habit is thus important. In this regard, the difference between character and habit articulated by McCormick is generally accepted: "Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance or peacefulness. Habit, in the present context, is more specific. It notes one's regular response to a repeated situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life—in business, at home, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of responding to a particular kind of situation with a specific type of conduct. Thus, a person may be in the habit of bounding down a certain stairway two or three steps at a time, of patronizing a particular pub after each day's work, or of driving [an] automobile without using a seat belt. The doing of the habitual act may become semi-automatic. . . McCormick, *Evidence* § 195 (3d ed.). The illustration provided by Rule 307 of the Model Code of Evidence is also instructive in distinguishing the two: "(1) In an action for the wrongful death of X at a railway crossing, P offers evidence (1) that X was a careful, cautious man, and (2) that X had the habit of stopping and looking carefully in both directions along the track before entering a railway crossing. Item (1) is inadmissible; item (2) admissible." Model Code of Evidence 190-191. Item (1) is evidence of character and item (2) is evidence of habit.

By its terms, subdivision (a) authorizes the admissibility of habit or routine practice whether corroborated or not and regardless of the presence of eyewitnesses. A requirement that the habit or routine practice be corroborated has been rejected because it goes to the weight of the evidence, and not to its admissibility. A requirement of absence of eyewitnesses to the event in question before the evidence of habit or custom can be admitted has also been rejected because, as the California Law Revision Commission has observed: "The 'no eyewitness' limitation is undesirable. Eyewitnesses frequently are mistaken, and some are dishonest. The trier of fact should be entitled to weigh the habit evidence against the eyewitness testimony as well as all of the other evidence in the case." Comment, California Evidence Code § 1105.

(b) Proving habit or routine practice.

Subdivision (b) specifies opinion and specific instances of conduct as the two permissible methods of proving habit or routine conduct. Reputation evidence is not included because it is unlikely that a person would have a reputation for a specific habit. The subdivision codifies present law. *See* Fisch, Evidence § 217 (2d ed.); McCormick, Evidence § 195 (3d ed.). Whether the conduct amounts to a habit or routine practice is a question to be determined by the court pursuant to CE 104(b).

The specific instances of conduct to prove habit, as under present law, must be sufficient in number to warrant a finding that the habit existed or the practice was routine. *See Hcdloran v, Virginia Chemicals*, 41 N.Y.2d at 392, 393 N.Y.S.2d at 346, *supra*; *Rigie v. Goldman*, 148 A.D.2d at 29, 543 N.Y.S.2d at 985, *supra*. The use of opinion testimony to prove habit may be a change in New York law. *See* Martin, Proposed Code of Evidence (Part I), N.Y.L.J., April 13, 1990 p. 3, col. 3. The change seems warranted because an opinion about habit must be otherwise admissible under section 701 or 702. This means that the opinion is either (1) a lay opinion that cannot be described in more concrete terms, but is rationally based on the perception of the witness and is helpful to the jury or (2) the opinion is a necessary expert opinion. These requirements narrow considerably the scope of opinion-habit testimony but permit it when necessary and helpful.

The 1990 version of this provision prohibited the introduction in a criminal case of other crimes, wrongs or acts to prove habit or routine practice, except as authorized under section 404(b). No authoritative decisional law supported this prohibition. Thus, the

**prohibition has been eliminated because, especially given the difference between true habit evidence and general character testimony, it is more consistent with the principles governing codification to leave the issue open for judicial resolution.**

**§ 407. Subsequent remedial measures**

Evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is not admissible 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. Evidence of such measures may, however, be admissible

when offered to impeach or as proof on controverted issues such as ownership, control, or feasibility of precautionary measures.

#### Comment

This section provides that subsequent remedial measures, whether it be a post-accident change, repair, or precaution, are not admissible to prove negligence, wrongful conduct, or a negligent or culpable defect in a product.

The section codifies present law. *See Scudero v. Campbell*, 288 N.Y. 328, 43 N.E.2d 66 (1942); *Getty v. Hamlin*, 127 N.Y. 636, 27 N.E. 399 (1891); *Corcoran v. Village of Peekskill*, 108 N.Y. 151, 15 N.E. 309 (1888).

In rendering inadmissible evidence subsequent remedial measures to prove negligent or culpable conduct with respect to a defect in a product but permitting that evidence to be admissible in cases not based upon negligent or wrongful conduct, the section is consistent with present New York law. The governing decisions exclude such evidence in strict liability cases based either upon design defect or upon the failure to warn or adequately instruct concerning use of a product, *i. e.*, causes of action which include concepts of culpability (blameworthiness). The decisions do not exclude evidence of subsequent repairs or recall letters in strict liability cases based upon a manufacturing defect, a cause of action which does not include concepts of culpability. *See Cover v. Cohen*, 61 N.Y.2d 261, 270, 473 N.Y.S.2d 378, 382 (1984). Courts, however, carefully scrutinize the cause of action to determine whether it is in fact based upon a manufacturing defect. *See, e.g., Perazone v. Sears, Roebuck*, 128 A.D.2d 15, 515 N.Y.S.2d 908 (3d Dep't 1987). Notably, even in strict liability manufacturing defect cases, subsequent remedial measures, especially changes in design, often shed no light on the alleged manufacturing defect, and exclusion is required under sections 401 and 402. In other cases, exclusion may be appropriate under section 403.

The term "event" will vary in meaning depending upon the cause of action and does not necessarily focus on the precise time when injury has been suffered. *See Cover v. Cohen*, 61 N.Y.2d at 271, 473 N.Y.S.2d at 382-383, *supra*.

The section does not, however, require exclusion of evidence of subsequent remedial measures when such evidence is offered to impeach or as proof of such issues, if controverted, as ownership, control, or feasibility of precautionary measures. *See Haran v. Union*

*Carbide Corp.*, 68 N.Y.2d 710, 506 N.Y.S.2d 311 (1986); *Cover v. Cohen, supra*. When offered for any of these purposes in a design defect case the jury must be carefully instructed that the evidence is not offered to prove the defect in design. *Cover v. Cohen, supra*; *Brandon v. Caterpillar Tractor Corp.*, 125 A.D.2d 625, 510 N.Y.S.2d at 165 (2d Dep't 1986). In light of the important considerations and policies underlying the rule in which evidence of subsequent remedial measures can be admitted, the rule should be narrowly construed. See *Haran v. Union Carbide Chemicals Corp., supra*; *Cover v. Cohen, supra*; McCormick, Evidence § 275 (3d ed.). The section, however, has no application when the remedial measure is relevant in a case in which the individual or entity taking the remedial measure is not a party. See *People v. Thomas*, 70 N.Y.2d 823, 523 N.Y.S.2d 437 (1987) (error to exclude defense proof of subsequent design modifications to automobile to show that defects which required modification, not defendant's intoxication, caused accident). The relevance of remedial measures for any of the above purposes is a question for the court to determine pursuant to CE 104(a).

#### § 408. Compromise of, and offers to compromise, disputed claims

Evidence of (a) furnishing or offering or promising to furnish, or (b) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove civil or criminal liability for, invalidity of, or the amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This section does not, however, require the exclusion of evidence existing before the compromise negotiations merely because it is presented in the course of compromise negotiations. This section also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, controverting a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

#### Comment

This section prohibits the admission of evidence dealing with settlement or attempted settlement of a disputed claim when offered either in a civil or criminal case as an admission concerning liability or amount. Inadmissibility is based on several considerations. As one commentator has observed: "First, an offer to compromise or settle ordinarily raises no logical inference of liability. It merely indicates a desire for peace, or the conviction that the prosecution of the claim would result in such expense and annoyance that it is preferable to dispose of the matter by paying a sum of money or doing some other act. Furthermore, even if the offer can be regarded

as raising some inference of liability, the most that could be inferred would be that the offeror believed himself or herself liable. Liability, however, is a legal matter and a party is not necessarily liable because the party so believes. Exclusion is also predicated on the social desirability of encouraging and facilitating extra-judicial settlements of disputes, thereby reducing the volume of litigation. To admit evidence of an unaccepted offer against the offeror would militate against the successful operation of this policy in so far as it would render litigants wary of entering into negotiations for settlement." Fisch, Evidence § 796 (2d ed.).

This wariness is present whether the party is concerned about subsequent use in either a civil or criminal case and the sections calls for exclusion in each. Exclusion in a criminal case is new to New York law since there is a dearth of state authority dealing with the issue.

With the exception of eliminating the requirement that lawyers use magical words like "speaking hypothetically," the section codifies present law. See *Tennant v. Dudley*, 144 N.Y. 504, 39 N.E. 644(1895); *Bigelow-Sanford, Inc. v. Specialized Commercial Floors of Rochester, Inc.*, 11 A.D.2d 464, 433 N.Y.S.2d 931 (4th Dep't 1980); *Mannion v. General Baking Co.*, 266 A.D. 1028, 44 N.Y.S.2d 890 (2d Dep't 1943); *Goldstein v. Albany Yellow Cab Co., Inc.*, 249 A.D. 701, 291 N.Y.S. 328 (3d Dep't 1936); Prince, Richardson on Evidence § 225 (10th ed.).

The prohibition in the section relates not only to settlements and attempted settlements of the very claim now being litigated, but also to settlement dealings a party may have had with third parties arising out of the same incident. It must be recognized that unlike CE 409, before the rule of exclusion contained in CE 408 can be applied, there must be a genuine dispute as to either validity or amount. Absent such a dispute there is, of course, no real compromise.

The second sentence of the section makes clear that evidence of conduct or statements made by a party during negotiation for the settlement of the claim may not be used as admissions in a later civil or criminal litigation. Limited admissibility in criminal cases is new to New York, but there is no decisional law to the contrary. The provision is supported by the idea that negotiations in civil cases will be substantially encouraged if parties have no fear of subsequent use of statements in a criminal prosecution. This is especially so when the government is a party to the civil proceeding.



Under present law, an admission of fact made in the course of an offer to compromise is admissible unless expressly stated to be made "without prejudice" or unless the admission of fact was made tentatively and hypothetically for the purpose of the compromise. *See White v. Old Dominion S.S. Co.*, 102 N.Y. 660, 6 N.E. 289 (1886). This section is preferable for several reasons. First, the *White* rule can prevent the complete candor between the parties that is most conducive, if not necessary, to settlement. Second, this section makes it unnecessary to examine the sometimes troublesome question as to whether the admission of fact was made tentatively or hypothetically for the purpose of compromise. Lastly, this section removes from the law what was often a trap for the unwary.

The limitation contained in the third sentence is designed to ensure that a party cannot render inadmissible evidence in existence prior to the commencement of the settlement discussions, *e.g.*, documents, by presenting the evidence to the other party in the course of such discussions. To permit the exclusion of a pre-existing document otherwise admissible merely because it is presented in the course of compromise negotiations simply would not further the underlying policy of the section.

When the evidence is offered for a purpose other than for establishing liability, it may be admissible. The section specifies some common situations in which this may occur. They are not, however, all inclusive, but only illustrative. Admissibility of such evidence for a purpose other than establishing liability is, of course, subject to CE 403. Whether such evidence is admissible is a question for the court to determine pursuant to CE 104(b).

#### § 409. Payment of medical and similar expenses

Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove civil or criminal liability for the injury. This section does not, however, require exclusion when the evidence is offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

#### Comment

This section codifies present law. *See Grogan v. Dooley*, 211 N. Y. 30, 105 N.E. 135 (1914). The section provides that evidence that a party promised to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove that party's liability for the injury. The underlying theory is that such evidence is of minimal probative value (*see* Comment to CE 408), especially in view of the common inclusion of medical payments coverage in automobile liability insurance policies. Furthermore, exclusion of such evidence will further the social policy of encouraging assistance to an injured party, as the risk that such action will be used in a subsequent case as an admission is removed. Consistent with these underlying policies, there is no requirement that there be an actual dispute as to liability or amount at the time the offer, promise, or actual payment was made.

Unlike the 1982 draft, the section does not exclude evidence of conduct or statements, *e.g.*, opinions or admissions of liability, when made in connection with an offer to pay hospital or other expenses covered by the section. This is consistent with present law.

*Cf. Prince, Richardson on Evidence § 225 (10th ed.).*

When the evidence is offered for a purpose other than for establishing liability, it may be admissible. The section specifies some common situations in which this may occur. They are not, however, all inclusive, but only illustrative. Admissibility of such evidence for a purpose other than establishing liability is, of course, subject to CE 403. Whether such evidence is admissible is a question for the court to determine pursuant to CE 104(b).

#### § 410. Inadmissibility of pleas, plea discussions, and related statements

Except as otherwise provided in this section, evidence of the following is not admissible in any civil or criminal case against the person who made the plea or was a participant in the plea discussions: (a) a plea of guilty which was later withdrawn or vacated; (b) a plea of nolo contendere validly made in any jurisdiction recognizing such pleas; (c) any statement made in the course of any judicial proceedings regarding either of the foregoing pleas; and (d) absent a waiver, any statement made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn or vacated. However, such a statement is admissible in any civil or criminal case in which another statement made in the course of the same plea or plea discussions has been introduced and the statement is necessary to complete, explain, assess, or make understood the previously introduced statement or in a criminal case for perjury or false statement if the statement was made by the defendant under oath, on the record, and in the presence of counsel.

#### Comment

This section is the criminal counterpart to CE 408. It provides that a person may plea bargain and offer to plead guilty without fear that any offer to plead or statements made during plea discussions will be used against that person in a subsequent criminal or civil case if the plea is withdrawn or vacated, or the discussions do not result in a plea of guilty. The purpose of the section is twofold. It is designed to provide fair treatment for a person whose guilty plea is withdrawn or vacated and to foster free and open negotiations between prosecutors and those accused of crimes. *Berger & Weinstein, 2 Weinstein's Evidence* ^ 410[02].

The section prohibits the admission of a plea of guilty which was later withdrawn or vacated against the person who made the plea. In this respect, it codifies the Court of Appeal's holding in *People v. Spitaleri*, 9 N.Y.2d 168,212 N.Y.S.2d 53 (1961). In *Spitaleri*, the Court ruled that a withdrawn plea of guilty is not admissible against the person in a later trial arising from his substituted plea of not guilty. It

declared: "flatly and finally that a plea so allowed to be withdrawn is out of the case forever and for all purposes." 9 N.Y.2d at 173, 212 N.Y.S.2d at 56. Additionally, the section precludes evidence of a plea of *nolo contendere* made in a jurisdiction that recognizes such a plea. This is based on principles of fairness to the person making the plea.

The section also makes clear that any statements made during the course of judicial proceedings regarding these pleas are likewise inadmissible. It is to be noted that these provisions apply equally to civil and criminal cases. In the Commission's opinion, no sufficient reason exists to distinguish between them.

This section also renders inadmissible, unless defendant has agreed to the contrary, any statements made in the course of plea discussions with an attorney for the prosecuting authority which do not result in a plea of guilty or which result in a plea of guilty later withdrawn or vacated. This is a slight change in New York law which provides for admissibility unless the prosecutor agrees that the statements will not be admissible. *People v. Evans*, 58 N. Y.2d 14, 457 N.Y.S.2d 757 (1982). However, the change reflects the usual practice under which prosecutors secure waivers from defendants, and is simply fairer in providing protection to persons who engage in discussions without counsel, as well as those persons represented by counsel who may well be unaware of the case law.

The section does not exclude statements made by the accused to other law enforcement officials, *i.e.*, to an officer other than an attorney for the prosecuting authority such as police officers or investigators. The fact that the section does not exclude such statements from evidence does not necessarily mean that such statements are admissible. Consideration must be given to the possibility that the admission of the statements may violate a constitutional or statutory right of the accused. *See* CE 416. Of course, with respect to statements made to an attorney for the prosecuting authority, such statements must be made in the course of plea discussions in order to be inadmissible under this section.

Lastly, it will be noted that such statements may be admissible in two limited situations. Under the section the statement is admissible in any case where another statement made in the course of the same plea or plea discussions has been introduced and the statement for purposes of completion, explanation, assessment or understanding ought be considered with it, and in a criminal prosecution for perjury or false statement if the statement was made under oath, on the record, and in the presence of counsel. Obviously, these exceptions are required in the interests of justice. No exception is provided to permit use of the statement for

**impeachment purposes. This is consistent with present law.**  
*See People v. Papo, 80 A.D.2d 623, 436 N.Y.S.2d 65 (2d Dep't 1981); People v. Heffron, 59 A.D.2d 263, 399 N.Y.S.2d 501 (4th Dep't 1981).*

**§ 411. Liability insurance**

Evidence that a person was or was not insured against liability is not admissible upon the issue whether such person acted negligently or otherwise wrongfully or whether such person

should be held strictly liable. This section does not, however, require exclusion when the evidence is offered for another purpose, such as proof of agency, ownership or control or bias or prejudice of a witness.

#### Comment

This section provides that evidence as to whether a person is or is not insured against liability is inadmissible upon the issue of negligence, wrongful conduct or strict liability. The section codifies present law. See *Oltarsh v. Aetna Ins. Co.*, 15 N.Y.2d 111, 256 N.Y.S.2d 577 (1965); *Leotta v. Plessinger*, 8 N.Y.2d 449, 209 N.Y.S.2d 304 (1960); *Simpson v. Foundation Co.*, 201 N.Y. 479, 95 N.E. 10 (1911); *Rendo v. Schermerhorn*, 24 A.D.2d 773, 263 N.Y.S.2d 743 (3d Dep't 1965).

Excluding evidence of insurance coverage on the issue of liability is premised on the theory that such evidence is irrelevant, the reason being that a person who is insured is no more likely to act negligently or otherwise wrongfully than he would if not insured; 2 Wigmore, Evidence § 282 (Chadbourn rev. 1979). The evidence is thus of low probative weight.

Additionally, such evidence is excluded because it may inject an extraneous factor into a case, *i.e.*, the jury may decide to share the resources of the insurer with the plaintiff, regardless of the merits of the case. McCormick, Evidence § 201 (3d ed.). Likewise, evidence that the person was not insured is excluded because such evidence is not considered to be probative, the reason being that it is unlikely that a person who lacks insurance will act more carefully than he

would if insured. Also, it may create sympathy for the uninsured person, and result in the jury not deciding the case on the merits.

When the evidence is offered for another purpose, it may be admissible. The section specifies some common situations in which this may occur. They are not, however, all inclusive, but only illustrative. Admissibility of such evidence for a purpose other than establishing liability is, of course, subject to CE 403. Whether such evidence is admissible is a question for the court to determine pursuant to CE 104(b).

#### § 412. Admissibility in sex offense cases of evidence of victim's sexual conduct

Evidence of the 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 or

in a proceeding under article three of the family court act unless such evidence: (a) proves or tends to prove specific instances of the victim's prior sexual conduct with the accused; (b) proves or tends to prove that the victim had 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; (c) rebuts evidence introduced by the prosecution of the victim's failure to engage in sexual intercourse, deviate sexual intercourse, or sexual contact during a given period of time; (d) rebuts evidence introduced by the prosecution 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 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. Any such offer or hearing shall be conducted outside the hearing of the jury.

#### Comment

**This section restates CPL 60.42 which limits use of a victim's minor sexual conduct in a criminal case. "The basic twofold purpose of this enactment (CPL 60.42) is to bar harassment of victims with respect to irrelevant issues and to keep from the jury confusing and prejudicial matters which have no proper bearing on the issue of the guilt or innocence of the accused. It attempts to strike a reasonable balance between protecting the privacy and reputation of a victim and permitting an accused, when it is found relevant, to present evidence of a victim's sexual conduct.<sup>B</sup> Bellacosa, Practice Commentary to CPL 60.42 (McKinney's 1981).**

#### **§ 413. Admissibility of evidence of victim's sexual conduct in non-sex offense cases**

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.

#### Comment

**This section restates verbatim CPL 60.43, added L. 1990, ch. 832, which sets forth the procedure to determine whether a witness's prior sexual conduct may be explored in a criminal case, other than a prosecution under article 130 of the Penal Law which is**

governed by CE 412. *See* Preiser, Practice Commentary to CPL 60.43, at 434 (McKinney's Supp. 1990).

In determining admissibility, CE 403 is applicable though caution is warranted in light of an accused's constitutional right to present a defense and right of confrontation, especially with respect to evidence relevant to show a witness's bias. *See* Preiser, *supra*.

#### § 414. Proof of age of child

Whenever it becomes necessary to determine the age of a child, the child may be produced and exhibited to enable the trier of fact to determine the child's age by a personal inspection.

#### Comment

This section restates without substantive change CPLR 4516 which governs the determination of a child's age by personal inspection of the child by the trier of fact. "Trier of fact" has been substituted for "court or jury" in order to be consistent with terminology used throughout the Code of Evidence. This section permits the trier of fact to draw an inference of age from inspection of the child whose age is in question. *People v. Kaminsky*, 208 N.Y. 389, 102 N.E. 515 (1913); *Union Bank of Brooklyn v. Mandel*, 139 A.D. 684, 124 N.Y.S. 459 (1910); Prince, Richardson on Evidence § 132 (10th ed.); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 1 4516.03. The section does not, however, permit inspection of the child for the purpose of showing physical resemblance to a party. *Bilkovic v. Loeb*, 156 A.D. 719, 141 N.Y.S. 279 (1st Dep't 1913); *Jn re Wendel's Estate*, 146 Misc. 260, 262 N.Y.S. 41 (Surrogates Ct., N.Y.Co. 1933).

#### § 415. Use of anatomically correct dolls

Any person who is less than sixteen 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 one hundred thirty, article two hundred sixty or section 255.25 of the penal law.

#### Comment

This section restates verbatim CPL 60.44 which governs the use of anatomically correct dolls by children testifying in certain sex crime prosecutions.



§ 416. Admissibility of statements of defendants

(a) General rule. Evidence of a written or oral confession, admission, or other statement made by a defendant with respect to such defendant's participation or lack of

participation in the offense charged, may not be received in evidence against such defendant in a criminal proceeding if such statement was involuntarily made.

(b) Involuntarily made defined. A confession, admission, or other statement is "involuntarily made" by a defendant when it is obtained from the defendant: (1) by any person by the use or threatened use of physical force upon the defendant or another person, or by means of any other improper conduct or undue pressure which impaired the defendant's physical or mental condition to the extent of undermining the defendant's ability to make a choice whether or not to make a statement; or (2) by a public servant engaged in law enforcement activity or by a person then acting under the direction of, or in cooperation with, such public servant: (A) by means of any promise or statement of fact, which promise or statement creates a substantial risk that the defendant might falsely incriminate herself or himself; or (B) in violation of such rights as the defendant may derive from the constitution of this state or of the United States.

#### Comment

This section restates without change CPL 60.45. Under this section any confession, admission, or statement of a defendant is not admissible against him in a criminal action if it has been "involuntarily made." See *People v. Spano*, 4 N.Y.2d 256, 263, 173 N.Y.S.2d 793, 798-799 (1957), *rev'd on other grounds*, 360 U.S. 315, 79 S.Ct. 1202. "Involuntarily made" is defined expansively to include not just confessions obtained by physical or mental coercion or by means of improper promises (for the traditional meaning of "involuntarily made," see *People v. Spano*, 4 N.Y.2d at 263, 173 N.Y.S.2d at 798-799, *supra*), but all confessions obtained in violation of a defendant's rights under the federal or state constitutions. Thus, confessions which are obtained after a failure to give the Miranda warning, *e.g.*, *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602 (1966), or by custodial interrogation after a request for counsel, *e.g.*, *People v. Grant*, 45 N.Y.2d 366, 408 N.Y.S.2d 429 (1978), or by custodial interrogation in the absence of counsel once counsel has become involved in the case, *e.g.*, *People v. Cunningham*, 49 N.Y.2d 203, 424 N.Y.S.2d 421 (1980), or by custodial interrogation in the absence of counsel following the commencement of criminal proceedings even though the accused has neither retained nor requested an attorney, *e.g.*, *People v. Samuels*, 49 N.Y.2d 218, 424 N.Y.S.2d 892 (1980), are also within the ambit of this section. See generally, Prince, Richardson on Evidence § 541 (10th ed.).

It should be noted that CPL 60.45 has been construed as not precluding the use of "involuntarily made" statements for impeachment purposes, see *People v. Maerling*, 64 N.Y.2d 134, 485 N.Y.S.2d 23 (1984); *People v. Harris*, 25 N.Y.2d 175, 303 N.Y.S.2d 71

(1969), *aff'd*, 401 U.S. 222, 91 S.Ct. 643 (1971); *People v. Kulis*, 18 N.Y.2d 318, 274 N.Y.S.2d 873 (1966), provided they were not involuntarily made as a result of physical duress or compulsion.

*See Mincey v. Arizona*, 437 U.S. 385, 98 S.Ct. 2408 (1978); *New Jersey v. Portash*, 440 U.S. 450, 99 S.Ct. 1292 (1979); *People v. Walker*, 61 N.Y.2d 776, 500 N.Y.S.2d 643 (1986), *aff'g on the memorandum below*, 110 A.D.2d 730, 488 N.Y.S.2d 198 (2d Dep't 1985).

#### § 417. Corroboration of confession or admission

A person may not be convicted of any offense solely upon evidence of a confession or admission made by such person without additional proof that the offense charged has been committed.

#### Comment

This section restates without change CPL 60.50. It states the confession corroboration rule, the purpose of which is to obviate the "danger that a crime may be confessed when [in fact] no such crime . . . has been committed by anyone." *People v. Reade*, 13 N.Y.2d 42, 45, 241 N.Y.S.2d 829, 831 (1963) *citing People v. Lytton*, 257 N.Y. 310, 314, 178 N.E. 290, 291 (1931). The effect of the statute is to require evidence, other than the confession, of the existence of the criminal fact to which the confession relates, *i.e.*, proof of the corpus delicti. *See People v. Murray*, 40 N.Y.2d 327, 331, 386 N.Y.S.2d 691, 694 (1976). The additional proof need not be evidence linking the defendant to the crime and can be circumstantial with the confession providing the guide to explaining the corroboration. *See People v. Lipsky*, 57 N.Y.2d 560, 457 N.Y.S.2d 451 (1982). Put simply, it suffices that there is "some proof, of whatever weight, that a crime was committed by someone." *People v. Daniels*, 37 N.Y.2d 624, 629, 376 N.Y.S.2d 436, 440 (1975).

#### § 418. Proof of prior conviction admissible when it constitutes an element or essential part of prosecution's case

Subject to the limitations prescribed in section 200.60 of the criminal procedure law, the prosecution 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.

#### Comment

This section restates without substantive change CPL 60.40(3). It is designed to assure that independent proof of a prior conviction is admissible in those cases in which a prior conviction constitutes an element or essential part of the prosecution's case. *See* Commission Staff Comment, Proposed N.Y.

**Criminal Procedure Law 72. Examples would be a charge of perjury based upon an allegedly false sworn statement of the defendant that he had never been convicted of a crime, and a charge of criminal possession of a weapon after prior conviction for a crime.**

#### **§ 419. Dangerous drugs destroyed pursuant to court order**

The destruction of dangerous drugs pursuant to the provisions of article seven hundred fifteen of the criminal procedure law shall not preclude the admission in any trial, proceeding, or hearing of testimony or evidence where such testimony or evidence would otherwise have been admissible if such drugs had not been destroyed.

#### **Comment**

**This section restates without substantive change CPL 60.70. "Hearing" has been included in order to be consistent with the applicable section of the Code of Evidence, 101(b). Under this section, evidence concerning dangerous drugs is admissible even though the drugs have been destroyed pursuant to court order under Article 715 of the CPL. Thus, testimony concerning the weight and narcotic content of such destroyed drugs is to be treated no differently than if the drugs had been produced in court and offered in evidence.**

#### **§ 420. Chemical test evidence**

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 1192 of the vehicle and traffic law, chemical test evidence properly admissible as evidence of intoxication under subdivision one of section 1195 of such law shall also, if relevant, be received in evidence with regard to the remaining charges in the indictments.

#### **Comment**

**This section restates verbatim CPL 60.75, governing the admissibility of chemical test evidence of intoxication.**

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## § 421. Corroboration of accomplice testimony

(a) General rule. 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.

(b) Accomplice defined. 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: (1) the offense charged; or (2) an offense based upon the same or some of the same facts or conduct which constitute the offense charged.

(c) Accomplice notwithstanding defense, exemption or impediment to conviction. A witness who is an accomplice as defined in subdivision (b) of this section is no less such because a prosecution or conviction of such witness 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 of that offense.

#### Comment

**This section restates without substantive change CPL 60.22. It precludes a conviction based solely upon the testimony of persons who are criminally implicated in, and possibly subject to prosecution for, the factual transaction on trial. It is applicable only to criminal cases. *Matter of Berenhaus v. Ward*, 70 N.Y.2d 436, 443, 522 N.Y.S.2d 478, 481 (1987).**

**The mandate of the section is that there shall be evidence, in addition to that furnished by an accomplice, "tending to connect the defendant with the commission" of the crime. While 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, such evidence must be truly independent. *See People v. Hudson*, 51 N.Y.2d 233, 238, 433 N.Y.S.2d 1004, 1007 (1980). As the Court of Appeals observed: "The independent evidence must be material evidence other than that of the accomplice . . . [and] it may not depend for its weight and probative value upon the testimony of the accomplice," *People v. Kress*, 284 N.Y. 452, 460, 31 N.E.2d 898, 902 (1940).**

**Additionally, the section defines "accomplice." Under the definition, a witness may be labeled an accomplice only if there is a**

**showing that the witness took part in the crime or in an offense based upon the same or some of the same facts or conduct constituting the crime charged. See *People v.***

***Velasquez*, 76 N.Y.2d 905, 561 N.Y.S.2d 911 (1990); *People v. Brooks*, 34 N.Y.2d 475, 358 N.Y.S.2d 395 (1974).**

§ 422. Eavesdropping evidence; admissibility; motion to suppress

(a) General rule. The contents of any intercepted or accessed electronic communication or any overheard or recorded communication, conversation, or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping, as defined by section 250.05 of the penal law, may not be received in evidence in any trial, proceeding, or hearing before any court or grand jury, or before any legislative committee, department, agency, bureau, or officer of the state, or a political subdivision thereof; provided, however, that such electronic communication, recorded communication, conversation, discussion, or evidence shall be admissible in any civil or criminal trial, proceeding, or hearing against a person who has, or is alleged to have, committed such crime of eavesdropping.

(b) Suppression procedures. In criminal cases, motions to suppress evidence inadmissible under subdivision (a) of this section shall be governed by article seven hundred ten of the criminal procedure law. In all other cases, motions to suppress shall be governed by subdivision (c) of this section.

(c) Suppression in non-criminal cases.

(1) Aggrieved person defined. As used in this subdivision, the term "aggrieved person" means: (A) a person who was a sender or receiver of an electronic, telephonic or telegraphic communication which was intentionally intercepted, accessed, overheard or recorded by a person other than the sender or receiver thereof, without the consent of the sender or receiver, by means of any instrument, device, or equipment; (B) a party to a communication, conversation or discussion which was intentionally intercepted, accessed, overheard or recorded, without the consent of at least one party thereto, by a person not present thereat, by means of any instrument, device, or equipment; or (C) a person against whom the intercepting, accessing, overhearing or recording described in subparagraphs (A) and (B) of this paragraph was directed.

(2) Grounds for suppression motions. An aggrieved person who is a party in any civil trial, proceeding, or hearing before any court, or before any department, agency, bureau, or officer of the state, or a political subdivision thereof, may move to suppress the contents of any intercepted, accessed, overheard or recorded communication,



conversation, or discussion, or evidence derived therefrom, on the ground that: (A) the communication, conversation, or discussion was unlawfully intercepted, accessed, overheard or recorded; (B) the eavesdropping warrant under which it was overheard or recorded is insufficient on its face; or (C) the eavesdropping was not done in conformity with the eavesdropping warrant.

(3) Motion for suppression. The motion prescribed in paragraph two of this subdivision must be made before the judge or justice who issued the eavesdropping warrant. If no eavesdropping warrant was issued, such motion must be made before a justice of the supreme court of the judicial district in which the trial, proceeding, or hearing is pending. The aggrieved person must allege in such person's motion papers that an intercepted, accessed, overheard or recorded communication, conversation, or discussion, or evidence derived therefrom, is subject to suppression under paragraph two of this subdivision, and that such communication, conversation, or discussion, or evidence derived therefrom, may be used against such person in the civil trial, proceeding, or hearing in which such person is a party. The motion must be made prior to the commencement of such trial, proceeding, or hearing unless there was no opportunity to make such motion or the aggrieved person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted, accessed, overheard or recorded communication, conversation, or discussion, or evidence derived therefrom, may not be received in evidence in any trial, proceeding, or hearing.

#### Comment

This section restates CPLR 4506. The only change of substance is to broaden the scope of the section to reflect the 1988, ch. 744 amendments to Penal Law section 255.00 that make it a crime to intercept electronic or telephonic communications. Under this section, any evidence obtained by conduct constituting the crime of eavesdropping, as defined by Penal Law § 250.05, and any evidence derived therefrom, is inadmissible in all civil or criminal actions as well as before legislative committees and governmental agencies. The suppression procedure in all other cases is governed by subdivision (c) of the presentation.

It is important to note that Penal Law § 250.05 makes it illegal only to engage in "wiretapping," the "mechanical overhearing of a conversation," or the interception or accessing of an electric communication, as defined in Penal Law § 250.00, without a valid eavesdropping warrant. Thus, this section does not apply to a person who overhears a conversation inadvertently, or by placing his ear against a wall or a keyhole, or by surreptitiously

staying in the presence of others. Such person may testify as to what has been heard unless testimony would be inadmissible under another rule of evidence, *e.g.*, privilege or hearsay.

## § 423. Proof of payment by joint tortfeasor

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. 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.

**Comment**

This section restates without change CPLR 4533-b. Its purpose is to modify the rule of *Livant v. Livant*, 18 A.D.2d 383, 239 N.Y.S.2d 608 (1st Dep't 1963), *appeal dismissed*, 13 N.Y.2d 894 (1963), which provides that payments made by one of several joint tortfeasors may be alleged and proved in mitigation in the presence of the jury. Under this section, the proof of such payment is kept from the jury and at the conclusion of the trial, in the event of a verdict in favor of plaintiff, the trial court will deduct the amount of such payment from the award. The section does not, however, prohibit use of the prior payment before the jury to impeach the credibility of the settling joint tortfeasor under CE 607, when that person is called to testify, because the section forbids its use only when "offered by a defendant in mitigation of damages." See McLaughlin, *New York Trial Practice*, N.Y.L.J., December 12, 1980, p. 1, col. 1.

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## ARTICLE 5—PRIVILEGES

### Section

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**Comment**

Unlike most of the other articles in the Code of Evidence whose purpose is to exclude irrelevant, unreliable or prejudicial evidence, the privileges recognized in Article 5 are premised on considerations unrelated to the relevancy, reliability, or prejudicial effect of the offered evidence. Privileges have been recognized in order to protect or encourage a specific relationship or interest as a matter of public policy. Privileges foster relationships and interests that are deemed to be of sufficient social importance so that nondisclosure of the privileged communication or matter is accepted even though the cost of doing so is to keep relevant and reliable evidence from the trier of fact.

This Article restates with some changes the privileges presently contained in Article 45 of the CPLR: the privileges for husband and wife, attorney and client, social worker and client, clergy and penitent, library records, as well as the patient's privileges for communication and information confidentially imparted to doctors, nurses, dentists, chiropractors and psychologists. The Article also includes privileges that have been judicially developed: privileges for political votes, official information, identity of persons providing information to law enforcement and trade secrets.

The Article does not affect the privileges granted by the Constitution of the United States or of New York, or by statute. Examples of those privileges outside the scope of the Article are the constitutional privilege against compelled self-incrimination, the journalist's privilege under Civil Rights Law 79-h, and the confidentiality for information regarding sexually transmissible diseases provided by Public Health Law § 2306.

Two sections in Article 1 should be noted. CE 101(c) provides that the privileges recognized in Article 5 are applicable not only at all stages of all judicial actions, proceedings, and

hearings, but also to all proceedings at which testimony can be compelled to be given. Thus, the privileges apply in administrative and legislative hearings as well as in trials. The determination as to whether a certain communication or matter is privileged is to be determined pursuant to the provisions of CE 104(b).



**In sum, while Article 5 codifies most present law, there are changes both in form and substance. See 501(c), 502(a), 503(b)(1), 504(a), 504(b), 505(b), 506(a)&(b), 507(a), 507(d), 508(a)&(b), 509(a)&(b).**

§ 501. General provisions relating to privileges

(a) Definitions. As used in this article:

(1) A "person" is a human being, and where appropriate, the state or a political subdivision, department, agency or bureau thereof, a public or private corporation, a partnership, an unincorporated association, or other organization.

(2) A "holder of a privilege" is a person upon whom this article confers a privilege to refuse to disclose and to prevent any other person from disclosing a communication or matter.

(3) A "joint holder of a privilege" is one of two or more persons upon whom this article confers a privilege to refuse to disclose and to prevent any other person from disclosing the same communication or matter.

(4) A "representative" of a holder or joint holder of a privilege is a person acting in the place of the holder or joint holder as a guardian, committee, conservator, personal representative or successor, trustee, or similar representative of a public or private corporation, partnership, unincorporated association, or other organization.

(b) Privileges recognized only as provided. Except as otherwise provided by the constitution of the United States or of this state, statute, or this chapter, no person has a privilege to: (1) refuse to be a witness; (2) refuse to disclose any communication or matter; (3) refuse to produce any object or writing; or (4) prevent another from being a witness or disclosing any communication or matter or producing any object or writing.

(c) Privileged communication or matter overheard or obtained by others. When evidence of a communication or matter otherwise privileged under this article is obtained without the knowledge or authorization of the holder of the privilege, an invocation of the privilege may be upheld upon a determination that upholding the invocation substantially furthers the policies underlying the particular privilege and that the holder of the privilege took reasonable precautions to protect against disclosure or unauthorized acquisition.

(d) Exclusion of privileged communication or matter when persons authorized to claim privilege are not present. If no person entitled to claim a privilege under this article is

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present at the proceeding, the court or presiding officer has discretion to exclude evidence of a privileged communication or matter when disclosure would be harmful to the privilege holder's interest or to the relationship sought to be protected by the privilege. If a joint holder is not present either in person or by a representative, the court or presiding officer has discretion to exclude evidence of a privileged communication or matter when disclosure would be harmful to the absent joint holder's interest.

#### Comment

##### (a) Definitions.

The definitions are self-explanatory.

##### (b) Privileges recognized.

This subdivision codifies present law by limiting privileges to those provided by the federal and state constitutions and statute, including the Code of Evidence. The subdivision precludes the creation of other privileges by the judiciary through case law. This position is premised on the view that privileges reflect the accommodation of important competing interests that should be left to the elected representatives of the people. As observed by the Court of Appeals in *People ex rel. Mooney v. Sheriff of New York County*, 269 N.Y. 291, 295, 199 N.E. 415, 416 (1936): "On reason and authority, it seems clear that this court should not now depart from the general rule in force in many of the States and in England and create a privilege in favor of an additional class. If that is to be done, it should be done by the Legislature. . . ." *See also* N.Y. Adv. Comm. on Prac. and Proc., 2d Prelim Rep., Leg. Doc. No. 13, pp. 87-88 (1958).

Article 5 has no provision tracking the language of constitutional provisions relating to the admissibility of evidence which may be termed as privileged, such as the privilege against self-incrimination. The scope and meaning of these provisions are best left to decisional law. *See* 5 Weinstein- Kom-Miiller, N.Y. Civ. Prac. 1 4501.01.

Similarly, privileges created by the Legislature by specific enactment are outside the scope of Article 5. *See* Fisch, Evidence § 744 (2d ed.) (collecting statutes). The great number and diversity of these statutes—many of them specifically tailored to the needs of narrow substantive fields—prevents their effective integration into the Code of Evidence.

(c) Overheard conversations and purloined communications.

Subdivision (c) provides that a privilege recognized in the Article is not automatically lost simply because knowledge of the privileged communication or matter has come to the attention of a third person without the consent of the holder of the privilege. Under present law only the attorney-client privilege is not lost if a confidential communication is overheard by another person. *See* CPLR 4503(a). The attorney-client rule is continued in CE 504(a).

At common law, a third party who obtained a privileged communication was not barred from testifying about that communication even though the third party had obtained the information without the knowledge or the consent of the holder of the privilege. *See Lanza v. New York State Joint Leg. Comm.*, 3 N.Y.2d 92, 97, 164 N.Y.S.2d 9, 12 *cert. denied*, 355 U.S. 856, 78 S.Ct. 85 (1957).

In 1958, the common law rule permitting third party testimony about privileged communication was changed with respect to the attorney-client privilege only. Thus CPLR 4503(a) prohibits, unless the client waives the privilege, ". . . any person who obtains without the knowledge of the client evidence of a confidential communication made between [an] attorney and [the] client in the course of professional employment" from disclosing that communication in any action or proceeding. The modification of the common law rule was made applicable only to the attorney-client privilege. *See Prink v. Rockefeller Center*, 48 N.Y.2d 309, 315 n.2, 422 N.Y.S.2d 911, 915 n.2 (1979). That modification is continued in section 504(a).

The limited expansion of the attorney-client eavesdropper rule to other privileges is premised on the view that present law could frustrate the policies underlying the other privileges and it was the frustration of similar policies that led to the change in the attorney-client privilege. This subdivision modifies present law governing these other privileges to preclude, in certain circumstances, third persons from testifying about clandestinely overheard privileged communications or such communications in purloined material, for example, correspondence or tape recordings.

The continuing privileged nature of other privileged communications overheard or discovered by a person not a party to the communication depends upon whether the holder of the privilege took reasonable steps to assure confidentiality and whether upholding the privilege substantially furthers the policies

underlying the privilege in question. In making that determination, the court must decide whether loss of the privilege in the particular circumstances would substantially discourage that kind of confidential communication or whether the policy underlying the privilege, for example, protection of the right of privacy, would be substantially undermined by loss of the privilege.

(d) Exclusion in the absence of the privilege holder.

Subdivision (d) is designed to protect the interests of holders of a privilege. The first sentence provides that when the holders of a privilege or any person entitled to claim the privilege are not present, the court or presiding officer may exclude evidence of the privileged communication or matter. For example, an eavesdropper may have been present when a client made a privileged communication to his attorney. In the absence of the client and the attorney, or of another person entitled to claim the privilege, the eavesdropper could testify concerning the communication if there were no provisions such as those contained in the subdivision. The second sentence provides that where there are joint holders of a privilege, *e.g.*, CE 504 (joint clients); CE 505(a)

(husband-wife), and when one joint holder is present and willing to waive the privilege, but the other joint holder is absent, the court or presiding officer may exclude evidence of the privileged communication or matter. Absent these provisions, the underlying policies of the recognized privileges could be frustrated. *Cf. Wesrover v. Aetna Life Ins. Co.*, 99 N.Y. 56, 1 N.E. 104 (1885); *Bacon v. Frisbie*, 80 N.Y. 394 (1880); *Murray v. Physical Culture Hotel, Inc.*, 16 N.Y.S.2d 978 (Sup. Ct. Livingston Co., 1939), *tiff'd*, 258 A.D. 334, 17 N.Y.S.2d 862 (4th Dep't 1939).

The subdivision vests discretion in the court or presiding officer to exclude the privileged communication or matter when disclosure would be harmful to the holder's interest or to the relationship sought to be protected by the privilege, and in instances involving an absent joint holder, to the absent joint holder's interest. Ordinarily, when it is established that a privilege exists, the discretion should be exercised to exclude from evidence the privileged communication or matter. The privileged communication or matter should be admissible only in rare situations, for example, where there are instructions or an authorization from the holder of the privilege permitting disclosure, or when there is no person entitled to claim the privilege in existence.

§ 502. Waiver of privilege

(a) General rule. Except as provided in subdivision (b) of this section, no person may claim a privilege provided in this article if the holder of the privilege, an authorized agent of the holder, or the holder's representative has voluntarily disclosed, or consented to disclosure of, any significant part of the privileged communication or matter. This provision does not apply if the disclosure itself was privileged, or if the disclosure was by court order made subject to an express limitation as to its use. A disclosure is not voluntary if it was compelled erroneously. A patient or client who, for the purpose of obtaining insurance benefits, authorizes the disclosure of any privileged communication or matter to any person shall not be deemed to have waived the privilege. For purposes of this paragraph:

(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;

(2) "insurance benefits" shall include payments under a self-insured plan.

(b) Waiver by joint holders. A joint holder or a representative of a joint holder may not claim the privilege if either has voluntarily disclosed, or consented to disclosure of, any significant part of the privileged communication or matter, but any other joint holder or representative of a joint holder may still claim the privilege if neither has voluntarily disclosed, or consented to disclosure of, any significant part of the privileged communication or matter.

#### Comment

This section covers the subject of waiver of the privileges provided in Article 5. Its provisions are premised on a recognition that the privilege should terminate when the holder by his or her own act or by the act of a representative (*see* CE 501ja)[4] or other person, authorized to do so, *e.g.*, an attorney, destroys the confidentiality of the communication or matter. *See* McCormick, Evidence §§ 83, 93, 103 (3d ed.); 8 Wigmore, Evidence §§ 2242, 2327-2329, 2374, 2389, 2390 (McNaughton rev. ed.). The section restates present law with one exception. *See* CPLR 4503, 4504, 4505, 4507, 4508; Fisch, Evidence §§ 530, 553-555, 599 (2d ed.); Prince, Richardson on Evidence §§ 418, 435, 436, 453, 454 (10th ed.). With respect to that exception, CPLR 4504(c) presently precludes waiver of the physician-patient privilege after the patient's death if the information is a communication between the physician and patient which would "tend to disgrace the memory of the decedent." This provision is not continued. *See* N.Y. Jud. Conf., 19th Ann. Rep., app'd, at A50-51 (1973).

(a) General rule governing waiver.

Subdivision (a) states the general rule with respect to the manner in which a privilege is waived. Under its provisions, except as provided in subdivision (b), a person may not claim a privilege if the holder of the privilege, an authorized agent of the holder, *e.g.*, an attorney, or a representative of the holder (*see* CE 501[a][4]) has voluntarily disclosed or consented to disclosure of any significant part of the privileged communication or matter. For example, there will be a waiver of the attorney-client privilege where the client voluntarily testifies about the communication between the client and the attorney. *See People v. Shapiro*, 308 N.Y. 453, 126 N.E.2d 559 (1955); *People v. Patrick*, 182 N.Y. 131, 74 N.E. 843, *reargument denied*, 183 N.Y. 52, 75 N.E. 963 (1905); *compare People v. Lynch*, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968).

Similarly, a waiver of the physician-patient privilege will be affected where the patient fails to object to the physician's testimony concerning privileged communications. *See Capron v. Douglass*, 193 N.Y. 11, 85 N.E. 827 (1908). Likewise, there will be a waiver of the attorney-client privilege when the client discloses a significant part of the privileged communication to third parties. *See People v. Farmer*, 194 N.Y. 251, 87 N.E. 457 (1909). A representative of a privilege holder (*see* CE 501[a][4]) acts in place of the holder and possesses whatever rights of waiver the holder has or had. In contrast, an agent, *e.g.*, an attorney, of a privilege holder must have been explicitly or implicitly authorized to waive a privilege or the waiver must have been ratified by the privilege holder. Whether there has been a waiver is determined by objective criteria. As Wigmore points out, a person seldom waives a privilege by an act desiring that effect. *See* 8 Wigmore, Evidence §§ 2327 (McNaughton rev. ed.); *see abo* Berger & Weinstein, 2 Weinstein's Evidence 1 511 [02]. If subjective intent were the sole criterion, there would never be a waiver and abuse of the privilege would be rampant. *Cf. In re Grand Jury Investigation of Ocean Transportation*, 604 F.2d 672 (D.C. Cir.) *cert. denied*, 444 U.S. 915 (1979); Prince, Richardson on Evidence § 418 (10th ed.). Implicit in these provisions is that disclosure by a person other than the holder, an authorized agent of the holder, or a representative will not constitute a waiver. *See Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 422 N.Y.S.2d 911 (1979); *New York City Council v. Goldwater*, 284 N.Y. 296, 31 N.E.2d 31 (1940). Sometimes, under other provisions of law, a waiver by the holder of a privilege will not bar another party from seeking judicial protection of the privilege and this subdivision does not address those issues. *See Cynthia B. v. Hospital*, 60 N.Y.2d 452, 470 N.Y.S.2d 122 (1983); *see abo Matter of Grattan v. People*, 65 N.Y.2d 243, 491 N.Y.S.2d 125 (1985).

The second sentence of the subdivision recognizes that not every disclosure by a holder of a privilege will amount to a waiver. Thus, its provisions provide that there will be no waiver if the disclosure of the privileged communication or matter occurred in another privileged communication. For example, a person will not waive the attorney-client privilege by telling a spouse what was told to the attorney. As observed by the California Law Revision Commission: "[T]he theory underlying the concept of waiver is that the holder of the privilege has abandoned the secrecy to which he is entitled under the privilege. Where the revelation of the privileged matter takes place in another privileged communication, there has not been such an abandonment. Of course, this rule does not apply unless the revelation was within the scope of the relationship in which it was made. . . ." Comment, California Evidence Code § 912. It is also provided by the sentence that a privilege is not waived if the disclosure was by "court order made subject to an



**express limitation as to its use." This provision is designed to expedite the litigation process.**

**The last sentence of the subdivision deals with the consequences of disclosure in the absence of a voluntary waiver. It provides that if disclosure of a privileged communication or matter is erroneously compelled, there will be**

no waiver of the claimed privilege. This provision, as noted by the California Law Revision Commission, "protects a holder of a privilege from the detriment he would otherwise suffer in a later proceeding, when in a prior proceeding the presiding officer erroneously overruled a claim of privilege and compelled revelation of the privileged information." Comment, California Evidence Code § 919. The last sentence, in accord with present law, *see* CPLR 4504, precludes the finding of a waiver simply because a patient or a client authorizes disclosure of a confidential communication in order to obtain insurance benefits.

(b) Joint holders.

Subdivision (b) provides that in instances where Article 5 confers a privilege upon two more persons (*e.g.*, CE 504 [joint clients], CE 505(a) [spouses]), a voluntary disclosure or consent to disclosure of a significant part of the privileged communication or matter by a joint holder of the privilege precludes that joint holder from claiming the privilege, but does not operate to waive the privilege for any of the other joint holders of the privilege. *See People v. Harris*, 39 Misc.2d 193, 240 N.Y.S.2d 503 (Sup. Ct. Bronx Co. 1963); *Weinstein-Kom-Miller*, N.Y. Civ. Prac. 1 4502.25.

§ 503. Claim of privilege: without knowledge of jury; comment upon or inference from; jury instruction

(a) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of a claim of privilege without the knowledge of the jury.

(b) Comment and inference.

(1) General rule. Except as otherwise provided in paragraph two of this subdivision, the valid claim of a privilege under this article whether in the present trial, proceeding, or hearing, or upon a prior occasion, is not a proper subject of comment by the court or counsel and the trier of fact shall draw no inference therefrom.

(2) Claim of privilege by party in civil case. In any civil case in which a party claims a privilege as to a communication or matter necessary to the claim or defense of another party, the court, when appropriate, may permit comment upon or an inference from the claim of privilege or the court, when appropriate, may grant other relief including dismissal of the claim for relief or the defense to which the privileged communication or matter would relate.

(c) Jury instruction. Upon request, any party against whom the jury might draw an impermissible adverse inference from a claim of a privilege is entitled to an instruction that no inference may be drawn therefrom.

#### Comment

##### (a) Claiming the privilege.

Subdivision (a) requires, to the extent practicable, that in cases tried before a jury the court employ procedures that will minimize the possibility of the jury learning of the claim of any privilege. Its underlying rationale is clear: to avoid a possible impression by the trier of fact that the witness is trying to hide something. *See* 8 Wigmore, Evidence §§ 2272 (McNaughton rev. ed.).

##### (b) Comment and inference.

Subdivision (b) addresses the subject of when comment or inference from a claim of a privilege provided in Article 5 is permissible. It does not govern situations involving any other statutory or constitutional privileges, such as the privilege against self-incrimination. *Compare Griffin v. California*, 380 U.S. 609, 85 S.Ct. 1229 (1965), with *Marine Midland Bank v. Russo Produce Co.*, 50 N.Y.2d 31, 427 N.Y.S.2d 961 (1980). Thus, the Code does not govern whether a judge may instruct a jury in a criminal case, that, in determining to what extent a witness's testimony should be believed and how much weight to afford that testimony, the jury may take into consideration the witness's refusal, based on the privilege-against-self-incrimination, to answer questions relating solely to credibility. *See* N.Y. Criminal Jury Instructions § 7.14 (no authority cited). Similarly, the Code is inapplicable in areas other than privileges, e.g., failure or refusal to produce a material witness who is within a party's control. *See* Prince, Richardson on Evidence § 92 (10th ed.).

##### (b) (1) General rule.

Paragraph (1) prohibits any comment on the valid claim of an article five privilege and provides that no inference may be drawn from such claim, except as otherwise provided in subdivision (b). The subdivision is intended to ensure that the policies promoted by the privileges will not be frustrated. *See* McCormick, Evidence § 74.1 (3d ed.); 8 Wigmore, Evidence §§ 2243, 2322, 2386 (McNaughton rev. ed.). If comments upon or inferences from a valid claim of privilege were permitted, as noted by the California Law Revision Commission: "a litigant would be under great pressure to forego a claim of privilege and the protection

sought to be afforded by the privilege would be largely negated."  
Comment, California Evidence Code § 913.

The exception to this general rule in civil cases is contained in paragraph (b)(2) but there is no exception in criminal cases. Comment on nonconstitutional privileges in criminal cases had been expressly left open by the Court of Appeals in *People v. Rodriguez*, 38 N.Y.2d 95, 100 n.3, 378 N.Y.S.2d 665, 670 n.3 (1986). The Code answers that question by precluding comment because of a concern that the trier of fact may view the significance of an accused's exercise of a privilege far out of proportion to its probative value. This concern in conjunction with the loss of liberty resulting from a criminal conviction is the basis for treating criminal cases differently than civil cases.

Under present law, as is the case under the Code, comment is permitted on an invalid invocation of a privilege even in a criminal case. See *Matter of Lee v. County Ct.*, 27 N.Y.2d 432, 442, 318 N.Y.S.2d 705, 713, cert. denied, 404 U.S. 823, 92 S.Ct. 46 (1971); 7 Wigmore, Evidence § 2243, at 261 (McNaughton rev. 1961).

(b) (2) Claim of privilege in a civil case.

Paragraph (2) provides that in a civil case when a party claims a privilege provided in Article 5 as to a communication or matter necessary to the claim or defense of another party, the court "when appropriate may permit comment upon or an inference from the claim of privilege, or, when appropriate, grant other relief including dismissal of the claim for relief or the defense to which the privileged testimony would relate." Fairness to civil litigants who need the evidence suppressed by the privilege dictates this exception to the general rule stated in subdivision (a). By permitting comment on the granting of other relief "when appropriate," the exception reflects the view of the Court of Appeals in *Marine Midland Batik v. Russo Produce Co. Inc.*, 50 N.Y.2d 31, 42, 427 N.Y.S.2d 961, 967, supra, that a jury could be instructed that it could consider adversely an invocation of the privilege against self-incrimination by a party "in assessing the strength of the evidence offered by the opposite party on the issue which the witness was in a position to controvert." Surely, if this is true with respect to the constitutional privilege against compelled self-incrimination, which is not contained in this Article, the same rule when appropriate should apply with equal or greater force to privileges within the Article. This is in accordance with present law. See *Commissiotier of Social Services v. Philip De G.*, 59 N.Y.2d 137, 141, 463 N.Y.S.2d 761, 763 (1983). As one court has observed, "[i]t does not follow that the protection of the privilege should be expanded to shield a [party] who with one hand seeks affirmative relief in court and with the other refuses to answer otherwise pertinent and proper questions which may have a bearing upon [that party's] right to maintain [the] action. To uphold this inconsistent position would enable the [party] to use the

privilege as an instrument of attack." *Levine v. Bomstein*, 13 Misc.2d 161, 174 N.Y.S.2d 574 (Sup. Ct., Kings Co. 1958), *aff'd*, 7 A.D.2d 995, 183 N.Y.S.2d 868 (2d Dep't 1959), *aff'd*, 6 N.Y.2d 892, 190 N.Y.S.2d 702 (1959).

In determining what other relief is appropriate, the court should tailor the remedy to cure the adverse consequences, if any, suffered by the party against whom the privilege has been successfully invoked. *See* Comment to CE 107.

The application of this provision when the government successfully asserts the official information privilege (CE 513) is left to judicial determination under the "when appropriate" language of the subdivision. Beyond criminal cases involving the identity of an informant privilege, *see* Comment to CE 514, *infra*, there is no New York authority on permitting comment or imposing a sanction upon the successful assertion of the official information privilege by the government as a plaintiff or as a defendant. The Supreme Court, however, has refused in civil cases to allow the government's successful claim of a state secret privilege involving national security matters to be used against the government as a defendant. *See United States v. Reynolds*, 345 U.S. 1, 73 S.Ct. 528 (1953); *Totten v. United States*, 92 U.S. 105 (1875); *see also Salisbury v. United States*, 690 F.2d 966, 975-76 (D.C. Cir. 1982); *cf. Berger & Weinstein*, 2 *Weinstein's Evidence* ^ 509[10]. In contrast, when the federal government seeks to assert the privilege as a plaintiff, federal courts have been less reluctant to afford relief to the defendant. *Compare United States v. Andolschek*, 142 F.2d 503 (2d Cir. 1944), *with Attorney General v. The Irish People, Inc.*, 684 F.2d 928 (D.C. Cir. 1982); *see Prince, Richardson on Evidence* § 456 (10th ed.); McCormick, *Evidence* § 104 (3d ed.).

(c) Jury instruction.

Subdivision (c) contains a safeguard for situations in which, when for any reason the jury might know or suspect that a claim of privilege has kept evidence out of the case, by providing that the party against whom the jury might draw an impermissible adverse inference is entitled at its request to an instruction that no such inference may be drawn. This provision is consistent with subdivision (b)(1). Such an instruction is not required, unless requested, because of the tactical risks involved.

§ 504. Attorney-client privilege

(a) Confidential communication privileged. Unless the client waives the privilege, an attorney or the employee of an attorney 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. An "attorney" is a person authorized or reasonably believed by the client to be authorized to practice law in this state or in any jurisdiction.

(b) Wills, deeds and other writings. In any action involving the probate, validity or construction of a will, a deed or other writing executed by a deceased client purporting to affect an interest in property, an attorney or his or her employee shall be required to disclose information as to the preparation, execution or revocation of a will, a deed, or other writing or other relevant instrument.

(c) Exceptions. The privilege in this section shall not apply when an exception is recognized by statute, or in other situations, where the policies underlying the privilege are absent, including but not limited to:

(1) Furtherance of crime or fraud. If the communications were made or obtained for the purpose of committing what the client knew or reasonably should have known to be a crime or a fraud.

(2) Breach of duty by attorney or client. As to a communication relevant to an issue of breach of duty by the attorney to the client or by the client to the attorney.

(3) Joint clients. As to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to an attorney retained or consulted in common, when offered in an action between or among any of the clients.

(4) Communication offered by accused. In a criminal case or disciplinary proceeding in which the communication is offered by an accused who was one of the persons between whom the communication was made.

#### **Comment**

##### **(a) General rule.**

**This section largely restates almost verbatim the attorney-**



client privilege presently contained in CPLR 4503 and adds exceptions recognized by decisional law. The privilege is premised on the rationale that a client, "secure in the

knowledge that his confidences will not later be exposed to public view," *Matter of Priest v. Rennessy*, 51 N.Y.2d 62, 68, 431 N.Y.S.2d 511, 514 (1980), will be encouraged to make the fullest disclosure to an attorney, which in turn will enable the attorney to act effectively, justly and expeditiously.

The communication must be intended to be confidential (*see People v. Osorio*, 75 N.Y.2d 80, 550 N.Y.S.2d 612 [1989]; *People v. Mitchell*, 58 N.Y.2d 368, 461 N.Y.S.2d 267 [1983]; *Baumann v. Steingester*, 213 N.Y. 328, 107 N.E. 578 [1915]; Prince, Richardson on Evidence § 413 [10th ed.]), and the communication must be for the purpose of obtaining or providing legal advice. *Matter of Priest & Rennessy*, 51 N.Y.2d at 69, 431 N.Y.S.2d at 514, *supra*; *see also Matter of Belcins Record Storage Co., Inc.*, 62 N.Y.2d 324, 476 N.Y.S.2d 806 (1984). Accordingly, not all information possessed by an attorney is cloaked by the privilege, *see Matter of Priest & Rennessy*, 51 N.Y.2d at 69-71, 431 N.Y.S.2d at 514-516, *supra*; *Hoopes v. Carota*, 74 N.Y.2d 716, 554 N.Y.S.2d 808 (1989). The privilege does, however, protect confidential communications to or legal advice from an attorney and this includes communications made to an attorney by joint clients who consult an attorney in pursuit of common interests as well as communications by the attorney to the clients. *See People v. Osorio*, *supra*; *United States v. Schwimmer*, 892 F.2d 237 (2d Cir. 1989); *see generally Capra, The Attorney-Client Privilege in Common Representations*, 20 Trial Lawyers Quarterly 20 (1989).

Clients protected by the privilege include but are not limited to individuals, corporations, associations and governmental entities regardless of the communication's form. *See Rossi v. Blue Cross & Blue Shield*, 73 N.Y.2d 588, 542 N.Y.S.2d 508 (1989); *Matter of Vanderbilt*, 57 N.Y.2d 66, 453 N.Y.S.2d 662 (1982); *Nicole v. Greenfield*, \_\_\_ A.D.2d \_\_\_, 558 N.Y.S.2d 371 (4th Dep't 1990); Prince, Richardson on Evidence § 414 (10th ed.); Capra, *Attorney-Client Privilege (Part I)*, N.Y.L.J., August 11, 1989, p. 3, col. 1. Of course, a person claiming the privilege on behalf of a corporate client must demonstrate that the attorney was acting as counsel and not in some other business capacity. *See Rossi v. Blue Cross and Blue Shield*, *supra*; *Spectrum Systems v. Chemical Bank*, 157 A.D.2d 449, 558 N.Y.S.2d 486 (1st Dep't 1990).

"Attorney" is defined as "a person authorized, or reasonably believed by the client to be authorized, to practice law in this state or any other jurisdiction." As drafted, the definition clarifies present law in two respects. *See Prince, Richardson on Evidence* § 412 (10th ed.). First, it suffices to invoke the privilege that the client "reasonably believes" that the person being consulted is a properly authorized attorney. As observed by the

California Law Revision Commission, "since the privilege is intended to encourage full disclosure, the client's reasonable belief that the person he is consulting is an attorney is sufficient to justify application of the privilege." Comment, California Evidence Code § 950. Second, the privilege applies to a

communication to an attorney admitted to practice in any jurisdiction. This provision recognizes that legal transactions frequently cross state and national boundaries and involve consultations with attorneys from other jurisdictions. *See McLaughlin, The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts, 26 The Record 30, 32 (1970).*

The Code does not deal with the definition of a client in the corporate context, leaving that matter to judicial development. *Compare Niesig v. Team 1, 76 N.Y.2d 363, 559 N.Y.S.2d 493 (1990) (for purpose of DR 7-104[A][1], which bars counsel from directly communicating with another 'party' known to have counsel in the matter, a corporate party includes 'corporation employees whose acts or omission in the matter under inquiry are binding on the corporation [in effect, the corporation's alter egos] or imputed to the corporation for purposes of its liability or employees implementing the advice of counsel; all other employees may be interviewed informally' by opposing counsel), with Upjohn Co. v. United States, 449 T.J.S. 383, 101 S.Ct. 677 (1981) (a corporation's attorney-client privilege includes communications to counsel about matters within the scope of their employment, by low- and mid-level corporate employees acting at the direction of corporate supervisors, for the corporate purpose of obtaining legal advice from counsel).*

(b) Wills, deeds and other writings.

This subdivision in large part codifies CPLR 4503(b) which requires an attorney to disclose information relevant to the preparation, execution, or revocation of a will. The underlying rationale is that ordinarily a client would not want confidences preserved at the cost of frustrating the client's intention regarding disposition of property after death. The CPLR is limited to wills or related instruments but the Code, consistent with the underlying rationale, includes deeds or writings affecting an interest in property. Finally, the Code does not continue the CPLR 4503(a) limitation on disclosure of information that would tend to disgrace the memory of the decedent. The reason for not doing so is the belief that the disposition of property in accordance with the deceased client's intention is more important than the client's interest in keeping secrets after death.

(c) Exceptions.

Subdivision (c) contains four exceptions to the privilege's applicability. The exceptions are premised on the recognition that the court's need for the privileged information in the specified

situations outweighs the need to protect the client's confidential communications and that they will not impair the purpose of the privilege. See *Matter of Priest v. Hennessy*, 51 N.Y.2d 62, 431 N.Y.S.2d 511 (1980); *Matter of Jacqueline F.*, 47 N.Y.2d 215, 417 N.Y.S.2d 884 (1979); *People ex rel. Vogelstein v. Warden of County Jail*, ISOMisc. 714, 270 N.Y.S. 362 (1934), *aff'd*, 242 A.D. 611, 271 N.Y.S. 1059 (1934). The

exceptions are based for the most part on judicial decisions recognizing the exception. The introductory clause of the subdivision recognizes exceptions in other statutes, *accord* CE 104(c), and the "including but not limited to" phrase is designed to continue judicial authority to recognize additional exceptions (*see* Comment to CE 102) in accord with the legislative intent underlying the privilege. *See, e.g., Hoopes v. Carota*, 74 N.Y.2d 716, 544 N.Y.S.2d 808 (1989); Capra, *Attorney-Client Privilege (Part II)*, N.Y.L.J., Sept. 8, 1989, p. 3, col. 1. In addition, the Code, except with respect to the official information in public interest privilege (513[a][1]) and the identity of an informant privilege (514[b][2]) for which well-developed case law recognizes an exception for exculpatory evidence in criminal cases, does not address and leaves to the judiciary whether, and under what circumstances, there is a constitutionally required exception to a privilege when a criminal defendant seeks disclosure of otherwise privileged communications relevant to establish that defendant's innocence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988); *People v. Goggins*, 34 N.Y.2d 163, 170, 356 N.Y.S.2d 571, 577, *cert. denied*, 419 U.S. 1011, 95 S.Ct. 332 (1974); *People v. Rivera*, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dep't), *leave to appeal denied*, 72 N.Y.2d 923, 532 N.Y.S.2d 857 (1988).

(c) (1) In furtherance of crime.

Paragraph (1) creates an exception to the attorney-client privilege when the communications were made to the attorney or obtained from an attorney for the purpose of committing what the client knew or reasonably should have known to be a crime or fraud. This exception "rests on the realization that the privilege's policy of promoting the administration of justice would be undermined if the privilege could be used as a cloak or shield for the perpetration of a crime or fraudulent wrongdoing." Berger & Weinstein, 2 Weinstein's Evidence, I 503[d][1][01], The paragraph codifies present law. *See People ex rel. Vogelstein v. Warden of County Jail*, 150 Misc. 714, 270 N.Y.S. 362, *supra*; McCormick, Evidence 95 (3d ed.); Richardson, Evidence § 417 (10th ed.); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. I 4503.13.

The exception encompasses a number of different situations, for example, an actual conspiracy between attorney-client, solicitation of illegal assistance which the attorney refuses, and performance of legal services for a client who conceals a criminal or fraudulent purpose. *See Note, The Future Crime or Tort Exception to Communication Privileges*, 11 Harv. L. Rev. 730, 731 (1964). In this regard, it must be noted that it is the client's knowledge that is controlling. The attorney's understanding or intent is immaterial. *Id.*

The knowledge requirement specified by the paragraph minimizes the effect of the exception on proper communications. Otherwise, "legitimate consultations would be inhibited by the risk that their subject matter might turn out to be illegal and therefore unprivileged." Note, *The Future Crime or Tort Exception to Communication Privileges*, 77 Harv. L. Rev. 730, 731 (1964).

The exception provided by the paragraph is limited. For example, if the crime or fraud has already been committed, and the client has retained the attorney to defend him, confidential communications between them are privileged. *See People v. Lynch*, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968); *People v. Shapiro*, 308 N.Y. 453, 126 N.E.2d 559 (1953). Otherwise, the policy of the privilege would be frustrated.

(c) (2) Controversies between attorney and client.

Paragraph (2) codifies present law that when the attorney and client become opponents in a subsequent action, the attorney may, to the extent necessary to protect his or her rights, disclose any confidential communication between the attorney and client. *See Glines v. Estate of Baird*, 16 A.D.2d 743, 277 N.Y.S.2d 71 (4th Dep't 1962); Prince, Richardson on Evidence § 423 (10th ed.); 5 Weinstein-Kom-Miller, N.Y. Gv. Prac. 1 4503.08. This exception is premised upon "the ground of practical necessity that if effective legal service is to be encouraged the privilege must not stand in the way of the lawyer's just enforcement of his rights to be paid a fee and to protect his reputation." McCormick, Evidence § 91 (3d ed.).

The duty involved must be one arising out of the attorney-client relationship, *i.e.*, the duty of the attorney to exercise reasonable care on behalf of the client, the duty of the attorney to care faithfully and account for the client's property, or the duty of the client to pay for the attorney's services. When the attorney sues the client to recover legal fees, it has been suggested that "sound policy requires the court to insure that the divulgence is not held over the client's head as a tactical weapon to compel the former client to pay up." McLaughlin, *The Treatment of Attorney-Client and Related Privileges in the Proposed Rules of Evidence for the United States District Courts*, 26 The Record 30, 36 (1970).

(c) (3) Joint consultations.

Paragraph (3) codifies the present rule that when two or more persons consult an attorney for their mutual benefit as clients, any communication made at that time is not privileged in any subsequent action between them. *See Collins v. Jamestown Mut. Ins. Co.*, 56 Misc.2d964, 290N.Y.S.2d791 (1968), *modified on other grounds*, 32 A.D.2d 725, 300 N. Y.S.2d 391 (3d Dep't 1969); *Groben v. Travelers Indem. Co.*, 49 Misc.2d 14, 266 N.Y.S.2d 616 (1965), *aff'd*, 28 A.D.2d 650, 282 N.Y.S.2d 214 (4th Dep't 1967); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 5 4503.07. The theory of the exception is that the



communication was made on behalf of both clients, who could not have intended that what each said would be kept confidential from the other. See McCormick, Evidence § 91 (3d ed.). Of course, simply because a co-party is present when another party discusses the case with the attorney does not mean there has been a joint consultation. *See People v. Osorio*, 75 N. Y.2d

**80, 550 N.Y.S.2d 612 (1989) (use of a co-defendant as an interpreter did not render conversation with an attorney a joint consultation protected by the privilege).**

**The exception does not apply in any action between one or all of the clients and a third person. See *Root v. Wright*, 84 N.Y. 72 (1881); Berger & Weinstein, 2 Weinstein's Evidence I 503[d][5][01].**

**(c) (4) Offered by accused.**

**This exception recognizes the attorney may, in a disciplinary action or even as a defendant in a criminal case, testify to communications given to or received from the client. Literally, the exception also permits the client to disclose information given to, or received from, the attorney but is probably unnecessary since the privilege belongs to the client.**

§ 505. Spousal privilege

(a) 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.

(b) Exceptions. The privilege in this section shall not apply when an exception is recognized by statute, or in other situations, where the policies underlying the privilege are absent, including but not limited to:

(X) Furtherance of crime or fraud. If the communication was made for the purpose of committing what the spouse knew or reasonably should have known to be a crime or fraud.

(2) Crimes in the family. In a criminal action or a family court proceeding in which one spouse is alleged to have committed an act against the person or property of (A) the other, (B) a child of either, or (C) a member of the same family or household.

(3) Certain civil actions and proceedings. In any civil action or proceeding brought by or on behalf of one spouse against the other, or in any civil action or proceeding involving custody of a child.

(4) Communication offered by accused spouse. In a criminal case in which the communication is offered by an accused who was one of the spouses between whom the communication was made.

(5) Condition in issue. As to a communication relevant to the physical, mental or emotional condition of the spouse in any action or proceeding in which the other spouse or the spouse's representative relies upon that condition as an element of a claim or defense.

#### Comment

This section confers a privilege upon a husband and wife to refuse to disclose and prevent others from disclosing confidential communications between them. It restates CPLR 4502(b), and adds exceptions recognized by decisional law.

The underlying motivation for the creation of the privilege by the Legislature was not only to encourage husband and wife to share confidences by the assurance that they would not be divulged in legal proceedings (see *Poppe v. Poppe*, 3 N.Y.2d 312, 165 N.Y.S.2d 99 [1957]; *People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 [1949]; *People v. Hayes*, 140 N.Y. 484, 35 N.E. 951 [1894]), but also to avoid the "feeling of indelicacy and want of decorum" that would arise from requiring a person to condemn or be condemned by his or her spouse, or for prying into the secrets of the marital relation. See Prince, Richardson on Evidence § 447 (10th ed.); 8 Wigmore, Evidence § 2228 (McNaughton rev. ed.).

#### (a) General rule.

A communication between spouses is not by itself confidential. Something more is required; namely the absence of third parties, and the intention that the communication will not go beyond the spouse. See *People v. Ressler*, 17 N.Y.2d 174, 269 N.Y.S.2d 414 (1966); *Warner v. Press Pub.*, 132 N.Y. 181, 30 N.E. 393 (1892); *Weston v. Weston*, 86 A.D. 159 (4th Dep't 1903); Prince, Richardson on Evidence § 450 (10th ed.); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 14502.17. Also, the confidential communication must be expressly or impliedly "induced by the marital relation and prompted by the affection, confidence and loyalty engendered by such relationship." *Matter of Vanderbilt*, 57 N.Y.2d 66, 73, 453 N.Y.S.2d 662, 666 (1982); see *People v. Melski*, 10 N.Y.2d 78, 217 N.Y.S.2d 65 (1961); *People v. Fields*, 31 N.Y.2d 713, 337 N.Y.S.2d 517, *ajjTg on opinion below*, 38 A.D.2d 231, 233, 328 N.Y.S.2d 542, 544-545 (1st Dep't 1972); *People v. Dudley*, 24 N.Y.2d 410, 301 N.Y.S.2d 9 (1969); *People v. D'Amato*, 105 Misc.2d 1048, 430 N.Y.S.2d 521 (1980); Prince, Richardson on Evidence § 448 (10th ed.); 5 Weinstein-Kom-MiHer, N.Y. Civ. Prac. ¶ 4502.21. Communication between spouses is presumed confidential and the "presumption is not rebutted by the fact that the parties are not living together at the time of the communication, or that their marriage has deteriorated, for even in a stormy separation

disclosures to a spouse may be induced by absolute confidence in the marital relationship."

*People v. Fediuk*, 66 N.Y.2d 881, 883, 498 N.Y.S.2d 763, 765 (1985); *see also People v. Fields*, *supra*; *People v. Dudley*, *supra*.

The communication may be oral or in writing or may even take the form of acts. *See* Prince, Richardson on Evidence § 449 (10th ed.); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 1 4502.17. As noted by the Court of Appeals in *People v. Daghita*, 299 N.Y. 194, 198-99, 86 N.E.2d 172, 174 (1949): "[T]he term communication means more than mere oral communications or conversations between husband and wife. It includes knowledge derived from the observance of disclosive acts done in the presence or view of one spouse by the other. . . ." Both spouses are the holders of the privilege. *See People v. Wood*, 126 N.Y. 249, 27 N.E. 362 (1891); *People v. McCormack*, 278 A.D. 191, 104 N.Y.S.2d 139 (1951); Fisch, Evidence § 599 (2d ed.).

The privilege may be claimed by either spouse, his or her guardian, a committee or a conservator, or the personal representative of a deceased spouse. *See Prink v. Rockefeller Center, Inc.*, 48 N.Y.2d 309, 422 N.Y.S.2d 911 (1979); *People v. McCormack*, *supra*; Prince, Richardson on Evidence § 455 (10th ed.).

#### (b) Exceptions .

Subdivision (b) contains four exceptions to the privilege's applicability. The exceptions, which are similar to those in the attorney-client privilege, *see* CE 504(c), are premised on the recognition that the court's need for the privileged information in the specified situations outweighs the need to protect the spouse's confidential communications and that disclosure is not inconsistent with the purpose of the privilege. Under CE 101(c) and the subdivision's introductory clause, exceptions to the privilege created by other statutes are not affected by the subdivision, *e.g.*, Family Court Act § 1046(a)(vii) (no privilege in proceedings for child abuse or neglect); Social Services Law § 384-b(3)(h) (no privilege in certain proceedings for guardianship and custody of destitute or dependent child). The subdivision's "including but not limited to" phrase is designed to continue judicial authority to recognize additional exceptions, in accord with the legislative intent underlying the privilege. *See* Comment to CE 102. In addition, the Code, except with respect to the official information in the public interest privilege (513[a][1]) and the identity of an informant privilege (514[b][2j) for which well-developed case law recognizes an exception for exculpatory evidence in criminal cases, does not address and leaves to the judiciary whether, and under what circumstances, there is a constitutionally required exception to a privilege when a criminal defendant seeks disclosure of otherwise

privileged communications relevant to establish that defendant's innocence. See *Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988); *People v. Goggins*, 34 N.Y.2d 163, 170, 356 N.Y.S.2d 571, 577, cert. denied, 419 U.S. 1011, 95 S.Ct. 332 (1974);

*People v. Rivera*, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dep't), *leave to appeal denied*, 72 N.Y.2d 923, 532 N.Y.S.2d 857 (1988).

(b) (1) Crime and fraud.

Paragraph (1) creates an exception to the spousal privilege if the communication was made for the purpose of committing what the communicating spouse knew or reasonably should have known to be a crime or fraud. A similar provision is provided in attorney-client privilege. The provision codifies present law. *See People v. Watkins*, 89 Misc.2d 870, 393 N.Y.S.2d 283 (1977), *aff'd.*, 63 A.D.2d 1033, 406 N.Y.S.2d 343 (2d Dep't 1978) *cert. denied*, 439 U.S. 984, 99 S.Ct. 575 (1978). In the situation covered by the exception, no justifiable purpose would be served by encouraging such communication. *See Note, The Future Crime or Tort Exception to Communications Privileges*, 77 Harv. L. Rev. 730, 734-735 (1964).

The exception provided by the paragraph does not permit disclosure of communications that reveal past crimes. *See Prince, Richardson on Evidence* § 448 (10th ed.). Permitting disclosure of such a communication would, of course, be inconsistent with the policy that underlies the privilege. *Cf. People v. Daghita*, 299 N.Y. 194, 86 N.E.2d 172 (1949).

(b) (2) Family crimes.

That the privilege is inapplicable in criminal or family court controversies involving immediate family members, as provided in paragraph (2), generally codifies present law. *See People v. St. John*, 74 A.D.2d 85, 426 N.Y.S.2d 863 (3d Dep't 1980); *People v. Allman*, 41 A.D.2d 325, 342 N.Y.S.2d 896 (2d Dep't 1973); *Prince, Richardson on Evidence* §§ 445, 446 (10th ed.). By covering property as well as crimes against the person, the exception expands present law slightly. The exception does not impair the underlying policy of the privilege, and the evidence which is admissible under it will in many cases be necessary to promote justice.

(b) (3) Civil actions and other proceedings.

The exception provided in paragraph (3), making the privilege inapplicable to civil actions brought by or on behalf of one spouse against the other or in a child custody proceeding, codifies present law. *See Poppe v. Poppe*, 3 N.Y.2d 312, 165 N.Y.S.2d 99 (1957); *Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (4th Dep't 1978). Its provisions do not impair the underlying policy of the privilege, and the evidence which is admissible under it will in many cases be necessary to promote justice. *Id.*

(b) (4) Communication offered by accused spouse.

Paragraph (4) provides that when a spouse is the defendant in a criminal case and seeks to introduce into evidence a communication between one spouse and the other spouse, no privilege attaches to the communication. Although no court has addressed itself to this situation, the exception is desirable and would be recognized in an appropriate case. *See* Comment, California Evidence Code § 897; *see also* Comment to CE 504(c)(4).

(b) (5) Condition in issue.

This exception to the privilege for communications relating to a physical, mental or emotional condition in an action in which the spouse relies on that condition as an element of a claim or defense restates present law. *See Prink v. Rockefeller Center*, 48 N.Y.2d 309, 422 N.Y.S.2d 911 (1979).

#### § 506. Privileged communication to the clergy

(a) **Confidential communication privileged.** Unless the person confessing or confiding waives the privilege, a member of the clergy, or other minister of any religion or duly accredited Christian Science practitioner or a person reasonably believed to be so by the person confessing or confiding, shall not be allowed to disclose a confession or confidence received in a professional character as spiritual advisor.

(b) **Exceptions—Furtherance of crime or fraud.** The privilege in this section shall not apply when an exception is recognized by statute, or in other situations, where the policies underlying the privilege are absent, including but not limited to: if the confession or confidence was made for the purpose of committing what the person confiding or confessing knew or reasonably should have known to be a crime or a fraud.

Comme

nt (a) General

rule.

The clergy-penitent privilege restates CPLR 4505 with two additions, discussed below dealing with persons reasonably believed to be a member of the clergy and an exception for communications for the purposes of committing a crime. The



section is designed to accommodate the "urgent need of people to confide in without fear of reprisal, those entrusted with the pressing task of offering spiritual guidance so that harmony with one's self and others can be realized." *Matter of Keenan v. Gigante*, 47 N.Y.2d 160, 166, 417 N.Y.S.2d 226, 229, *cert. denied*, 444 U.S. 887, 100 S.Ct. 181 (1979).

It is not required that the person making the communication be a member of the same religion as the member of the clergy to whom the disclosure is made. *See Kohloff v. Bronx Savings Bank*, 37 Misc.2d 27, 233 N.Y.S.2d 849 (1962); *Kruglikov v. Kruglikov*, 29 Misc.2d 17, 111 N.Y.S.2d 845 (1961). It is also not necessary that the communication be part of the practice of a particular religion or that it involve confession or absolution. *See Kruglikov v. Kruglikov, supra*.

A communication will not be confidential simply because it is made to a member of the clergy. *See Puglisi v. Pignato*, 26 A.D.2d 817, 274 N.Y.S.2d 213 (1st Dep't 1966). Something more is required: namely the absence of third parties, and intention that the communication will not go beyond the member of the clergy. *See Matter of Keenan v. Gigante*, 47 N.Y.2d at 166, 417 N.Y.S.2d at 229, *supra*; *People v. Brown*, 82 Misc.2d 115, 368 N.Y.S.2d 645 (1974); McLaughlin, Practice Commentary to CPLR 4505 in McKinney's Consol. Laws of N.Y., Book 7B, Pocket Part). Conduct undertaken by the clergy member is not generally privileged. *Matter of Keenan v. Gigante*, 47 N.Y.2d at 167, 417 N.Y.S.2d at 229-230, *supra*.

The privilege extends to confidential communications between a confessor or confiding party and a member of the clergy in a "professional capacity as a spiritual advisor." Under this language it is necessary that the confidential communication be of a spiritual concern. *See Prince, Richardson on Evidence* § 425 (10th ed.); *compare, Kruglikov v. Kruglikov, supra*, (communications made by estranged couple to rabbi with view to reconciliation; privileged), *with People v. Gates*, 13 Wend. 311 (1835) (communications related to church business not privileged); *United States v. Wells*, 446 F.2d 2 (2d Cir. 1971) (communication related to request to have an FBI agent see the person not privileged); *Christensen v. Pestorious*, 189 Minn. 548, 250 N.W. 363 (1933) (communication to pastor concerned accident; not privileged). It is not, however, required that the confidential communication rise to the level of a spiritual confession. *See Kruglikov v. Kruglikov, supra*; McLaughlin, Practice Commentary to CPLR 4505 in McKinney's Consol. Laws of N.Y., Book 7B, Pocket Part. A member of the clergy includes a person who is reasonably believed to be so by the person confiding or confessing. This is an addition to New York law and parallels similar provisions in CE 504 (attorney-client privilege), CE 507 (physician-patient), CE 508 (psychologist-client) and CE 509 (social worker-client). *See*

Comment to CE 504, 507, 508 and 509.

(b) **Exceptions.**

This subdivision recognizes a crime or fraud exception similar to that recognized in other privileges, *see* Comment to 504(c)(1), 505(b)(1) and seems consistent with New York law. *See Matter of Keenan v. Gigante*, 47 N.Y.2d 160, 417 N.Y.S.2d 226, *supra*.

The subdivision's introductory clause recognizes exceptions in other statutes, *accord* CE 102(c), and the "including but

not limited to" phrase is designed to continue judicial authority to recognize additional exceptions consistent with the legislative intent underlying the privilege. *See id*; *see also* Comment to CE 102. That the codified exceptions to other privileges have not found their way into this section should not be read as reflecting an intent that these other exceptions are inapplicable to this privilege. Rather, given the nature of the privilege for confidential communications to the clergy and the paucity of litigated cases dealing with exceptions, the drafters thought it best to leave additional exceptions to the common law process. In addition, the Code, except with respect to the official information in the public interest privilege (513[a][1]) and the identity of an informant privilege (514[b][2]) for which well-developed case law recognizes an exception for exculpatory evidence in criminal cases, does not address and leaves to the judiciary whether, and under what circumstances, there is a constitutionally required exception to a privilege when a criminal defendant seeks disclosure of otherwise privileged communications relevant to establish that defendant's innocence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988); *People v. Goggins*, 34 N.Y.2d 163, 170, 356 N.Y.S.2d 571, 577, *cert. denied*, 419 U.S. 1011, 95 S.Ct. 332 (1974); *People v. Rivera*, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dep't), *leave to appeal denied*, 72 N.Y.2d 923, 532 N.Y.S.2d 857 (1988).

§ 507. Physician, nurse, dentist, and chiropractor-patient privilege.

(a) Confidential information privileged. Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry or chiropractics shall not be allowed to disclose any information acquired in attending a patient in a professional capacity, and which was necessary to enable the physician, nurse, dentist or chiropractor 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, and the patients to whom they respectively render professional medical services. For purposes of this section: "physician" shall mean a person who is licensed or reasonably believed by the patient to be licensed to practice medicine in this state or in any other jurisdiction; "nurse" shall mean a person who is authorized or reasonably believed by the patient to be authorized to practice registered professional nursing or licensed practical nursing in this state or in any other jurisdiction; "dentist" shall mean a person who is licensed or reasonably believed by the patient to be licensed to practice dentistry in this state or in any other jurisdiction; "chiropractor" shall mean a person who is authorized or reasonably believed by the patient to be authorized to practice chiropractics in this state or in any other jurisdiction.

(b) Identification by dentist. A dentist shall be required to disclose information necessary for identification of a patient.

(c) Mental or physical condition of deceased patient. A physician, dentist, chiropractor or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a) of this section, 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 of kin or any other party in interest.

(d) Exceptions. The privilege in this section shall not apply when an exception is recognized by statute, or in other situations, where the policies underlying the privilege are absent, including but not limited to:

(1) Furtherance of crime or fraud. If the services of the physician, dentist, nurse, or chiropractor were sought for the purpose of committing what the patient knew or reasonably should have known to be a crime or a fraud, or to escape detection or apprehension after the commission of a crime or fraud.

(2) Crime committed against patient under sixteen. As to a communication relevant to a crime committed against a patient under the age of sixteen.

(3) Examination by order of court. As to a communication made in the course of a court-ordered examination of the physical condition of the patient, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise.

(4) Condition in issue. As to a communication relevant to the physical, mental or emotional condition of the patient in any action or proceeding in which the patient or the patient's representative relies upon that condition as an element of a claim or defense.

#### Comment

##### Comment (a) General

##### rule.

**This section restates virtually verbatim CPLR 4504 with the addition of judicially recognized or well founded exceptions to the privilege. In 1990 the privilege was expanded to include chiropractors.**

At common law there was no rule prohibiting the disclosure of communications between a patient and physician. *See Edington v. Aetna Life Ins. Co.*, 77 N.Y. 564 (1879). In New York in 1828 this rule was changed by statute, Rev. Stat. of N.Y., part III, ch. VII, tit. III, § 73, and the physician-patient privilege established by that statute has been recognized since that time. See CPLR 4504.

The underlying purpose of this privilege and the reason that motivated the Legislature to establish it was "to protect those who are required to consult physicians from the disclosure of secrets imparted to them, to protect the relationship of patient and physician, and to prevent physicians from disclosing information which might result in humiliation, embarrassment, or disgrace to patients." *See Steinberg v. New York Life Ins. Co.*, 263 N.Y. 45, 48-49, 188 N.E. 152, 153 (1933); *see also, People v. Al-Kanani*, 33 N.Y.2d 260, 351 N.Y.S.2d 969 (1973); Prince, Richardson on Evidence § 444 (10th ed.).

The definition of "physician", "nurse", "dentist" and "chiropractor" restates the definition contained in CPLR 4504 with two additions. First, the definition includes the phrase "or is reasonably believed by the patient to be authorized to practice" medicine, registered professional nursing or licensed practical nursing, dentistry, or chiropractry. Since the privilege is intended to benefit the patient, the definition focuses on the perception of the patient. Imposing a risk on the patient that the communication will not be privileged if the person purporting to be a physician, nurse or dentist is not in fact such a health care professional is not justifiable. The patient should be protected from reasonable mistakes. This addition parallels similar provisions in CE 504 (attorney-client), 506 (privileged communication to the clergy), CE 508 (psychotherapist-patient), and CE 509 (social worker-client). Secondly, the definition includes physicians, nurses, dentists, and chiropractors who are not licensed or authorized to practice in New York.

A communication will not be confidential simply because it is made to a physician, nurse, dentist, or chiropractor. Something more is required, namely the absence of third persons, the intention that the communication will not go beyond the physician, nurse, dentist, or chiropractor and that the communication was necessary to enable the specialized professionals to act in that capacity. *See People v. Decina*, 2 N.Y.2d 133, 157 N.Y.S.2d 558 (1956); *Baumann v. Steingester*, 213 N.Y. 328, 107 N.E. 578 (1915); *Hughson v. St. Francis Hosp.*, 93 A.D.2d 491, 499, 463 N.Y.S.2d 224, 226-227 (2d Dep't 1983); *Holiday v. Harrows, Inc.*, 91 A.D.2d 1062, 458 N.Y.S.2d 669 (2d Dep't 1983); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. ^ 4505.07).

Communications include medical information obtained from observation of the patient's appearance and symptoms unless the facts observed would be obvious to a layperson. *See Dillenbeck v. Hess*, 73 N.Y.2d 278, 284 n.4, 539 N.Y.S.2d 707, 711. n.4 (1989). Communications also include medical information acquired by the physician through the application of professional skill and knowledge, *e.g.*, results of blood tests. *Id.* Nonetheless, the privilege protects

only confidential communications to the doctor, not the patient's personal knowledge of the mere facts and incidents of medical history. *Williams v. Roosevelt Hospital*, 66 N. Y.2d 391,396-97,497 N.Y.S.2d 348, 351-52 (1985). Confidential communications from doctor to patient are also protected. *Id.* at 396, 497 N.Y.S.2d at 351.

The privilege may be claimed by the patient, or the patient's guardian, committee or conservator, or, if deceased, a personal representative. *See Fisch*, Evidence § 551 (2d ed.). Additionally, the physician, dentist, chiropractor, or nurse may claim the privilege on behalf of the patient; the authority to do so will be presumed in the absence of evidence to the contrary. *See Matter of Warrington*, 303 N.Y. 129, 100 N.E.2d 170 (1951); *Johnson v. Johnson*, 14 Wend. 637 (1835); *Lora v. Board of Education*, 74 F.R.D. 565 (U.S. Dist. Ct., E.D.N.Y. 1977); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 5 4504.09.

(b) Identification of a patient by a dentist.

This subdivision repeats verbatim CPLR 4504 requirement that a dentist must disclose information necessary to identify a patient.

(c) Communications of deceased patient.

This subdivision continues unchanged the CPLR 4504 requirement that in the absence of a objection or when the privilege has been waived, the various professionals must disclose information about the mental or physical condition of a deceased patient.

(d) Exceptions.

Subdivision (d) contains four exceptions to the privilege's applicability. The exceptions are premised on recognition that the court's need for the privileged information in the specified situations outweighs the need to protect the client's confidences and that they will not impair the purpose of the privilege. Under CE 101(c) and the subdivision's introductory clause, exceptions to the privilege created by other statutes are not affected by the

subdivision; *e.g.*, Family Court Act § 1046(a)(vii) (no privilege in proceedings for child abuse or neglect); Social Services Law § 384-b(3)(h) (no privilege in certain proceedings for guardianship and custody of destitute or dependent child); Public Health Law § 2101 (required disclosure of knowledge of communicable disease); Public Health Law § 3373 (required disclosure of patient's use of controlled substance). The subdivision's "including but not limited to" phrase is designed to continue judicial authority to recognize other exceptions in accord with the legislative intent underlying the privilege. *See* Comment to CE 102. In addition, the Code, except with respect to the official information in the public interest privilege (513{a}[1]) and the identity of an informant privilege (514[b][2]) for which well-developed case law recognizes an exception for exculpatory evidence in criminal cases, does not address and leaves to the judiciary whether, and under what circumstances, there is a



constitutionally required exception to a privilege when a criminal defendant seeks disclosure of otherwise privileged communications relevant to establish that defendant's innocence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988); *People v. Goggins*, 34- N.Y.2d 163, 170, 356 N.Y.S.2d 571, 577, *cert. denied*, 419 U.S. 1011, 95 S.Ct. 332 (1974); *People v. Rivera*, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dep't), *leave to appeal denied*, 72 N.Y.2d 923, 532 N.Y.S.2d 857 (1988).

(d) (1) Fraud or crime.

Paragraph (1) creates an exception to the physician-patient privilege when the services of the physician were sought or obtained for the purpose of committing what the patient knew or reasonably should have known to be a crime or fraud, or to escape detection or apprehension after the commission of a crime or fraud. Surely, no desirable goals would be served by encouraging such communications. Whether this exception presently exists has not been decided by any case, but would be recognized in an appropriate situation. *See* Comment to CE 504(c)(1).

(d) (2) Crimes against children.

Paragraph (2) restates CPLR 4504(b), requiring the various professionals to disclose information concerning crimes against patients under the age of sixteen. *See People v. Easter*, 90 Misc.2d 748, 395 N.Y.S.2d 926 (1977); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. ^ 4504,11.

(d) (3) Court-ordered examination.

Paragraph (3) is applicable to those situations where the court has ordered an examination of a person's physical condition. In these situations, the benefits that disclosure would afford in placing before the court such information as is necessary for the informed judgment that necessitated the examination justifies the exception. Moreover, the patient is protected by the relevancy limitation in the exception and by the court's discretion in controlling the examination or ordering that the communications be privileged.

(d) (4) Condition in issue.

Paragraph (4) provides that there is no privilege as "to a communication relevant to the physical condition of the patient in any action or proceeding in which the patient or his or her representative relies upon the condition as an element of a claim or

**defense." See *People v. Al-Kanani*, 33 N.Y.2d 260, 351 N.Y.S.2d 969, supra; *Koump v. Smith*, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969); *Baecher v. Baecher*, 58 A.D.2d 822, 396 N.Y.S.2d 447 (2d Dep't 1977); Prince, Richardson on Evidence §§ 437, 438 (10th ed.). As observed by the Court of Appeals: "As a practical matter, a plaintiff or a defendant, who**

**affirmatively asserts a mental or physical condition, must eventually waive the privilege to prove his case or his defense. To uphold the privilege would allow a party to use it as a sword rather than a shield. A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to absolve himself from liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." *Koump v. Smith*, 25 N.Y.2d at 294, 303 N.Y.S.2d at 864, supra. When a party does not rely upon the condition, the privilege remains applicable. See *Dillenbeck v. Hess*, 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).**

#### § 508. Psychologist-client privilege

(a) Confidential communications privileged. The confidential relations and communications between a psychologist registered under the provisions of article one hundred fifty-three of the education law and a 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 "psychologist" shall mean a person who is licensed or reasonably believed by the client to be licensed to practice psychology in this state or any other jurisdiction.

(b) Exceptions. The privilege in this section shall not apply when an exception is recognized by statute, or in other situations, where the policies underlying the privilege are absent, including but not limited to:

(1) Furtherance of crime or fraud. If the services of the psychologist were sought or obtained for the purpose of committing what the patient knew or reasonably should have known to be a crime or a fraud or to escape detection or apprehension after the commission of a crime or fraud.

(2) Crime committed against client under sixteen. As to a communication relevant to a crime committed against a client under the age of sixteen.

(3) Examination by order of court. As to a communication made in the course of a court-ordered examination of the condition of the client with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise.

(4) Condition in issue. As to a communication relevant to the physical, mental or emotional condition of the client in any action or proceeding in which the client or the client's representative relies upon that condition as an element of a claim or defense.

## Comment

This section restates virtually verbatim CPLR 4507 with the addition of well-recognized exceptions to the privilege. A person with mental or emotional difficulties may seek professional help only if he is assured that confidences will not be divulged. *See* Guttmacher & Weihofen, *Psychiatry and the Law* 272; Slovenko, *Psychiatry and a Second Look at the Medical Privilege*, 6 *Wayne L. Rev.* 175 (1960). The success of the psychologist-patient relationship itself will depend on the patient's ability and willingness to talk freely. *See* Report No. 45, *Group for the Advancement of Psychiatry* 92 (1960); *United States ex rel. Edney v. Smith*, 425 F. Supp. 1038 (1976). Otherwise, the psychologist will be unable to treat the patient properly. *See* Louisell, *The Psychologist in Today's Legal World: Part II*, 41 *Minn. L. Rev.* 731 (1957); **Comment**, *Patient Testimonial Privileges Under the Proposed Code of Evidence for New York*, 45 *Alb. L. Rev.* 773, 779-780 (1981). These factors support the need to protect the confidentiality of communications between patient and psychologist. On the other hand, as in other situations involving privileges, according these communications privileged status may keep relevant evidence from the trier of fact in derogation of the search for truth, resulting "in an injury to justice far more substantial than the injured expected to result to the . . . [relationship] as a result of disclosure." *Koump v. Smith*, 25 N.Y.2d at 293, 303 N.Y.S.2d at 864, *supra*.

This section, the psychologist-client privilege, is designed to accommodate these competing interests. As noted, it largely restates CPLR 4507.

## (a) Scope of the privilege.

The definition of "psychologist" is identical to that contained in CPLR 4507 with two additions. First, the definition of psychologist includes persons who are "reasonably believed by the patient to be a psychologist." Since the privilege is intended to benefit the patient, the definition focuses on the perception of the patient. Imposing a risk on the patient that a communication will not be privileged if the person purporting to be a psychologist is not in fact a psychologist is not justifiable. The patient should be protected from reasonable mistakes. This addition parallels similar provisions in CE 504 (attorney-client), CE 506 (privileged communication to the clergy), CE 508 (physician-patient) and CE 510 (social worker-client). Second, the definition includes psychologists who are not licensed or authorized to practice in New York.

A communication will not be confidential simply because it is made to a psychologist. Something more is required, namely the

absence of third persons, and the intention that the communication will not go beyond the psychologist. *See People v. Decina*, 2 N.Y.2d 133, 157 N.Y.S.2d 558 (1956); *Bauman v. Steingester*, 213 N.Y. 328, 107 N.E. 578 (1915); *Milano v. State*, 44 Misc.2d 290, 253 N.Y.S.2d 662 (Ct. Cl. 1964); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. ¶ 4504.07. A communication includes information obtained from an examination or observation. *See Prince, Richardson on Evidence* § 432 (10th ed.).

The communication must have been made while the psychologist was engaged in diagnosis or treatment of the patient's condition. *See People v. Newman*, 32 N.Y.2d 379, 345 N.Y.S.2d 502 (1973), *cert. denied*, 414 U.S. 1163, 94 S.Ct. 927 (1974); Prince, Richardson on Evidence §§ 430-433 (10th ed.). The holder of the privilege is the patient. *See Prince, Richardson on Evidence* § 434 (10th ed.). The psychologist may claim the privilege on behalf of the patient; the authority to do so will be presumed in the absence of evidence to the contrary. *See Matter of Warrington*, 303 N.Y. 129, 100 N.E.2d 170 (1951); *Johnson v. Johnson*, 14 Wend. 637 (Ct. Err. 1835); *Lora v. Board of Education of City of New York*, 74 F.R.D. 565 (1977); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. ¶ 4504.09.

**(b) Exceptions.**

Subdivision (b) contains four exceptions to the privilege's applicability. The exceptions are premised on recognition that the court's need for the privileged information in the specified situations outweighs the need to protect the client's confidences and that they will not impair the purpose of the privilege. *See Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute*, 36 Conn BJ 175 (1962). Under CE 101(c) and the subdivision's introductory clause, exceptions to the privilege created by other statutes are not affected by the subdivision. *See, e.g., Family Court Act* § 1046(a)(vii) (no privilege in proceedings for child abuse or neglect); *Social Service Law* § 384-b(3)(h) (no privilege in certain proceedings for guardianship and custody of destitute or dependent child; *Public Health Law* § 2101 (required disclosure of knowledge of communicable disease); *Public Health Law* § 3373 (required disclosure of patient's use of controlled substance). The subdivision's "including but not limited to" phrase is also designed to continue judicial authority to recognize additional exceptions in accord with the legislative intent underlying the privilege. *See Comment to CE 102*. In addition, the Code, except with respect to the official information in the public interest privilege (513[a][1]) and the identity of an informant privilege (514[b][2J) for which well-developed case law recognizes an exception for exculpatory evidence in criminal cases, does not address and leaves to the judiciary whether, and under what

circumstances, there is a constitutionally required exception to a privilege when a criminal defendant seeks disclosure of otherwise privileged communications relevant to establish that defendant's innocence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988); *People v. Goggins*, 34 N.Y.2d 163, 170, 356 N.Y.S.2d 571, 577, *cert. denied*, 419 U.S. 1011, 95 S.Ct. 332 (1974); *People v. Rivera*, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dep't), *leave to appeal denied*, 72 N.Y.2d 923, 532 N.Y.S.2d 857 (1988).

(b) (1) Fraud or crime.

Paragraph (1) creates an exception to the psychologist-patient privilege when the services of the psychologist were sought or obtained to enable or aid any person to commit or plan to commit what the patient knew or reasonably should have known to be a crime or fraud, or to escape detection or apprehension after the commission of a crime or fraud. Surely, no desirable goals would be served by encouraging such communications. Whether this exception presently exists has not been decided by any case, but would be recognized in an appropriate situation. *See* CPLR 4507; Comment to CE 504(d)(1).

(b)(2) Crimes against children under the age of sixteen.

Paragraph (2) restates CPLR 4504(b) making applicable to the psychologist-client privilege the exception contained in CPLR 4504(b) (doctor-patient) for disclosures revealing that a client under the age of sixteen has been the victim of a crime. *See People v. Easter*, 90 Misc.2d 748, 395 N.Y.S.2d 926 (1977); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. % 4504.11.

(b) (3) Court-ordered examination.

This paragraph is applicable to those situations where the court has ordered an examination of a person's mental condition. *See People ex rel. Chitty v. Fitzgerald*, 40 Misc.2d 966, 244 N.Y.S.2d 441 (Sup. Ct. 1963); Corrections Law § 402(1); CPL 330.20(2); Article 730 of the Criminal Procedure Law. In these situations, the benefits that disclosure would afford in placing before the court such information as is necessary for the informed judgment required by law justifies the exception. Moreover, since the patient is aware the examination is not undertaken with an immediate view toward treatment, there will not be the confidential relationship which the privilege is intended to promote. Even if the examination continues so long that the patient erroneously perceives the relationship as directed toward therapy, the patient is protected by the relevancy

limitation in the exception and by the court's discretion in controlling the examination or ordering that the communications be privileged.

(b) (4) Condition in issue.

This paragraph, like its counterpart in CE 507(d)(4), provides that there is no privilege as "to a communication relevant to the physical, mental or emotional condition of the patient in any action or proceeding in which the patient or his or her representative relies upon the condition as an element of a claim or defense." This exception would nullify the decision in *People v.*

*Wilkins*, 65 N.Y.2d 172, 490 N.Y.S.2d 759 (1985). In that case, the defendant raised a justification defense and testified that he had killed the victim in selfdefense after she had stabbed him. Though defendant had placed in issue his physical condition concerning the stab wounds, the court held that his testimony did not waive the psychologist-client privilege concerning defendant's statements . to a hospital psychologist that the wrist and abdominal stab wounds had been self-inflicted. The Court reached this conclusion because CPLR 4507 places the psychologist-client privilege on the same basis as the attorney-client privilege and statements made to an attorney are not admissible to impeach the client who testifies at trial.

The Court recognized that if the defendant had made the hospital statements to a doctor, then his trial testimony that the victim had caused the stab wounds would have waived the privilege with respect to that condition.

This same result would have been obtained if the statement was made to a psychiatrist, who is a medical doctor. In this context it is impossible to justify the distinction between a physician and a psychiatrist on the one hand and a psychologist on the other. As noted above, the exception to the psychologist- client privilege would be treated the same as that of doctor-patient and make the privilege inapplicable when a party has put a condition in issue. When a party does not rely upon the condition, however, the privilege remains applicable.

*See Dillenbeck v. Hess*, 73 N.Y.2d 278, 539 N.Y.S.2d 707 (1989).

§ 509. Social worker-client privilege

(a) Confidential information privileged. A person duly registered as a certified 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 to the certified social worker, including a person the client reasonably believes to be a certified social worker, or the advice given thereon, in the course of professional employment, nor shall any clerk, stenographer or other person working for the same employer as the certified social worker or for the certified social worker be

allowed to disclose any such communication or advice given thereon.

(b) Exceptions. The privilege in this section shall not apply when an exception is recognized by statute, or in other situations, where the policies underlying the privilege are absent, including but not limited to:

(1) Contemplated crime or harmful act. When a client reveals to the social worker the contemplation of a crime or harmful act.

(2) Crime against a client under the age of sixteen. Where the client is a child under the age of sixteen and the information acquired by the certified social worker indicates that the client has been the victim or subject of a crime, the certified 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.

(3) Charges against social worker involving confidential communications. Where the client brings charges against the certified social worker involving confidential communications between the client and certified social worker.

(4) Condition in issue. As to a communication relevant to the physical, mental, or emotional condition of the client in any action or proceeding in which the client or the client's representative relies upon that condition as an element of a claim or defense.

#### Comment

##### (a) General rule.

This section restates virtually verbatim CPLR 4508. The practice of social work is "for the purpose of helping individuals, families, groups and communities to prevent or to resolve problems caused by social or emotional stress" (Education Law § 7701). In order to accomplish that purpose clients of social workers must feel free to confide in the social worker. *See Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (4th Dep't 1978); *Yaron v. Yaron*, 83 Misc.2d 276, 372 N.Y.S.2d 518 (1975). Similarly, the social worker must be able "explicitly or impliedly [to] assure his client that his statement will not be revealed for purposes detrimental to his [the client's] interests." Note, *The Social Worker-Client Relationship and Privileged Communications*, 1965 Wash. U. L. Q. 362, 380-381. These factors support the need to protect the confidentiality of communications between client and social worker. On the other hand, as in other situations involving privileges, according these communications privileged status may keep relevant evidence from the trier of fact in derogation of the search for truth, resulting "in an injury to justice far more substantial than the injury expected to result to the [relationship] as a result of disclosure." *Koump v. Smith*, 25 N.Y.2d 287, 293, 303 N.Y.S.2d 858, 864 (1969).

A client is a person who consults with or is interviewed by a social worker. *See Lichtenstein v. Montefiore Hospital & Medical Center*, 56 A.D.2d 281, 392 N.Y.S.2d 18 (1st Dep't 1977). A "social worker" is identical to the definition contained in CPLR 4508, with one addition, the inclusion of "or a person reasonably believed to be so by the social worker." Since the privilege is intended to benefit the client, the definition focuses on the perception of the client. Imposing a risk on the client that a communication will not be privileged if the person purporting to be a social worker is not in fact a social worker

is not justifiable. The client should be protected from reasonable mistakes. This addition parallels similar provisions in CE 504 (attorney-client), CE 506 (privileged communication to the clergy), CE 507 (physician-patient), and CE 508 (psychotherapist-patient).

A communication will not be confidential simply because it is made to a social worker. Something more is required, namely the absence of third persons, and the intention that the communication will not go beyond the social-worker. *See People v. Decina*, 2 N. Y.2d 133, 157 N. Y.S.2d 558 (1956); *Baumann v. Steingester*, 213 N.Y. 328, 107 N.E. 578 (1915); *Matter of Clear*, 58 Misc.2d 699, 296 N.Y.S.2d 184 (1969), *reversed on other grounds sub nomine*; *In re King*, 32 A.D.2d 915, 302 N.Y.S.2d 418 (1st Dep't 1969). The confidential communication must have been made or transmitted for the purpose of obtaining or providing the professional services of a social worker. Professional services of a social worker are those encompassed by Education Law § 7701.

(b) Exceptions.

Subdivision (b) contains four exceptions to the privilege's applicability, the first three of which are presently contained in CPLR 4508, *i. e.*, disclosures revealing a contemplated crime or harmful act, disclosures indicating that a client has been the victim of a crime, and proceedings in which the client brings charges involving the confidential communication against the social worker. The exception presently in CPLR 4508 for authorized disclosures is not set forth here but is encompassed by the waiver provision of section 502. The exceptions are premised on recognition that the court's need for the privileged information in the specified situations outweighs the usual need to protect the client's confidences and that they will not impair the purpose of the privilege. Under CE 101(c) and the subdivision's introductory clause, exceptions to the privilege created by other statutes are not affected by the subdivision. *See, e.g.*, Family Court Act § 1046(a)(vii) (no privilege in proceedings for child abuse or neglect); Social Service Law § 384-b(3)(h) (no privilege in certain proceedings for guardianship and custody of destitute or dependent child). The subdivision's "including but not limited to" phrase is designed to continue judicial authority to recognize additional exceptions in accord with the legislative intent underlying the privilege. *See* Comment to CE 102. In addition, the Code, except with respect to the official information in the public interest privilege (513[a][1]) and the identity of an informant privilege (514[b][2]) for which well-developed case law recognizes an exception for exculpatory evidence in criminal cases, does not address and leaves to the judiciary whether, and under what circumstances, there is a

constitutionally required exception to a privilege when a criminal defendant seeks disclosure of otherwise privileged communications relevant to establish that defendant's innocence. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 107 S.Ct. 989 (1987); *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105 (1974); *People v. Tissois*, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988); *People v. Goggins*, 34 N.Y.2d 163, 170, 356 N.Y.S.2d 571, 577, *cert. denied*, 419 U.S. 1011, 95 S.Ct. 332 (1974); *People v. Rivera*, 138 A.D.2d 169, 530 N.Y.S.2d 802 (1st Dep't), *leave to appeal denied*, 72 N.Y.2d 923, 532 N.Y.S.2d 857 (1988).

The first exception for communications to a social worker revealing a client's intent to commit a crime or harmful act is not specified as an exception to any of the other privileges. The exception to the social worker-client privilege is contained in present law, CPLR 4508, and is carried along with the recodification of CPLR 4508. Whether other privileges should be subject to similar exceptions is left to the decisional law process under the "includes but not limited to" introductory language to exceptions in each privilege. That the social worker-client privilege contains such an exception is simply the result of general principles governing codification of existing statutes and should not be read as expressing an intent one way or another with respect to the other privileges.

The last exception (4) is when the client's condition is "in issue." Its provisions are similar to CE 507(d)(4) and CE 508(b)(4). Thus, there is no privilege as to a communication relevant to the condition for which the client was rendered professional services by the social worker in any action or proceedings in which the client relies upon the condition as an element of a claim or defense. The rationale justifying a similar exception for the physician-patient and psychotherapist privileges is equally applicable for the social worker-client privilege. *See Perry v. Fiumano*, 61 A.D.2d 512, 403 N.Y.S.2d 382 (4th Dep't 1978). As the Court of Appeals observed in *Koump v. Smith*, 25 N.Y.2d 287, 294, 303 N.Y.S.2d 858, 864 (1969): "As a practical matter, a plaintiff or a defendant, who affirmatively asserts a mental or physical condition, must eventually waive the privilege to prove [a] case or [a] defense.

To uphold the privilege would allow a party to use it as a sword rather than a shield. A party should not be permitted to assert a mental or physical condition in seeking damages or in seeking to ... [avoid] liability and at the same time assert the privilege in order to prevent the other party from ascertaining the truth of the claim and the nature and extent of the injury or condition." When a party does not rely upon the condition, however, the privilege remains applicable.

#### § 510. Library records privilege

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 audiovisual 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.

**Comment**

**This section restates without change the library records privilege presently contained in CPLR 4509.**

**§ 511. Trade secrets privilege**

A person who owns a trade secret has a privilege, which may be claimed by that person or an agent, employee, or exclusive licensee, to refuse to disclose and to prevent any other person from disclosing that trade secret, unless recognition of the privilege would tend to conceal fraud or otherwise work injustice. When disclosure is directed, the court shall take protective measures as may be required by the interests of the holder of the privilege, of the parties and in the furtherance of justice.

**Comment**

**This section confers a privilege upon the owner of a trade secret, which may be claimed by him, his agent, employee, or exclusive licensee, to refuse to disclose and prevent others from disclosing his trade secret. The section is designed to protect a trade secret from any unnecessary disclosure that may endanger its commercial value. See Ladd, *Privileges*, 1969 L. & Soc. Order 553; Comment, *Federal Rules of Evidence and The Law of Privileges*, 15 Wayne L. Rev. 1287 (1969); Stedman, *Trade Secrets*, 23 Ohio St. L. J. 4 (1962). Its provisions codify present law. See *Drake v. Herman*, 261 N.Y. 414, 185 N.E. 685 (1933); *Cronin v. Pierce & Stevens Chemical Corp.*, 36 A.D.2d 764, 321 N.Y.S.2d 239 (2d Dep't 1971); *Haffenberg v. Wendling*, 271 A.D. 1057, 69 N.Y.S.2d 546 (1947); Fisch, *Evidence* § 746 (2d ed.); 8 Wigmore, *Evidence* § 2212 (McNaughton rev ed.).**

**The section confers a privilege only upon the disclosure of trade secrets. In this regard, the definition of a trade secret most widely followed by the courts is that set forth in the Restatement of Torts, § 757 (1939), which provides that "[a] trade secret may consist of any formula, pattern, device, or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." See *General Aniline & Film Corp. v. Frantz*, 50 Misc.2d 994, 272 N.Y.S.2d 600 (Sup. Ct. Broome Co.), *mod. denied*, 52 Misc.2d 197, 274 N.Y.S.2d 634 (1966); Milgrim, *Trade Secrets* § 2.01; Hutter, *Trade Secret Misappropriation: A Lawyer's Practical Approach to the Case Law*, 1 Western New England L. Rev. 1 (1978).**

**The privilege conferred by the section is not, however, an absolute one. See Gellhom, *The Treatment of Confidential Information by the***

*Federal Trade Commission: The Hearing*, 116 U. Penn. L. Rev. 401 (1968). The section provides that the privilege cannot be claimed where its recognition "would tend to conceal fraud or otherwise work injustice." This provision is premised on the recognition that there are dangers in the recognition of such a privilege. *See* Berger & Weinstein, 2 Weinstein's Evidence 1 508[03]. For example, disclosure of the matters protected by the privilege may be necessary to establish unfair competition or fraud, or to reveal the improper use of items by the party asserting the privilege. As Wigmore has observed, "[i]n such cases, it might amount practically to a legal sanction of the wrong if the court conceded to the alleged wrongdoer the privilege of keeping his doings secret from judicial investigation." 8 Wigmore, Evidence § 2212 (McNaughton rev. ed.). Accordingly, the privilege is qualified.

Disclosure is, however, conditioned upon the presence of safeguards which will prevent the information from becoming available to persons other than the parties to the case. What protective measures will be appropriate will depend upon the circumstances. *See generally*, Milgrim, Trade Secrets § 7.06.

### § 512. Secrecy of the vote privilege

A person has a privilege to refuse to disclose and to prevent any other person from disclosing the tenor of that person's vote cast during an election conducted pursuant to the provisions of the election law unless the vote was cast illegally.

#### Comment

This section confers a privilege upon a person to refuse to disclose and prevent others from disclosing the tenor of his vote cast during an election conducted pursuant to the provisions of the Election Law. This privilege is a logical corollary of the principle of secrecy of the ballot embodied in Article 2, Section 7 of the State Constitution and implemented by various provisions of the election law, *e.g.*, Election Law §§ 7-202, 8-300. As Judge Denio observed: "The right to vote in this manner has usually been considered an important and valuable safeguard of the independence of the humble citizen against the influence which wealth and station might be supposed to exercise. This object would be accomplished but very imperfectly, if the privacy supposed to be secured was limited to the moment of depositing the ballot. The spirit of the system requires that the elector should be secured then, and at all times thereafter, against reproach or an inadversion, or any other prejudice, on account of having voted according to his own

unbiased judgment; and that security is made to consist in shutting up within the privacy of his own mind all knowledge of the manner in which he has bestowed his suffrage." *People ex rel. Smith v. Pease*, 27 N.Y. 45, 81 (1863) (dissenting opinion); *see also*, 8 Wigmore, Evidence § 2214 (McNaughton rev. ed.); Nutting, *Freedom of*

*Silence: Constitutional Protection Against Governmental Intrusion in Political Affairs*, 47 Mich. L. Rev. 181 (1948). The provisions of the section codify present law. See *People ex rel. Deister v. Wintermute*, 194 N.Y. 99, 86 N.E. 818 (1909); *People ex rel. Judson v. Ihacher*, 55 N.Y. 525 (1874); *McGuinness v. De Sapio*, 9 A.D.2d 65, 191 N.Y.S.2d 798 (1st Dep't 1955); *Martin v. Wood*, 4 N.Y.S 208 (S.Ct., Onondaga County 1988); Fisch, Evidence § 750 (2d ed.).

Under the section only the tenor of the vote is privileged. Thus, neither the fact that a vote was cast, nor the qualifications of the voter are protected.

Furthermore, if it is determined that the vote was cast illegally, the voter is no longer protected by the privilege. The rationale of this exception is that "[p]rotection of the legal voter is necessary in order to insure honest elections, free from intimidation, bribery and other forms of corrupt influence. However, if a person not qualified to vote has succeeded in doing so, an inquiry into his actions is necessary if dishonesty at the polls is to be discovered and punished."

Nutting, *supra*, 47 Mich. L. Rev. at 192; see also Berger & Weinstein, 2 Weinstein's Evidence ¶ 507[04], The privilege against self-incrimination is still, however, available to the illegal voter. In this regard, it should be noted that a grant of immunity is permissible. See Election Law §17-146.

### § 513. Official information in the public interest privilege

(a) Nature of privilege. The state, a political subdivision, department, agency or bureau thereof or a governmental entity, has a privilege to refuse to disclose and to prevent any officer or employee from disclosing confidential official information when the court determines that the public interest in preserving the confidentiality of the official information outweighs the interests calling for disclosure in the particular proceeding. Provided, however, (1) an accused in a criminal proceeding is entitled to disclosure of relevant exculpatory evidence; and (2) in civil cases when a law enforcement agency is the repository of confidential information, the interest calling for disclosure in the particular proceeding must outweigh the public law enforcement interest in maintaining confidentiality.

(b) Official information defined. For purposes of this section, "official information" means confidential communications made to or confidential communications between public officers or employees in the performance of their duties, provided those communications are neither available to the public pursuant to article six of the public officers law or other statute, nor otherwise officially disclosed or intentionally made available to the public prior to the time the claim of privilege is made.



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## Comment

## (a) Nature of the privilege.

In accordance with present law, *Cirale v. 80 Pine Street Corp.*, 35 N.Y.2d 113, 359 N.Y.S.2d 1 (1974), section 513 sets forth a qualified privilege for official information in the public interest that permits a court to prohibit disclosure of official information if it finds that the public interest in maintaining confidentiality outweighs the need for disclosure. The court may conduct an *in camera* inspection of the information in question. See *United States v. Nixon*, 418 U.S. 603, 713-14 (1974). Only information in public, as distinguished from information in private, hands is encompassed by the privilege. See *People v. Keating*, 286 A.D. 150, 141 N. Y.S.2d 562 (1st Dep't 1955). The holder of the privilege is the government rather than the individual who made or received the communication. The essence of the privilege is the public interest in maintaining confidentiality often, but not exclusively, for the purpose of encouraging full and frank discussion of issues and alternatives before a final decision is made. Nonetheless, there must be specific support for the claim of privilege. *Cirale v. 80 Pine Street Corp.*, 35 N.Y.2d at 118, 359 N.Y.S.2d at 4-5, *supra*. Notably, the Court of Appeals has cautioned about misuse of the privilege to hide official incompetence or misconduct. *Id.* at 119, 359 N. Y.S.2d at 5-6.

With respect to communications to public officers or employees from members of the public, the communication must have been intended to be confidential. See *Fischer v. Citizens Committee*, 72 Misc.2d 595, 339 N. Y.S.2d 853 (Sup. Ct. Wyoming Co. 1973); *cf. Matter of Egan*, 205 N.Y. 147, 157, 98 N.E. 467, 470 (1912). The government has the burden of showing that this is the case and the burden also generally rests on the government to show each element of the privilege including the necessity for nondisclosure and why that necessity outweighs the interest of the party seeking disclosure.

## (a) (1) Accused in a criminal case.

This paragraph recognizes that a criminal accused is constitutionally entitled to obtain relevant exculpatory evidence even if it is confidential official information. See *United States v. Nixon*, 418 U.S. at 711-713, *supra*; cases cited in Comment to 514(b)(2), *infra*. Sometimes courts talk in terms of "material and relevant evidence" but the word material has been omitted because, as defined in section 401, relevant evidence includes a materiality requirement. In making its determination, the court, under the applicable constitutional standard, need only be satisfied that there is a

**reasonable possibility that the evidence sought is exculpatory. See *People v. Vilardi*, 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990). Whether the court may conduct an *in camera* examination before making its determination is left to decisional law. Compare *United States v. Nixon*, 418 U.S. at 713-14, *supra*, with *People v.***



*Goggins*, 34 N.Y.2d 163, 169, 356 N.Y.S.2d 571, 575, *cert. denied*, 419 U.S. 1011, 95 S. Ct. 332(1974),

(a) (2) Official law enforcement information.

Despite the general burden on the government to establish the privilege, with respect to confidential information in the possession of law enforcement, the Code reflects case law that places the burden on a party, other than an accused in a criminal case, seeking confidential information to establish a particularized need that outweighs the public law enforcement interest both in the particular case and to demonstrate how disclosure would affect the public interest in the future. *See, e.g., Melendez v. City of New York*, 109 A.D.2d 13, 489 N.Y.S.2d 741 (1st Dep't 1985); *Matter of Greene v. Greene*, 53 A.D.2d 693, 385 N.Y.S.2d 125 (1st Dep't 1976); *Matter of Langert v. Tenney*, 5 A.D.2d 586, 173 N.Y.S.2d 665 (1st Dep't 1958). With respect to both law enforcement and non-law enforcement official information, the court will make its determination pursuant to 104(b), which calls for a preponderance of the evidence standard.

(b) Official information defined.

Official information includes confidential communications to and communications between public employees in the performance of their duties where the public interest requires that these communications should not be divulged. This simple definition of official information reflects present New York law. *Cirale v. 80 Pine Street Corpi*, 35 N.Y.2d 113, 359 N.Y.S.2d 1, *supra*; *People v. Keating*, 286 A.D. 150, 141 N.Y.S.2d 562, *supra*; *see Note, Discovery of Governmental Documents and the Official Information Privilege*, 76 Col. L. Rev. 142 (1976); *see generally Wetlauger, Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Indiana LJ. 845 (1990). The definition encompasses many possibilities, including the identity of informers which, however, is the subject of a separate provision, 514, because of the particularly well-settled decisional law principles governing that kind of disclosure. Similarly, the privilege for grand jury proceedings, CPL § 190.25(4)(a), is governed by a different body of case law. *See, e.g., People v. DiNapoli*, 27 N.Y.2d 229, 316 N.Y.S.2d 622 (1970); *Melendez v. City of New York*, 109 A.D.2d 13, 489 N.Y.S.2d 741, *supra*. Where there is a communication between a public officer or agency and its lawyer, the more specific attorney-client privilege (CE 504) should govern. *See Nicole v. Greenfield*, A.D.2d , 558 N.Y.S.2d 371 (4th Dep't 1990).

An example of the official information in the public interest privilege is found in *Fischer v. Citizens Committee*, 72 Misc.2d 595, 339 N.

Y.S.2d 853 (Sup. Ct. Wyoming Co. 1973) where the special prosecutor assigned to investigate the Attica uprising subpoenaed the records of the McKay Commission which had been conducting an independent investigation of the uprising as authorized by the Governor. The Commission moved to quash the subpoena on the ground that the records contained interviews with almost 3,000 persons, all of whom had been assured that their identity and information would be kept confidential. The special prosecutor contended that he was entitled to all information which would aid the grand jury in its determination of whether crimes had been committed, and if committed, who the perpetrators were. The court found this consideration outweighed by the fact that if such materials were turned over, executive department investigations could never be successfully carried out. The prospect that all such information could be made subject to the prosecutor's subpoena would cripple such endeavors. *See also Langert v. Tenney*, 5 A.D.2d 586, 173 N.Y.S.2d 665, *supra*.

There is no privilege if disclosure is required under FOIL.

The privilege, however, is limited by the Freedom of Information Law (Public Officers Law, Art. 6) and no privilege attaches to any material required to be disclosed under that law. This also reflects present law. *Doolan v. Boces*, 48 N.Y.2d 341, 422 N.Y.S.2d 927 (1979). There is, however, information that is exempted from disclosure under the Freedom of Information Law § 87(b)(2) (FOIL) that may be subject to the privilege in this section, depending upon how the court in a particular case balances the public interest in maintaining confidentiality and the need for disclosure in the particular proceeding. *See Brady v. Ottaway Newspapers*, 63 N.Y.2d 1031, 484 N.Y.S.2d 798 (1984). With respect to these exemptions, there is no reason to believe that FOIL has in any way affected the public interest official information privilege that might attach to information covered by those exemptions. *See Cirale v. 80 Pine Street Corp.*, 35 N.Y.2d at 117 n. 1, 359 N.Y.S.2d at 4 n.l, *supra*. Indeed, the specific exemptions from FOIL demonstrate that a privilege is indeed appropriate.

#### § 514. Privilege for identity of person providing information to law enforcement

(a) Nature of privilege. The state, or a political subdivision, department, or agency thereof, has a privilege to refuse to disclose and to prevent any of its present or former officers or employees from disclosing the identity, or information which would lead to the identity, of a person who has furnished information concerning a violation of law to a law enforcement officer

or prosecutor.

(b) Exceptions. Situations in which there is no privilege under this section include, but are not limited to:

(1) Voluntary disclosure. If the identity of the informant has been disclosed by the state or its employee or by the informant's own actions under circumstances which make it unnecessary to maintain confidentiality.

(2) Trial on the merits. When the informant's testimony will provide relevant testimony as to the guilt or innocence of an accused in a criminal proceeding.

(3) In camera disclosure in suppression hearings. Where there is insufficient evidence to establish the legality of the means by which evidence has been obtained, apart from testimony about communications received from an informer, and the issue of identity is raised by a defendant on a suppression motion in a criminal case, the court shall direct that the informant be produced before the court for in camera questioning.

#### Comment

##### t (a) General

##### rule.

This section codifies the common law privilege protecting the identity of a civic-minded citizen or criminal informant from disclosure. See *People v. Rios*, 60 N.Y.2d 764, 469 N.Y.S.2d 670 (1983); *People v. Pena*, 37 N.Y.2d 642, 376 N.Y.S.2d 452 (1975); *People v. Darden*, 34 N.Y.2d 177, 356 N.Y.S.2d 582 (1974); *People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571, cert. denied, 419 U.S. 1011, 95 S.Ct. 332 (1974); *Matter of Langert v. Tenney*, 5 A.D.2d 586, 173 N. Y.S.2d 665 (1st Dep't 1958). The section is designed to accommodate the public interest in effective law enforcement and an individual's right to a fair trial. See *People v. Cerrato*, 24 N.Y.2d 1, 298 N.Y.S.2d 688 (1969), cert. denied, 397 U.S. 940, 90 S.Ct. 951 (1970). The section does not address the right to production of the informant, a question that is left to decisional law. See *People v. Jenkins*, 41 N.Y.2d 307, 392 N.Y.S.2d 587 (1977).

The holder of the privilege is the state, or a political subdivision, department, or agency thereof. Such an entity may itself refuse to make disclosure and may also prevent disclosure by any of its present or former officers or employees. The privilege may be claimed by an appropriate representative of the state, political subdivision, department, or agency thereof.



(b) **Exceptions.**

Subdivision (b), in accordance with present law, sets forth three exceptions to the privilege. *See generally People v. Jenkins, supra, People v. Goggins, supra; People v. Darden, supra.* Like the other privileges in this article (CE 504-509), the "includes but not limited to" introductory phrase to the exceptions is designed to continue judicial development of exceptions, in accord with the legislative intent underlying the privilege. *See Comment to CE 102.*

(b) (1) Previous disclosure of identity.

The exception provided by paragraph (b)(1) is based on the principle that once the identity of the person who provided the information has been disclosed, nothing will be gained by the application of the privilege.

(b) (2) Exculpatory incriminatory evidence.

Paragraph (b)(2) is consistent with present law in recognizing that the identity of an informant must be disclosed when the informant has relevant and material information with respect to the guilt or innocence of a criminal defendant. *People v. Singleton*, 42 N.Y.2d 466, 398 N.Y.S.2d 871 (1977); *People v. Colon*, 39 N.Y.2d 872, 386 N.Y.S.2d 220 (1976); *People v. Lee*, 39 N.Y.2d 388, 38 N.Y.S.2d 123 (1976); *People v. Pena*, 37 N.Y.2d 642, 376 N.Y.S.2d 452 (1975); *People v. Goggins*, 34 N.Y.2d 163, 356 N.Y.S.2d 571, *supra*. The word "material" is not contained in the paragraph because "relevant evidence," as defined in section 401, includes a materiality requirement. The Court of Appeals in the *Goggins* case, *supra*, held that a defendant "must show a basis in fact to establish that [the] demand [for disclosure] does not have an improper motive and is not merely an angling in desperation for possible weaknesses in the prosecution's investigation and that the truly crucial factor in every case is the relevance of the informant's testimony to the guilt or innocence of the accused." 34 N.Y.2d at 169-170, 356 N.Y.S.2d at 575. The relevance standard will vary with the role played, and the information provided by, the informant. Thus, for example, when the role played or the information provided is of a marginal nature then there must be an "extremely strong showing of relevance." *Id.* at 170, 375 N.Y.S.2d at 575; *People v. Rios*, 60 N.Y.2d at 765, 469 N.Y.S.2d at 670, *supra*. On the other hand, even an informant's minor role might call for disclosure in a case where the identity of defendant as the perpetrator "rests upon evidence that is equally balanced." *People v. Goggins*, 34 N.Y.2d at 170, 375 N.Y.S.2d at 575. This section is intended to continue these general principles. With respect to the disclosure of exculpatory evidence, the State Constitution has been interpreted as requiring only a reasonable possibility standard, *People v. Vilardi*, 76 N.Y.2d 67, 556 N.Y.S.2d 518 (1990). To the extent that the *Vilardi* case imposes a lesser burden, than does *Goggins*, on a criminal defendant to obtain disclosure of an informant who could provide exculpatory testimony, the *Vilardi* constitutional standard, of course, governs exculpatory disclosure under this section. Once the defendant has met the required burden, disclosure is required and the judge should not conduct an *in camera* inquiry of the informant. *See People v. Goggins*, 34 N.Y.2d at 169, 356 N.Y.S.2d at 575, *supra*.

**(b) (3) *In camera* disclosure—suppression hearings.**

**Paragraph (b)(3) is consistent with present law governing *in camera* disclosure when an informant is relied upon exclusively to establish probable cause to search or arrest. See *People v. Darden*, 34 N.Y.2d 177, 356 N. Y.S.2d**

582, *supra*. The details of the procedure to be followed are set forth in the *Darden* case, *supra*, and include: "The prosecution should be required to make the informer available for interrogation before the Judge. The prosecutor may be present but not the defendant or [defense] counsel. Opportunity should be afforded counsel for defendant to submit in writing any questions which he may desire the Judge to put to the informer. The Judge should take testimony, with recognition of the special need for protection of the interests of the absent defendant, and make a summary report as to the existence of the informer and with respect to the communications made by the informer to the police to which the police testify. That report should be made available to the defendant and to the People, and the transcript of testimony should be sealed to be available to the appellate courts if the occasion arises. At all stages of the procedure, of course, every reasonable precaution should be taken to assure that the anonymity of the informer is protected to the maximum degree possible." 34 N.Y.2d at 181, 356 N.Y.S.2d at 586.

## ARTICLE 6-WITNESSES

### Section

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    - (1) Criminal cases
    - (2) Civil cases
  - (c) Convictions more than fifteen years old
    - (1) General rule
    - (2) The accused in a criminal case
  - (d) Effect of pardon, vacated convictions and findings of innocence
  - (e) Sealed and nullified convictions, youthful offender, and juvenile delinquency adjudications
  - (f) Pendency of appeal
610. Evidence of religious beliefs or opinions
611. Mode and order of examination and presentation
- (a) Control by court
  - (b) Scope of cross-examination
  - (c) Leading questions
612. Writing or object used to refresh memory
- (a) While testifying
  - (b) Before testifying
  - (c) Claims of privilege or irrelevance
  - (d) Failure to produce
613. Prior inconsistent statement of witness
- (a) Examining witness concerning prior inconsistent statement
  - (b) Extrinsic evidence of prior inconsistent statement of witness
  - (c) Impeachment in a criminal case of own witness by proof of contradictory statement
    - (1) Testimony tending to disprove the calling party's case
    - (2) Admissible only for impeachment
    - (3) Refreshing recollection by disclosing contents prohibited
614. Calling and examination of witnesses by court

- (a) Calling by court
- (b) Examination by court
- (c) Objections

615. Exclusion of witnesses

**Comment**

This Article covers the subjects of the general qualities a person must possess before being permitted to testify, the credibility and impeachment of witnesses, and judicial control over witnesses and their testimony. The article is intended to ensure an intelligible presentation of trustworthy, relevant testimony. Its provisions make several changes of varying degrees of significance in present law. *See* 606(a), 607, 608(a), 608(b)(1), 608(b)(4), 609(c)(1), 609(e), 613(a)(1), 615, *infra*.

**§ 601. General provision of competency**

Except as otherwise provided by this chapter or other statute, every person is competent to be a witness and no person is incompetent to testify to any matter.

**Comment**

The common law had developed many rules that made a person incompetent as a matter of law to testify as a witness either because the person belonged to a particular group or possessed a certain characteristic or attribute. *See* McCormick, Evidence §§ 61-68 (3d ed.). The modern trend in all jurisdictions has been to abrogate or modify these incompetency rules. This trend has been premised on a recognition that as a general proposition the common law rules were "serious obstructions to the ascertainment of truth." McCormick, Evidence d 71 (3d ed.); *see also* Fisch, Evidence § 257 (2d ed.); 2 Wigmore, Evidence §§ 501, 509 (Chadbourn rev. 1979).

Section 601 is consistent with this trend. It mandates that, except as otherwise provided by statute or the Code of Evidence, every person is competent to be a witness. The section thus makes clear that there can be no nonstatutory grounds for witness incompetency. Accordingly, various witness characteristics or attributes, *e.g.*, age, mental illness, religious belief, conviction of a crime, marital relationship, and most connections with the litigation as a party or interested person, cannot be the grounds for declaring

**a person incompetent to testify, as they are not recognized by statute as grounds of**



mcompetency. Such matters may, however, have relevance, for they may be used to impeach the person's credibility. *See* CE 607(a).

The Code of Evidence does contain several exceptions to the general rule of competency recognized by this section. CE 602 contains five of those exceptions and renders incompetent a person who: (a) lacks personal knowledge, (b) is incapable of expressing herself or himself, or (c) is incapable of understanding the nature of an oath or affirmation except as otherwise provided by CE 603(b). CE 602(d) continues CPLR 4502, which provides that in an action founded upon adultery, neither spouse is competent to testify against the other except: (1) to prove the marriage; (2) to disprove the adultery; or (3) to disprove a defense after evidence has been introduced tending to prove such defense. CE 602(e) continues the "dead person's" statute (CPLR 4519) that precludes persons interested in a civil lawsuit from testifying against a dead person or that person's successors in interest. CE 605 and CE 606(a) provide, respectively, that neither the presiding judge nor a member of the jury is competent to testify in the case in which he or she is participating. CE 606(b) provides that a juror may not testify to the deliberation process of the jury unless the testimony concerns outside influence on the jury. All these exceptions are based on strong public policy reasons and in no way compromise the goals of CE 601.

The section restates present law with one exception. *See* N.Y. Const. Art. I, § 3; CPLR 4502(a), 4512, 4513; Prince, Richardson on Evidence § 386-395 (10th ed.). Under present law neither spouse is competent to testify to non-access during wedlock where the effect would be to show the illegitimacy of the offspring, except in proceedings pursuant to Family Court Act § 531 (paternity proceedings) and Family Act § 436 (support proceedings). *See* Matter of Findlay, 253 N.Y. 1 (1930); Prince, Richardson on Evidence § 446 (10th ed.). This rule is premised on notions of decency and morality. *See* Fisch, Evidence § 303 (2d ed.). Since this common law rule has not been codified in the Code of Evidence, it will be legislatively overruled upon the enactment of the Code. The rule is detrimental to the ascertainment of the truth. The goals of the rule are adequately achieved by the presumption favoring legitimacy, which can be overcome only through clear and convincing evidence to the contrary. *See* Comment to CE 302.

## § 602. Incompetencies

- (a) Lack of personal knowledge. Except as otherwise provided by this chapter or other

statute, a person may not testify to a matter unless evidence is introduced sufficient to support a finding that such person has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness's own testimony.

(b) Incapable of expressing oneself. A person may not testify if the court finds such person is incapable of expressing herself or himself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand such person.

(c) Incapable of understanding the nature of an oath or affirmation. Except as otherwise provided by this chapter or other statute, a person may not testify if the court finds such person is incapable of understanding the nature of an oath or affirmation.

(d) 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.

(e) Personal transaction or communication between witness and decedent or mentally ill person. 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 derived 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. A person shall not be deemed interested for the purpose of this subdivision 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. 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 her or the award of costs to him or her. 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 subdivision, 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.

Nothing contained in this subdivision, 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.

#### Comment

This section sets forth five grounds of incompetency. It provides that a person may not testify if any of five conditions is present: (1) the person does not possess personal knowledge concerning the matter about which such person is to testify; (2) the person is incapable of expressing herself or himself, either directly or through an interpreter, so as to be understood by the trier of fact; or (3) the person is incapable of understanding the nature of an oath or affirmation except as otherwise provided by CE 603(b); or (4) a husband or wife is incompetent to testify against the other in an action founded upon adultery with certain exceptions; or (5) a person interested in an event or transaction may not testify against the estate of, or person claiming under, a dead person. The provisions of the section codify present law. *See* Fisch, Evidence § 308, 260, 261 (2d ed.); Prince, Richardson on Evidence §§ 389-390 (10th ed.); CPLR 4502(a); CPLR 4519.

#### (a) Lack of personal knowledge.

Subdivision (a) sets forth a traditional requirement: the person must have personal knowledge of the facts about which he or she is to testify, unless the person is an expert, in which case the witness is subject to the provisions of CE 703. *See* Fisch, Evidence § 308 (2d ed.); McCormick, Evidence § 10 (3d ed.). "Personal knowledge" means a present recollection of an impression derived from the exercise of the witness's own senses. *See Hallenbeck v. Vogt*, 9 A.D.2d 836, 193 N.Y.S.2d 445 (3d Dep't 1959); 2 Wigmore, Evidence § 657 (Chadbourn rev. 1979).

The subdivision is essentially a specific application of CE 401. A person's testimony is simply not relevant under CE 401 unless the person testifies from personal knowledge. *See* Comment to CE 401. Whether the person has the requisite personal

knowledge is a determination governed by CE 104(a). *See* Comment to CE 104(a). In this regard, the subdivision provides that evidence to establish personal knowledge may, but need not, consist of the testimony of the person.

Notably, the requirement of personal knowledge does not prohibit a person from testifying to what he or she heard unless what that person heard is excluded by the hearsay rules of Article 8 of the Code of Evidence. The witness has in these circumstances personal knowledge of what the declarant said. However, the person cannot testify to the subject matter of the statement without personal knowledge of the subject matter.

**(b) Incapability of self-expression.**

Subdivision (b) also sets forth a fundamental rule: a person may not testify if that person is incapable of expressing herself or himself, either directly or through an interpreter, so as to be understood by the trier of fact. *See* Fisch, Evidence § 261 (2d ed.); McLaughlin, Practical Trial Evidence at 4; *cf. People v. McGee*, 1 Dennio 19 (1845). Interpreters are governed by CE 604.

Whether a person possesses the requisite ability to communicate is a determination governed by CE 104(b). *See* Comment to CE 104(b). In this regard, it must be noted that a person is not prevented from testifying by the provisions of this subdivision merely because of the age, or mental disease or defect, unless the ability to communicate or perceive is thereby affected. *See People v. Fuller*, 50 N.Y.2d 628, 431 N.Y.S.2d 357 (1980); *People v. Reusing*, 14 N.Y.2d 210, 250 N.Y.S.2d 401 (1964); *Barker v. Washburn*, 200 N.Y. 280, *aff'd* 128 A.D. 93, 113 N.Y.S. 1134 (1911); *Aguilar v. State of New York*, 279 A.D. 103, 108 N.Y.S.2d 456, *amended*, 279 A.D. 1121, 112 N.Y.S.2d 779, *appeal withdrawn*, 304 N.Y. 616 (3d Dep't 1951); Fisch, Evidence § 261 (2d ed.).

**(c) Incapability of understanding the nature of an oath or affirmation.**

Subdivision (c) continues a well-settled practice: a person may not testify if that person is incapable of understanding the nature of an oath or affirmation, except as otherwise provided in CE 603(b). *See People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976); Prince, Richardson on Evidence §§ 388-391 (10th ed.). The requirement of an oath or affirmation and the form thereof are set forth in CE 603(a).

Whether a person possesses the requisite ability to

understand the nature of an oath or affirmation is a determination governed by CE 104(b). *See* Comment to CE 104(b). In this regard, it must be noted that evidence of mental disease or defect does not in itself work an automatic prohibition under the provisions of the subdivision. *See People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 848, *supra*; *People v. Reusing*, 14 N.Y.2d 210, 250 N.Y.S.2d 401, *supra*; Prince, Richardson on Evidence § 389 (10th ed.). Similarly, there is no precise age at which a child will be deemed as a matter of law incapable of understanding the nature of an oath or affirmation. *See People v. Fuller*, 50 N.Y.2d 628, 431 N.Y.S.2d 357, *supra*; *Rittenhouse v. Town of North*

*Hempstead*, 11 A.D.2d 957, 210 N.Y.S.2d 493 (2d Dep't 1960); *Stoppick v. Goldstein*, 174 A.D. 306, 160N.Y.S. 947 (2d Dep't 1916); Prince, Richardson on Evidence § 390 (10th ed.). A person with a mental disease or defect or a child may still testify, provided the child has the requisite understanding. *See People v. Marks*, *supra*; *People v. Reusing*, *supra*.

(d) Incompetency of spouse in action based on adultery.

This subdivision restates verbatim CPLR 4502(a) governing incompetency of a spouse in an action founded on adultery.

(e) Incompetency of an interested person to testify about a transaction with a deceased or mentally ill person.

This subdivision represents verbatim the dead person's statute, CPLR 4519, including the exceptions contained in that statute and is not intended to affect exceptions contained in other statutes. *See, e.g.*, EPTL 5-1.1(b)(3).

§ 603. Oath or affirmation

(a) Requirement of oath or affirmation. Except as otherwise provided in subdivision

(b) of this section or other statute, every person shall be required before testifying to declare that such person will testify truthfully by oath or affirmation administered in a form calculated to awaken such person's conscience and impress such person's mind in accordance with such person's religious or ethical beliefs.

(b) Unsworn testimony in a criminal case or in a family court proceeding. In a criminal case or in an abuse, neglect or child custody proceeding in family court, every person at least

twelve years of age may testify only under oath or affirmation unless the court is satisfied that the person cannot, as a result of mental disease or defect, understand the nature of an oath or affirmation. A child less than twelve years old may not testify under oath or affirmation unless the court is satisfied that the child understands the nature of an oath or affirmation. If the court is not so satisfied, such child under twelve or such person at least twelve years of age who cannot as a result of mental disease or defect understand the nature of an oath or affirmation may nevertheless be permitted to give unsworn evidence if the court is satisfied that the child or person possesses sufficient intelligence and capacity to justify the reception thereof. An accused may not be convicted of an offense solely upon unsworn evidence given pursuant to this subdivision.

## Comment

## (a) Requirement of oath or affirmation.

Under subdivision (a), a witness must declare by oath or affirmation that he or she will speak the truth as a precondition to testifying. The difference between an oath and affirmation is that an oath mentions God and an affirmation mentions perjury. The requirement of an oath or affirmation is designed to serve two functions: to alert the witness to the duty to testify truthfully, and to deter false testimony by establishing a legal basis for a peijury prosecution. *See People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 248 (1976); *Matter of Brown v. Ristich*, 36 N.Y.2d 183, 366 N.Y.S.2d 116 (1975); McCormick, Evidence § 245 (3d ed.).

It must be recognized that the choice whether to take an oath or affirmation rests with the witness. *See People v. Wood*, 66 N.Y.2d 374, 497 N.Y.S.2d 340 (1985). In this respect, no legal significance attaches to the distinction between an oath and an affirmation. *Id.*; *cf.* Penal Law § 210.00(1).

The subdivision is in accord with present practice. *See* CPLR 2309(b); McLaughlin, Practical Trial Evidence 4-5; Prince, Richardson on Evidence §§ 387, 388 (10th ed.); Fisch, Evidence § 260 (2d ed.). It does not affect existing procedures governing the administration of the oath. *See, e.g.*, CPLR 2309; Judiciary Law § 2-b.

## (b) Unsworn testimony in criminal case or family court proceeding.

Subdivision (b) restates without substantive change subdivisions (2) and (3) of CPL 60.20. Its provisions permit the reception of unsworn testimony of a child under twelve years of age or of any witness found by the court to be unable to understand the nature of an oath by reason of mental disease or defect. The court must first find that although the witness is not able to take the oath, that person possesses sufficient intelligence and capacity to justify the reception of his or her testimony. Finally, the subdivision provides that a defendant may not be convicted of an offense solely upon unsworn evidence given by such a witness. *See People v. Groff*, 71 N.Y.2d 101, 524 N.Y.S.2d 13 (1987); *People v. Fuller*, 50 N.Y.2d 628, 431 N.Y.S.2d 357 (1980); *People v. Nisoff*, 36 N.Y.2d 560, 369 N.Y.S.2d 686 (1975). The subdivision on its face is applicable to criminal cases, and abuse, neglect and child custody proceedings in Family Court but is also applicable, by virtue of CE 101(d), to juvenile delinquency and PINS proceedings in Family

**Court.**



**§ 604. Interpreters**

An interpreter is subject to the provisions of this chapter relating to qualification as an expert and the administration of an oath or affirmation that the interpreter will make a true translation.

**Comment**

This section, which is consistent with present law, *see* Prince, Richardson on Evidence § 476 (10th ed.), imposes two requirements upon interpreters. First, they must qualify as experts under the Code of Evidence,

CE 702. Where the witness does not speak English at all, the interpreter will satisfy the expert witness requirements of CE 702 upon a showing of his comprehension and fluency in both English and the appropriate foreign language. In instances where an interpreter is necessary because the witness is hearing-impaired, mute, or suffers from a physical speaking impairment, it must be shown that the interpreter can understand and communicate with the witness.

Second, the interpreter must take an oath or affirmation that he or she will make a "true translation," which requires the interpreter to communicate exactly what the witness is expressing in his or her testimony.

This section does not address the questions of when an interpreter should be appointed or of compensation for the interpreter. Both of these questions are governed by other provisions of law. *See* Judiciary Law §§ 380-390; *Menella v. Metropolitan Street Ry. Co.*, 43 Misc. 5, 86 N.Y.S. 930 (Sup. Ct. App. Term 1904).

**§ 605. Competency of judge as witness**

The testimony of a judge shall not be admissible at a trial, proceeding, or hearing at which the judge is presiding. No objection need be made in order to preserve the point.

**Comment**

This section provides that a judge is incompetent to testify at the trial, proceeding, or hearing over which that judge is presiding. The section is designed to prevent the judge from being placed in the inconsistent roles of both witness and presiding authority, to avoid the risk of prejudice which the judge's testimony

would introduce into the trial, proceeding, or hearing, and to avoid putting parties to the action in the difficult position of having to cross-examine the judge or object to the judge's testimony. *See* McCormick, Evidence § 68 (3d ed.); Comment, California Evidence Code § 703.

The section codifies present law. *See People v. Dohring*, 59 N.Y. 374 (1874); Prince, Richardson on Evidence § 406 (10th ed.).

When a violation of the section occurs, the section provides that a party need not make an objection to preserve his right to argue this error on appeal. In effect, the section gives each party an "automatic" objection. This exception to the general policy of requiring objections to be made is provided so that a party faced with the testimony of the judge need not be compromised in a belief that the judge would feel that his or her integrity had been attacked by such an objection, and thus be prejudiced against the objecting party for the balance of the trial.

It should be noted that the section does not prohibit a judge from testifying in a case over which the judge is not presiding. A judge, therefore, is competent to testify in another case as to what occurred at a case conducted before that judge. *See People v. Carpus*, 2 A.D.2d 653, 152 N.Y.S.2d 27 (4th Dep't 1956).

§ 606. Competency of juror as witness

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which such member is sitting as a juror.

(b) Inquiry into the validity of verdict. Except as otherwise provided by statute, upon an inquiry into the validity of a verdict, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations, or to the effect of anything upon such juror's or any other juror's mind or emotions as influencing such juror to assent to or dissent from the verdict, or concerning such juror's mental processes in connection therewith. The juror's affidavit or evidence of any statement by such juror concerning a matter about which such juror would be precluded from testifying is likewise not admissible. A juror may, however, testify on the question whether extraneous prejudicial information, regardless of its source, had been brought to the jury's attention or any outside influence or other influence that violates the constitutional right to a jury trial was improperly brought to bear upon any juror.

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nt (a) At the

trial.

Subdivision (a) provides that a member of the jury is incompetent to testify as a witness before that jury in the case in

which the juror is sitting. Like CE 605, which provides a similar incompetency to judges, subdivision (a) of CE 606 is designed to promote the rights of litigants to a fair trial.

Subdivision (a) is contrary to present law, which provides that a juror may be sworn as a witness. *See People v. Dohring*, 59 N.Y. 374 (1874); Prince, Richardson on Evidence § 407 (10th ed.). Present law is unsound. *See McCormick*, Evidence § 68 (3d ed.).

(b) Inquiry into validity of the verdict.

Subdivision (b) states the circumstances in which a juror is competent to testify regarding the validity of a verdict. The subdivision codifies the distinction developed by the New York courts precluding inquiry into the subjective deliberation process of the jury, while permitting juror testimony as to objective events or incidents that constitute an outside influence improperly brought to bear upon any juror, including improper outside information brought to the attention of the jury by one of its own members. *See People v. Legister*, 15 N.Y.2d 832, 552 N.Y.S.2d 906 (1990); *Alford v. Sventek*, 53 N.Y.2d 743, 439 N.Y.S.2d 339 (1981); *People v. Brown*, 48 N.Y.2d 388, 423 N.Y.S.2d 461 (1979); *People v. Crimmins*, 26 N.Y.2d 319, 310 N.Y.S.2d 300 (1970); *People v. DeLucia*, 20 N.Y.2d 275, 282 N.Y.S.2d 526 (1967); *People v. Jacobson*, 109 Misc. 2d 204, 440 N.Y.S.2d 458 (Sup. Ct. Bronx Co. 1981); *see generally* Prince, Richardson on Evidence § 407 (10th ed.). This distinction is a reasoned compromise between the view that jury verdicts should be totally immunized from review in order to encourage freedom of deliberation, stability and finality of judgments, and to ensure a just result in the individual case. *See McCormick*, Evidence § 68 (3d ed.). Under the provisions of the subdivision, the juror's thought processes and mental operations are protected from later scrutiny. *See People v. DeLucia*, 20 N.Y.2d 275, 279, 282 N. Y.S.2d 526, 529530 (1967). On the other hand, juror testimony concerning outside influences brought to bear upon the jury is permitted. *See People v. Brown*, 48 N.Y.2d 388, 393, 423 N.Y.S.2d 461, 463 (1979). Examples of sources of extraneous prejudicial information are: an unauthorized visit by juror to a scene where a material fact occurred, *see People v. Crimmins*, 26 N.Y.2d 319, 310 N.Y.S.2d 300, *supra*; *cf.* CPL 270.40, 270.50; a "test" conducted by juror outside the jury room the result of which was reported to other jurors, *see People v. Legister*, *supra*; *People v. Brown*, *supra*; *People v. Harris*, 84 A.D.2d 63, 438 N.Y.S.2d 843 (2d Dep't 1981); publicity and extra-record evidence reaching the jury room, *see Parker v. Gladden*, 385 U.S. 363, 87 S.Ct. 468 (1966); *People v. Marrero*, 83 A.D.2d 565, 441 N.Y.S.2d 12 (1981). *See generally* Hellenbrand & Giordano, *Impeachment of Jury Verdicts: A Guide for Misconduct Claim*, N.Y.L.J., May 26, 1981, p. 1, col. 1. There may be other events that occur during deliberations that violate the constitutional right to a jury trial and about which jurors should be permitted to testify. The section recognizes the fact and permits such testimony. Nonetheless, this exception is a narrow one and should not be interpreted to provide license to challenge jury verdicts.

The subdivision does not by its terms address such questions as the propriety of counsel interviewing jurors after they have been discharged; when

jury misconduct will require a new trial (*compare People v. DeLucia, supra, with Alford v. Sventek, supra*); the effect of bias, prejudice, or other disqualifying factors on the part of a juror not revealed or concealed on the voir dire, *see People v. Leonti*, 262 N.Y. 256, 186 N.E. 693 (1933); the procedures for determining the validity of allegations of jury misconduct, *see People v. Ciaccio*, 47 N.Y.2d 431, 418 N.Y.S.2d 371 (1979); or disclosures by grand jurors regarding proceedings before a grand jury. *See CPL 190.25(4)*. All of these issues are left to the common law process. *See CE 102*.

### § 607. Credibility of witnesses

(a) General rule. Except as otherwise provided by this chapter or other statute, the trier of fact may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of the witness's testimony. However, except as provided by this chapter, extrinsic proof on a collateral matter affecting only credibility is not admissible.

(b) Who may impeach. Except as otherwise provided in subdivision (c) of section 613 of this article, the credibility of a witness may be attacked by any party, including the party calling that witness. Provided, however, a party may not call a witness for the sole purpose of impeaching the credibility of that witness unless that witness has previously testified or a hearsay statement of that witness has previously been admitted into evidence.

#### Comme

#### nt (a) General

#### rule.

"Credibility of a witness" refers to whether the witness's testimony is believable or unbelievable. *See 3 A Wigmore, Evidence* § 875 (Chadbourn rev. 1970). It is generally dependent upon two considerations: the truthfulness of the witness *i.e.*, sincerity, and the accuracy of what the witness says, *i.e.*, the witness's opportunity and capacity to perceive together with the capacity to recollect and communicate. *See People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 334, *on remand*, 413 N.Y.S.2d 279 (1978); Fisch, *Evidence* § 446 (2d ed.); McCormick, *Evidence* § 33 (3d ed.); Ladd, *Some Observations on Credibility: Impeachment of Witnesses*, 52 Cornell 239 (1967). Under the Code, the truthfulness component is governed specifically by sections 607(a), 608, 609 and 610, while the accuracy component is generally left to regulation under the more general principles of CE 104, CE 401, CE

**402 and CE 403; *but see* CE 608(b)(3).**

**Subdivision (a) of this section provides that in determining the credibility of a witness the trier of fact may consider any matter that has any tendency or reason to prove or disprove the truthfulness of the witness's**

testimony, except as otherwise provided by statute or the Code of Evidence. In view of the probative value of such evidence, subdivision (a) is technically unnecessary, as such evidence would be admissible under CE 402. It serves, however, as a guide to the courts, demonstrating that some matters that do not relate to a specific substantive issue in the case are nevertheless relevant because they may affect the credibility of a witness.

Among the matters that may be admissible under the subdivision to challenge a witness's truthfulness are: (1) reputation for truth and veracity, *see* CE 608(a); (2) prior acts of misconduct, *see* CE 608(b); (3) prior convictions, *see* CE 609; (4) partiality, *i.e.*, bias, interest, hostility, *see* CE 608(3); and (5) prior inconsistent statements, *see* CE 102, CE 613. *See generally* Prince, Richardson on Evidence § 493 (10th ed.). The material used to challenge a witness's truthfulness is, however, not limited to those contained in the code. *See People v. Coleman*, 56 N.Y.2d 269, 273, 451 N.Y.S.2d 705, 707 (1983).

Evidence that supports or rehabilitates a witness's testimony as truthful is also admissible under this section and this too reflects present law. *See, e.g., People v. Huertas*, 75 N.Y.2d 487, 544 N.Y.S.2d 444 (1990) (victim-witness description of rapist to the police after the crime); Martin, *Hearsay and Credibility: Eyewitness Descriptions to Police*, N.Y.L.J., June 8, 1990, p. 3, col. 3; *People v. Rice*, 75 N.Y.2d 929, 555 N.Y.S.2d 677 (1990) (prompt complaint of rape); *People v. Alex*, 260 N.Y. 425 (1933) (prompt complaint of police mistreatment); *People v. Screven*, 111 A.D.2d 100, 489 N.Y.S.2d 234 (1st Dep't 1985) (prior writing of witness); *see also* Prince, Richardson on Evidence § 519 (10th ed.).

Subdivision (a) generally prohibits extrinsic use of evidence upon a collateral matter that affects only general credibility. This reflects current law that a cross-examiner cannot contradict a witness's answers concerning collateral matters by producing extrinsic evidence for the sole purpose of impeaching general credibility. *See Badr v. Hogan*, 75 N.Y.2d 629, 555 N.Y.S.2d 249 (1990); *People v. Pavao*, 59 N.Y.2d 282, 289, 464 N.Y.S.2d 458, 462 (1983); *People v. Schwartzman*, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969); *see generally* Prince, Richardson on Evidence § 491 (10th ed.); Fisch, Evidence § 486 (2d ed.); Martin, *Impeachment of a Witness*, N.Y.L.J., Dec. 14, 1990, p. 3, col. 1. In other words, if a matter is collateral, the cross-examiner may inquire into it, but he must take the witness's answer and he is not free to put in independent proof as to the collateral matter. *See Badr v. Hogan, supra; People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 334, *supra*. Impeachment evidence is not collateral when it is directly relevant to one or more issues in the case. *See People v. Cade*, 73 N.Y.2d 904, 539 N.Y.S.2d 287 (1989); *People v. Beavers*, 127 A.D.2d 138, 141, 514 N.Y.S.2d 235, 237 (1st Dep't 1987). Also not collateral is extrinsic evidence to show bias, prejudice, interest, motive, hostility, or the ability to perceive or remember and the like. *See CE 608(b)(3); Prince, Richardson on Evidence § 491*, at 447-478 (10th ed.).



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(b) Who may impeach.

Subdivision (b) provides that any party, including the party who calls the witness, may attack the credibility of any witness, except as otherwise provided by CE 613(c) which governs a party's impeachment of its own witness in a criminal case. Its provisions substantially change present law, which prohibits, in both civil and criminal cases, a party from impeaching its own witness, except as provided in CPLR 4514 and CPL 60.35(1). *See* Prince, Richardson on Evidence § 508 (10th ed.); Fisch, Evidence § 489 (2d ed.). CPLR 4514 permits impeachment of one's own witness by the use of a prior inconsistent statement, provided it was in writing and signed by the witness, or made under oath, and CPL 60.35(1) provides that when a witness called by a party gives testimony upon a material issue which tends to disprove the position of the party, the party may impeach the witness by the use of a prior signed or sworn statement of the witness. CPL 60.35 is retained in CE 613(c).

Present New York law is derived from the common law notion that parties select their witnesses and, therefore, should not be heard to say at trial that their witnesses are unworthy of belief. *See* McCormick, Evidence § 38 (3d ed.). The voucher rule has been universally condemned. *See, e.g.,* Fisch, Evidence § 488 (2d ed.); 2 N.Y. Jud Council Rep (1936) 175, 179-181; 3A Wigmore, Evidence § 896 (Chadbourn rev. 1970), and abandoned by numerous jurisdictions. *See* McCormick, Evidence § 38 (3d ed.). This treatment accorded the rule has been based upon a recognition that it rests on false premises, as well as the practical exigencies of litigation. As noted by the California Law Revision Commission: "A party has no actual control over a person who witnesses an event and is required to testify to aid the trier of fact in its function of determining the truth. Hence, a party should not be 'bound' by the testimony of a witness produced by him and should be permitted to attack the credibility of the witness without anachronistic limitations. Denial of the right to attack credibility may often work a hardship on a party where by necessity he must call a hostile witness. Expanded opportunity for testing credibility is in keeping with the interest of providing a forum for full and free disclosure." Comment, California Evidence Code § 785. These views are sound, and support the change from present law.

§ 608. Evidence of character and conduct of witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, subject to these

limitations:

(1) Only evidence of character for truthfulness. The evidence may refer only to character for truthfulness; and

(2) Evidence of truthful character only after an attack on truthfulness.

Evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence, or the witness has been attacked in any other manner as a person unworthy of belief because of an untruthful character and not because the witness is mistaken, confused, forgetful, or inaccurate with respect to his or her testimony on this particular occasion.

(b) Specific instances of conduct.

(1) General rule. A witness may be asked, if asked on reasonable grounds and in good faith, about specific instances of conduct bearing on that witness's credibility, provided, however, a witness may not be asked about conduct that was the subject of criminal charges of which the witness was acquitted.

(2) Inquiry of character witness. A witness who has been examined and testified about the truthful character of another witness may be asked, if asked on reasonable grounds and good faith, about specific instances of conduct bearing on the truthfulness of that other witness. A character witness may be asked whether, based upon that witness's knowledge or opinion, he or she would believe the other witness under oath. A character witness on behalf of a criminal defendant, however, may not be asked on cross-examination whether the witness's testimony would be different if the witness knew that defendant had committed the crime charged.

(3) Extrinsic evidence. For the purpose of attacking or supporting the truthfulness of a witness under this section, specific instances of the conduct of the witness not resulting in a criminal conviction may not be proved by extrinsic evidence, provided, however, nothing in this subdivision shall preclude extrinsic proof bearing on matters such as a witness's bias, prejudice, interest, motive, hostility, or ability to perceive or remember.

(4) The accused in a criminal case. In a criminal case, specific instances of conduct bearing on the credibility of the accused offered by the prosecution are not admissible if the prejudicial effect of the evidence, including the effect the evidence would have in deterring the accused from testifying, outweighs the probative worth of the evidence on the accused's credibility. Upon request, the prosecutor shall, pursuant to section 240.43 of the criminal procedure law, inform the accused before the commencement of trial of the specific acts of conduct of the accused about which it intends to inquire if the accused chooses to testify. To remedy the prejudice from the failure to give notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require. At the request of the accused, the determination

pursuant to this subdivision of the admissibility of evidence of specific instances of conduct of the accused shall be made before the commencement of trial.

(5) A party in a civil case. Subject to section 403 of this chapter, a party in a civil case may be asked about specific instances of conduct bearing on the credibility of that party.

(c) Instances of conduct more than fifteen years old.

(1) General rule. Evidence of a specific act of conduct under this section is not admissible if a period of more than fifteen years, excluding any period of incarceration, has elapsed since the date of the occurrence of the act, unless the court determines that the probative worth of the specific act on the witness's credibility substantially outweighs its prejudicial effect. The proponent of evidence of a specific act of conduct more than fifteen years old shall make known to all parties the proponent's intention to offer the evidence and its particulars sufficiently in advance of offering the evidence to provide them with a fair opportunity to meet it. To remedy the prejudice from the failure to give notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

(2) The accused in a criminal case. Upon request the prosecutor, pursuant to section 240.43 of the criminal procedure law, shall inform the accused before the commencement of trial of the specific instances of the accused's conduct more than fifteen years old about which it intends to inquire. At the request of the accused, the determination pursuant to this subdivision of the admissibility of such evidence shall be made before the commencement of trial.

(d) Self-incrimination. The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of such person's privilege against self-incrimination when examined with respect to matters which relate only to credibility. A witness who properly invokes the privilege against self-incrimination may be required to testify only if there is compliance with the requirements of section 50.20 of the criminal procedure law.

#### Comment

##### (a) Opinion and reputation.

**Subdivision (a) governs impeachment of a witness by proof of untruthful character and the repair of a witness's credibility by proof of truthfulness. It is applicable in both civil and criminal cases.**

Initially, the subdivision provides that a witness's credibility may be attacked by reputation or opinion evidence that the witness is by disposition an untruthful person. Its provisions recognize that the character of a witness for truthfulness or untruthfulness is probative on the question of the truth of particular testimony of the witness. Thus, a character witness is permitted either to state an opinion of the character for truthfulness of the witness whose credibility is in issue or to describe the reputation of the latter for truthfulness.

While New York courts have held that a witness's character for truthfulness may be attacked, or supported once attacked, by reputation evidence, *see People v. Pavao*, 59 N.Y.2d 282, 464 N.Y.S.2d 458 (1983); Prince, Richardson on Evidence §§ 494, 495, 518 (10th ed.), they have not permitted it to be proved by testimony in the form of opinion. *See Conley v. Meeker*, 85 N.Y. 618 (1881); *Spira v. Holoschutz*, 38 Misc. 754 (Mun. Ct. N.Y. Co. 1902). *See also People v. Barber*, 74 N.Y.2d 653, 543 N.Y.S.2d 365 (1989). This difference is unjustifiable since testimony in the form of reputation is frequently, in essence, testimony as to opinion. *Cf. Fisch*, Evidence § 453 (2d ed.). The subdivision recognizes this fact. The use of opinion and reputation evidence as means of proving the witness's character for untruthfulness is consistent with CE 405(a). *See Comment to CE 405(a)*.

The untruthful character of a witness cannot, however, be proved by prior specific acts. Moreover, the character witness's testimony must relate specifically to truthfulness. Other character traits are not sufficiently probative of a witness's truthfulness to permit their admission on the issue of credibility. Thus, a character witness's testimony that in his or her opinion another witness is a violent person or a drunk would not be admissible under the subdivision. *See Prince*, Richardson on Evidence § 496 (10th ed.).

The subdivision also provides that reputation or opinion evidence may not be used to sustain a witness's character for truthfulness until that character for truthfulness has first been attacked. The rationale is that there is no need to waste time with character references before the need to do so affirmatively arises. Additionally, it is specifically provided that opinion or reputation evidence that the witness is untruthful will qualify as an attack on a witness's character for truthfulness. The last phrase of the sentence recognizes that a character attack may take other forms but must in fact be a character attack and not simply an attempt to show that the witness was mistaken, confused, forgetful or inaccurate on this single occasion. For example, evidence of a conviction, misconduct not the subject of conviction, or corruption,

when admitted, will open the door to evidence in support of truthfulness. Not all forms of impeachment, however, qualify as an attack, *see* McCormick, Evidence § 49 (3d ed.), and the last clause of the subdivision recognizes that it is a character flaw, not a mistake on this one occasion perhaps as reflected by a prior inconsistent statement, that permits rehabilitation by proof of a witness's truthful character.

Under the subdivision, reputation refers to the "aggregate tenor of what others say or do not say about [a person]." *People v. Bouton*, 50 N.Y.2d 130, 139, 428 N.Y.S.2d 218, 222-223 (1980). When a witness testifies as to reputation, the witness must be able to demonstrate familiarity with the person's reputation in the relevant community. *See People v. Bouton, supra; People v. O'Regan*, 221 A.D. 331, 223 N.Y.S. 339 (2d Dep't 1927); Prince, Richardson on Evidence § 494 (10th ed.). There is no requirement that the witness be personally acquainted with the person about whom testimony is given or that the witness have first-hand knowledge of any facts. *See McLaughlin, New York Trial Practice*, N.Y.L.J., July 10, 1981, p. 1. col. 1. The testimony is admissible as an exception to the hearsay rule CE 803(c)(18). When the witness testifies in the form of opinion, the appropriate provisions of Articles 6 and 7 are applicable. The court has the power under CE 403 to control the number of character witnesses a party may call to testify as to the character for truthfulness of a witness.

(b) Specific instances of conduct.

(1) General rule.

This paragraph of section 608, which is applicable in both civil and criminal cases involving witnesses, subject to other paragraphs of the subdivision governing criminal defendants and civil parties, governs impeachment of a witness and repair of a witness's credibility by evidence of specific instances of conduct. It pertains to acts which may be criminal but which have not resulted in a conviction, as well as immoral, wrongful or other relevant acts.

Thus, under the subdivision examination concerning past acts is to be limited to those acts which bear on, *i. e.*, are relevant to, the credibility of the witness. *See also* CE 607. ■ Other acts cannot be inquired into because they have little or no logical connection to credibility, and because they frequently have an undue prejudicial effect.

The initial sentence imposes two further limitations. First, the examination must be based on reasonable grounds and, second, it must be pursued in good faith. This codifies present law. *See People v. Greer*, 42 N. Y.2d 170, 399 N.Y.S.2d 613 (1977); *People v. Schwartzman*, 24 N.Y.2d 241, 299 N.Y.S.2d 819 (1969); *People v. Alamo*, 23 N.Y.2d 630, 298 N.Y.S.2d 681, *cert. denied*, 396 U.S. 879, 90 S.Ct. 156 (1969); Prince, Richardson on Evidence § 498 (10th ed.). In this regard, it must be noted that the extent of the examination is committed to the discretion of the trial court. *See* CE 611(a); *People v. Schwartzman, supra*.



Paragraph (b)(1) states the general rule that witnesses may be asked about specific acts bearing on credibility. The 1982 proposal sought to change this rule by limiting inquiry to only those acts bearing on a character trait for truthfulness. This change, however, conflicts with common sense notions about

acts that would lead people to question the believability of a witness who, for example, stole money by committing robbery or assaulted a person or burned down a building on behalf of a person who paid the witness to do so. Still, not all criminal acts or criminal conduct necessarily bear on credibility and the trial judge must determine relevance under section 607. The paragraph's focus on criminal or immoral acts bearing on "credibility" may represent a slight change in present law which could well be read to permit impeachment use of any and all evidence of immoral or criminal conduct relevant to show the witness's "moral turpitude" (*see People v. Sorge*, 301 N.Y. 198, 200, 93 N.E.2d 637, 638 [1950]; Prince, Richardson on Evidence §§ 498, 499 [10th ed.]). A more recent leading case, however, in passing spoke of "disparaging questions . . . bearing on the credibility of a witness," the phrase used in this subdivision. *People v. Duffy*, 36 N.Y.2d 258, 262, 367 N.Y.S.2d 236, 240 (1975), *cert. denied*, 423 U.S. 861, 96 S. Ct. 116 (1975). In any event, the change in the law, if such there be, is justified because the assumption that all bad acts are probative of a witness's capacity to tell the truth is simply not justifiable. *See* 3 Wigmore, Evidence § 982 (3d ed. 1940). Moreover, since the extent of cross-examination is so very discretionary (*see* Prince, Richardson on Evidence § 500 [10th ed.]), it seems only reasonable to recognize that a trial judge in exercising that discretion would surely prohibit inquiry about an immoral or criminal act that had no relevance to a witness's credibility. Finally, under the paragraph a witness may not, as is the case under present law, be asked about conduct that was the subject of criminal charges that resulted in acquittal. *See People v. Santiago*, 15 N.Y.2d 640, 255 N.Y.S.2d 863 (1964); *People v. Cascone*, 185 N.Y. 317, 334, 78 N.E. 287 (1906).

(b) (2) Specific act inquiry of character witnesses.

Paragraph (b)(2) continues present law and allows inquiry of a testifying character witness about specific acts bearing on the truthfulness of another witness. *See* Prince, Richardson on Evidence § 153 (10th ed.). The inquiry must be on reasonable grounds and in good faith. *See id.* The second sentence continues the practice of asking a character witness, based upon that witness's opinion or knowledge, whether he or she would believe the other witness under examination. Fisch, Evidence § 454 (2d ed.). Finally, the paragraph continues another present practice by forbidding the prosecutor from asking a character witness if the witness's testimony would be different if the witness knew that defendant had committed the crime charged. *See People v. Lediard*, 80 A.D.2d 237, 242, 438 N. Y.S.2d 540, 543-544 (1st Dep't 1981); *People v. Thompson*, 75 A.D.2d 630, 427 N.Y.S.2d 303 (2d Dep't 1980); *People v. Lopez*, 67 A.D.2d 624, 411 N.Y.S.2d 628 (1st Dep't 1979).

(b) (3) Extrinsic evidence.

The first sentence of paragraph (3) provides that if an act did not culminate in a criminal conviction, then it cannot be proved

by extrinsic evidence. Acts which have been the basis of a conviction may be so proved as

provided in CE 609. The difference in treatment is dictated by several considerations. As has been observed: "When the bad conduct is the subject of a conviction, the need to prove the underlying behavior is absent and the ensuing possibility of confusing the jury and protracting the trial by the side issue of the witness's guilt is eliminated. The factor of a surprise also disappears in the case of a conviction since the witness may be expected to remember and explain his [or her] convictions but cannot possibly be prepared to dispute each allegation of misconduct that may be lodged against [the witness]," Berger & Weinstein, 3 Weinstein's Evidence 1 608[05]. The sentence codifies present law. See *People v. Zabrocky*, 26 N.Y.2d 530, 311 N.Y.S.2d 892 (1970); *People v. McCormick*, 303 N. Y. 403 (1952); Prince, Richardson on Evidence § 498 (10th ed.).

The effect of the prohibition of the use of extrinsic evidence of a prior act or conduct is that the party who inquires about a specific act of conduct must "take the answer" of the witness who denies it. McCormick, Evidence § 43 (3d ed.). This does not mean that the cross-examiner may not press the witness in an attempt to gain an admission of the conduct. Rather, it lies within the discretion of the court to determine the extent to which the inquiry may proceed, and once it ends, no extrinsic evidence may be used to complete the impeachment. *People v. Schwartzman*, 24 N.Y.2d 241, 299 N.Y.S.2d 817, *remittur added*, 241 N.Y.2d 914, 30 N.Y.S.2d 644, *cert. denied*, 396 U.S. 846, 90 S.Ct. 103 (1969); 3A Wigmore Evidence § 979 (Chadbourn rev. 1970).

The second sentence of the subdivision, however, recognizes that the rule barring extrinsic proof has no application when that proof bears on matters such as a witness bias, prejudice, motive, hostility or ability to perceive or remember. This restates present law. See Prince, Richardson on Evidence § 503 (10th ed.).

(b) (4) The accused in a criminal case.

Paragraph 4 continues with one slight change the present New York rule governing criminal defendants who testify. See *People v. Duffy*, 36 N.Y.2d 258, 262, 367 N.Y.S.2d 236, 239-240 (1975), *cert. denied*, 423 U.S. 861, 96 S.Ct. 116 (1975). The rule permits prosecutorial inquiry in the court's discretion when the acts "reveal a disposition or willingness to place self-interest ahead of principle and society, proof that was relevant to suggest his readiness, as a witness to do so again." *Id.* at 262, 367 N.Y.S.2d at 239-240. In making this determination, the trial court must balance the probative value of impeachment against its prejudicial effect. See *People v. Pollock*, 50 N.Y.2d 547, 429 N.Y.S.2d 628 (1980). It is in the balancing test that the Code makes a slight change in the law. That

change is that in determining whether the specific act may be the subject of inquiry, the trial judge must decide whether the prejudicial effect of the act outweighs its probative value, instead of whether the prejudice so far outweighs the probative value. *See People v. Sandoval*, 34 N.Y.2d 371, 376, 378, 357 N.Y.S.2d 849, 854-56 (1974). The reason for the

change is that unlike convictions, which are governed by the "substantially outweighs" standard (*see* CE 609), there may be a serious question whether an act was in fact committed and its probative value is therefore somewhat less than the fact of conviction.

Under present law, the self-interest rule in criminal cases is limited to cross-examination of defendant by the prosecutor and the court under this section may not limit cross-examination of a defendant by a co-defendant, cross-examination of a defense witness other than the defendant or prosecution witnesses. *See People v. McGee*, 68 N.Y.2d 328, 508 N.Y.S.2d 927 (1986); *People v. Ocasio*, 47 N.Y.2d 55, 416 N.Y.S.2d 581 (1979); *People v. Allen*, 50 N.Y.2d 898, 430 N.Y.S.2d 588 (1980), *affirming on opinion below*, 67 A.D.2d 558, 416 N.Y.S.2d 49 (2d Dep't 1979). The section continues that rule. Still, a court has discretion, even with respect to cross-examination of defendant by a co-defendant, to assure that inquiry is for the purpose of attacking credibility and not simply to show propensity. *See* CE 607; *People v. Williams*, 142 A.D.2d 310, 536 N.Y.S.2d 814 (2d Dep't 1988), *leave to appeal denied*, 73 N.Y.2d 1023, 541 N.Y.S.2d 778 (1989). Even with respect to prosecution or defense witnesses, other than the defendant, in addition to the relevance requirement, there exist additional limitations on cross-examination. *See* CE 412, 413, 611.

Finally, the notice required in paragraph (4) accords with present law. *See* CPL § 240.43.

**(b) {5} Civil cases .**

Paragraph (b)(5) provides that the 403 balancing test applies to parties in civil cases to avoid a judicial construction that balancing is only required in criminal cases when the defendant testifies. *See Green v. Bock Laundry*, 490 U.S. 504, 109 S.Ct. 1981 (1989). There is no authoritative decisional law adopting a balancing test with respect to civil parties but there seems little reason to treat the civil party different than the criminal defendant especially given the vast judicial discretion governing the extent and scope of cross-examination. *See* Prince, *Richardson on Evidence* § 500 (10th ed.). In this regard it may well be that the *Duffy-Sandoval* balancing self-interest test could appropriately be applied to parties in civil cases. *See Evans v. Wilson*, 133 Misc. 2d 1079, 509 N.Y.S.2d 296 (N.Y.C. Civil Ct. 1986). With respect to witnesses in civil cases, other than parties, in addition to the relevance requirement of the general rule in subdivision (b)(1) of this section, *see also* CE 607, there exist other limitations on cross-examination. *See* CE 611.

(c) Conduct more than 15 years old.

(1) General rule.

Under this section, conduct that occurred more than 15 years before the witness's testimony in the instant case is subject to a special balancing test. That test requires the court to be persuaded that the probative value of the evidence substantially outweighs its prejudicial effect. Under present law there is no time limit, although courts recognize that the older the act, the less its probative value. Of course, some acts such as perjury or other acts of individual dishonesty or untrustworthiness will always be relevant no matter when they occurred. *See People v. Sandoval*, 34 N.Y.2d 371, 377, 357 N.Y.S.2d 849, 855 (1974). Still, with respect to most acts more than 15 years old, the shifting of the burden to the offering party seems to make sense. The section, however, does not include in the 15 year period any time during which the defendant was incarcerated.

(2) The accused in a criminal case.

The special notice and pretrial determination provisions in criminal cases are similar to those required under paragraph (b)(4) and make no real change in the law.

(d) Self-incrimination.

Paragraph (d) preserves for any witness the constitutional privilege against self-incrimination with respect to "matters which relate only to credibility." It is intended to encourage witnesses to testify without fear of disclosure of past misconduct which is not relevant to any substantive issue in the case. For an accused, it allows the exercise of the option to testify without paying the price of having opened inquiry into prior criminal acts that relate only to credibility. This is in accord with present law. *See People v. Betts*, 70 N.Y.2d 289, 520 N.Y.S.2d 370 (1987).

§ 609. Evidence of conviction of crime

(a) General rule. For the purpose of attacking the credibility of a witness, when that witness 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 the witness may independently prove that conviction. If in response to proper inquiry whether the witness 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 party examining the witness may inquire into the nature of the criminal conduct underlying the conviction and is not precluded from making that inquiry by the witness's answer concerning the conviction.



(b) The accused in a criminal case and parties in a civil case

(1) Criminal cases. In a criminal case, evidence offered by the prosecution that the accused has been convicted of an offense, or evidence of the nature of an offense, is not admissible if the prejudicial effect of the evidence, including the effect the evidence would have in deterring the accused from testifying in his or her own behalf, substantially outweighs the probative worth of the evidence on the accused's credibility. Upon request, the prosecutor shall, pursuant to section 240.43 of the criminal procedure law, inform the court and the accused of the convictions of the accused about which the prosecutor intends to inquire. At the request of the accused, determination pursuant to this subdivision shall be made before the commencement of trial.

(2) Civil cases. Subject to section 403 of this chapter, evidence that a party in a civil case has been convicted of an offense is admissible under subdivision (a) of this section.

(c) Convictions more than fifteen years old.

(1) General rule. Evidence of a conviction under this section is not admissible if a period of more than fifteen years, excluding any period of incarceration, has elapsed since the date of the conviction or the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines that the probative worth of the conviction on the witness's credibility substantially outweighs its prejudicial effect. The proponent of evidence of a conviction more than fifteen years old as calculated herein shall make known to all parties the proponent's intention to use the conviction sufficiently in advance of offering the evidence to provide them with a fair opportunity to contest the use of such evidence. To remedy the prejudice from the failure to give notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

(2) The accused in a criminal case. Upon request, the prosecutor, pursuant to section 240.43 of the criminal procedure law, shall inform the accused before the commencement of trial of the specific convictions more than fifteen years old about which it intends to inquire. At the request of the accused, the determination pursuant to this subdivision of the admissibility of such evidence shall be made before the commencement of trial.

(d) Effect of pardon, vacated convictions and findings of innocence. Evidence of a conviction is not admissible under this section if the conviction has been set aside pursuant to law, vacated, or has been the subject of a pardon on a finding of innocence or other equivalent procedure based on a finding of innocence.

(e) Sealed and nullified convictions, youthful offender, and juvenile delinquency adjudications. For purposes of this section, a conviction sealed and deemed nullified pursuant to sections 160.50, 160.55 and 160.60 of the criminal procedure law or other equivalent procedure, an adjudication as a youthful offender under article seven hundred twenty of the criminal procedure law or an adjudication as a juvenile delinquent under article three of the family court act or an adjudication as a person in need of supervision under article seven of the family court act is not admissible. Subject to subdivisions (b) and (c) of section 608 of this article, the party examining the witness may, however, inquire into the facts underlying the conviction or adjudication.

(f) Pendency of appeal. Evidence of a conviction is admissible under this section even though an appeal is pending therefrom. Evidence of the pendency of the appeal is admissible.

#### Comme

#### nt (a) General

#### rule.

**Subdivision (a) governs impeachment of a witness in civil and criminal cases by evidence of a conviction of an offense except as provided in other paragraphs of the subdivision governing impeachment of criminal defendants and civil parties. The first two sentences of this subdivision are virtually identical to CPL 60.40 and the last sentence authorizing the cross-examining party to explore the nature of the conduct underlying the conviction restates well-settled decisional law. See Prince, Richardson on Evidence § 506 (10th ed.). The subdivision authorizes inquiry into any felony, misdemeanor, or a violation (see Penal Law § 10.00(1)), of which the witness has been convicted.**

**Under present law in New York, in civil cases, CPLR 4513 provides that a witness may be impeached by proof of a conviction of a "crime," i. e., a felony or misdemeanor. See *Able Cycle Engines, Inc. v. Allstate Insurance Co.*, 84 A.D.2d 140, 445 N.Y.S.2d 469 (2d Dep't 1981); *Guarisco v. E. J. Milk Farms*, 90 Misc. 2d 81, 393 N.Y.S.2d 883 (N.Y.C. Civil Ct. Queens Co. 1977); McLaughlin, *N.Y. Trial Practice*, N.Y.L.J., December 12, 1980, p. 1, col. 1. In criminal cases, a witness may be impeached by proof of a conviction of an "offense," which is a broader term than "crime" and includes conviction of a violation, e.g., harassment. See CPL 60.40; *People v. Gray*, 41 A.D.2d 125, 341 N. Y.S.2d 485 (3d Dep't 1973), *aff'd*, 34 N.Y.2d 903, 359 N.Y.S.2d 286 (1974), *cert. denied*, 419 U.S. 1055, 95 S.Ct. 637 (1974). The Code continues the rule in criminal cases and, in the interest of**

**uniformity, conforms the rule in civil cases to that followed in criminal cases.**

Under the subdivision, the cross-examining party may not only elicit the fact of the conviction from the witness, but also prove it by public record if the witness denies the conviction or answers equivocally. Thus, a denial by the witness of a conviction does not preclude the examiner from proving it. *See* Prince, Richardson on Evidence § 506 (10th ed.). Moreover, as is the case under present law, the examining party may inquire into the factual circumstances underlying the conviction even if the witness acknowledges the conviction. *See id.*

(b) (1) Accused in criminal cases.

Subparagraph (b)(1) continues present decisional law which requires a balancing standard with respect to testifying defendants in criminal cases but does not require any balancing with respect to other defense or prosecution witnesses. *See People v. Ocasio*, 47 N.Y.2d 55, 416 N.Y.S.2d 581 (1979); *People v. Allen*, 50 N.Y.2d 898, 430 N.Y.S.2d 588 (1980), *affirming on the opinion below*, 67 A.D.2d 558, 416 N.Y.S.2d 49 (2d Dep't 1979). *See People v. Sandoval*, 34 N.Y.2d 371, 376, 357 N.Y.S.2d 849, 854-855 (1974). Under the balancing standard, convictions relevant to impeach the accused witness are those which demonstrate a willingness to place self-interest ahead of principle or society. *Id.* at 377, 357 N. Y.S.2d at 855. If that standard is satisfied a court may preclude inquiry only if the prejudicial effect of the evidence so far, *i. e.*, substantially, outweighs the probative worth of the evidence on the witness's credibility. *Id.* at 376, 378, 357 N.Y.S.2d at 856. The subdivision also recognizes judicial discretion to limit inquiry into the facts underlying the offense or even the name of the crime. This practice known as the *Sandoval* compromise conforms to cases decided in each of the four judicial departments. *See People v. Lotz*, 145 A.D.2d 900, 538 N.Y.S.2d 706 (4th Dep't 1988); *People v. Johnson*, 137 A.D.2d 719, 524 N.Y.S.2d 375 (2d Dep't 1988); *People v. Bostwick*, 92 A.D.2d 697, 460N.Y.S.2d 626 (3d Dep't 1983); *People v. Hicks*, 88 A.D.2d 519, 450 N.Y.S.2d 15 (1st Dep't 1982); *see also People v. Bermudez*, 98 Misc. 2d 704, 414 N.Y.S.2d 645 (Sup. Ct. N.Y. Co. 1979).

Under present law, the *Sandoval* rule is limited to cross-examination by the prosecutor and may not be used to limit cross-examination by a codefendant. *See People v. McGee*, 68 N.Y.2d 328, 508 N.Y.S.2d 927 (1986). Still, under the subdivision a court has discretion, even with respect to crossexamination by a codefendant, to assure that inquiry is relevant for the purposes of attacking credibility and not simply to show propensity. *Accord People v. Williams*, 142 A.D.2d 310, 536 N.Y.S.2d 814 (2d Dep't 1988), *leave to appeal denied*, 73 N.Y.2d 1023, 541 N.Y.S.2d 778 (1989); *see also* CE 607. Even with respect to prosecution and defense witnesses, other than

**a defendant, there exist limitations on cross-examination. *See, e.g.,* CE 412, 413, 609(a), 611(a).**

The subdivision also provides, as does present law (*see* CPL 240.43), for notice to a defendant and a pretrial determination of the *Sandoval* motion if the defendant so requests.

(b) (2) Civil cases.

This paragraph changes the law and permits the impeachment use of a violation in the cross-examination of a testifying civil party to conform the civil practice with the rule governing cross-examination of criminal defendants. *See* Comment to subdivision (a), *supra*. The paragraph also makes clear that the section 403 balancing test applies to the parties in civil cases. *Cf Green v. Bock Laundry*, 490 U.S. 504, 109 S.Ct. 1981 (1989). There is no authoritative decisional law adopting a balancing test with respect to civil parties but there seems little reason to treat the civil party different than the criminal defendant especially given the vast judicial discretion governing the extent and scope of cross-examination. *See* Prince, Richardson on Evidence § 500 (10th ed.). The self-interest standard governing cross-examination of a criminal defendant may well be appropriate with respect to testifying parties on the civil side. *See Evans v. Wilson*, 133 Misc. 2d 1079, 509 N.Y.S.2d 296 (N.Y.C. Civil Ct. 1986). With respect to witnesses in a civil case, other than a party, in addition to the relevance requirement of the general rule in subdivision (a), there exist other limitations on cross-examination. *See, e.g.,* CE 611(a).

(c) Convictions more than 15 years old.

Subdivision (c) provides that if more than fifteen years have elapsed from the date of conviction, the conviction cannot as a general proposition be used for impeachment purposes. Such a conviction can be used only if a party who wishes to offer it gives sufficient notice to the other parties to the litigation, and the court then determines that the probative worth of the conviction or the witness's truthfulness "substantially outweighs" its prejudicial impact. This time limitation is based upon the assumption that after such an extended period of time, the conviction has lost much of its probative value. *See People v. McCleaver*, 78 Misc. 2d 48, 354 N.Y.S.2d 847 (Sup. Ct. N.Y. Co. 1974); Ladd, *Credibility Tests—Current Trends*, 89 U. Pa. L. Rev. 166 (1940). The exception is provided for those situations where the general assumption does not apply. Still, as the court said in *People v. Sandoval*, 34 N.Y.2d at 377, 357 N.Y.S.2d at 855, *supra*; "Commission of perjury on 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." Nothing in this subdivision would lead to a different result for

convictions with such a high probative value.

Present law does not impose a time limitation regarding the use of convictions and, as noted, *Sandoval* strongly suggests that with respect to certain crimes there should be no time limit, a result that would also be true under this subdivision. Several decisions, however, can be read to suggest that there should be such a time limit with respect to other crimes. Compare *People v. Caviness*, 38 N. Y.2d 227, 379 N. Y.S.2d 695 (1975) (gun possession conviction over 20 years old excluded), with *People v. Mackey*, 49 N.Y.2d 274, 425 N.Y.S.2d 288 (1980) (petty larceny and disorderly conduct convictions over ten years old admitted). In an analogous situation, the second felony offender statute, Penal Law § 70.06, provides that a ten-year-old conviction computed by a procedure similar to that set forth in the subdivision, may not be used for the purpose of imposing additional punishment.

(d) Pardons and vacated convictions on grounds of innocence.

Subdivision (d) provides that a pardon, vacated conviction, "or other equivalent procedure" resting upon a determination that a convicted person is innocent, renders the conviction inadmissible for impeachment purposes. The desirability of this rule has been well stated by one commentator: "If the law is correct in its assumption that a convicted felon is not to be trusted, does he become more trustworthy for having been pardoned? . . . [T]he only logical approach to the problem must be based on the distinction between a pardon for innocence and other pardons. If the pardon was granted because the prisoner had political influence, or was a model prisoner, or behaved bravely in a prison fire, the pardon should not affect his credibility at all. The damage to his credibility . . . is not a legal consequence of the conviction; the conviction is merely evidence that he is untrustworthy, a fact not wiped out by the pardon. On the other hand, if the pardon was granted for innocence, the whole presumption falls. It is only the man guilty of crime who is presumed untrustworthy; if he was not guilty, he has no blot on his credibility." Weihofen, *The Effect of a Pardon*, 88 U. Pa. L. Rev. 177, 182-83 (1939).

(e) Sealed and nullified convictions, youthful offender, and juvenile delinquency adjudications.

Subdivision (e) prohibits inquiry into a sealed and nullified conviction, adjudication as a youthful offender under Article 720 of

the Criminal Procedure Law, or an adjudication as a juvenile delinquent under article three of the family court act or adjudication as a person in need of supervision under article 7 of the family court act. The limitation on sealed and nullified convictions may be a change in present law that has not yet fully addressed the issue. This change is, however, consistent with present law which, like the Code, prohibits a witness from being impeached by evidence of youthful offender, juvenile delinquency and PINS adjudications, although examination into the acts underlying the adjudications is permissible. *See People v. Cook*, 37 N.Y.2d 591, 376 N.Y.S.2d 110 (1975); *People v. Rahming*, 26 N.Y.2d 411, 311 N.Y.S.2d 292 (1970); *People v. Vidal*, 26 N.Y.2d 249, 309 N.Y.S.2d 336 (1970); Prince, Richardson on Evidence § 506 (10th ed.). Cross-examination is subject to the limitations in section 608.

(f) Pendency of an appeal.

Subdivision (e) provides that pendency of an appeal does not render evidence of a conviction inadmissible for impeachment purposes if the evidence is otherwise admissible under the provisions of CE 609. This rule rests upon a presumption of the correctness attending judicial proceedings. The pendency of an appeal is, however, a qualifying fact which may be brought out at the trial.

§ 610. Evidence of religious beliefs or opinions

- Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature credibility is impaired or enhanced.

Comment

This section prohibits the use of evidence of religious beliefs or opinions when offered for the purpose of showing that the witness's credibility is thereby impaired or enhanced. The underlying theory of the section is that inquiry into religious beliefs or opinions is not sufficiently probative of the credibility of a witness when considered in light of the potential for undue prejudice. *See McCormick* § 48 (3ded.); Note, *Evidence—Impeaching Witness by Showing Religious Belief*, 9 N.C.L. Rev. 77 (1930). Additionally, the section reflects deference to First Amendment principles and privacy concerns.

*See Berger & Weinstein*, 3 Weinstein's Evidence H 610(01).

The section does not bar inquiry into religious beliefs or



opinions for the purpose of showing interest or bias because of them. For example, if a church is a party to the action, it is permissible to show that a witness is a member of the church. This evidence would go to show bias.

Section 610 codifies present law. *See Brink v. Stratton*, 176 N.Y. 150 (1903); Prince, *Richardson on Evidence* § 387 (10th ed.); Fisch, *Evidence* § 464 (2d ed.). *Cf. People v. Wood*, 66 N.Y.2d 374, 390 N.Y.S.2d 848 (1985).

§ 611. Mode and order of examination and presentation

(a) Control by court. The court shall exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make the examination and presentation effective for the ascertainment of the truth; (2) avoid prolonging the trial to an unreasonable extent without any corresponding advantage to the examining party; and (3) protect witnesses from harassment, humiliation or danger. Cross-examination may be limited under

paragraphs two and three of this subdivision only if the probative value of that cross-examination is substantially outweighed by the interest in limiting cross-examination.

(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court may, in the exercise of discretion, permit inquiry into additional matters as if on direct examination.

(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness's testimony. Ordinarily, leading questions should be permitted on cross-examination. When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, or when a witness turns hostile, examination may be by leading questions.

#### Comment

##### (a) Control by court

Subdivision (a) provides generally for the exercise of reasonable control by the court over the mode and presentation of evidence. It codifies the traditional role of the court regarding the mechanics of the trial process, and the method and order of examining witnesses and presenting evidence. *See People v. Parks*, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976); Prince, Richardson on Evidence § 459 (10th ed.). Additionally, the subdivision specifies three general principles which should guide the court in its exercise of "reasonable control." The first limitation to assure that the examination and presentation is effective to ascertain the truth and the second limitation on the unreasonable prolonging of the trial without corresponding advantage to the examining party restate present law. *See Feldsberg v. Nitschke*, 49 N.Y.2d 636, 643, 427 N.Y.S.2d 751, 755 (1980); *People v. Davis*, 43 N.Y.2d 17, 27, 400 N.Y.S.2d 735, 740 (1977), *cert. denied*, 435 U.S. 998, 98 S. Ct. 1653 (1978); *Matter of Fried el v. Board of Regents*, 296 N.Y. 347, 351, 73 N.E.2d 545, 548 (1942). The paragraph (3) limitation on the harassment, humiliation or endangerment of a witness also reflects present law. *See People v. Stanard*, 42 N.Y.2d 74, 84, 396 N.Y.S.2d 825, 831-832 (1977). To protect the right of cross-examination, however, the subdivision, as does present law {*see, e.g., id.*}, requires the court to balance the probative value of the cross-examination against its unreasonably prolonging the trial without any corresponding advantage to the examining party, or its harassing, humiliating or endangering nature and to preclude questions only when their probative value is substantially

outweighed by these other concerns. *See id.*; *see also* CE 403; *but see* CE 413. In this context, probative value relates to both credibility and the material issues in the case.

(b) Scope of cross-examination.

Subdivision (b) provides that generally the scope of cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. Consistent with subdivision (a) and the court's power to control the order of proof, the subdivision recognizes that the court may permit a broader scope of cross-examination in an appropriate case. However, inquiries into matters which were not the subject of direct examination shall be treated as if originating from direct examination. The subdivision codifies present practice. *See Friedel v. Board of Regents*, 296 N.Y. 347, 73 N.E.2d 545, *supra*; Prince, Richardson on Evidence § 490 (10th ed.); Fisch, Evidence § 343 (2d ed.).

The subdivision (b) must be read in conjunction with other sections of the Code of Evidence which place restrictions on the scope of cross-examination. *See* CE 401; 403; 410; 412; 413; 608; 609; 610; 611(a); 613.

(c) Leading questions.

Subdivision (c) governs the use of leading questions. A question is leading when it "puts into a witness' mouth the words that are to be echoed back, or plainly suggest the answer which the party wishes to get from him." *People v. Mather*, 4 Wend. 229, 247 (1830). Whether a question is leading turns not only on the form of the question, but also the context in which it is posed, the tenor of the testimony already introduced, and the tone of the examiner's voice. *See* Fisch, Evidence § 331 (2d ed.).

The first sentence of subdivision (c) provides that whether a witness may be asked a leading question rests in the court's discretion. It codifies present law. *See Downs v. New York Central R.R. Co.*, 47 N.Y. 83 (1871); Prince, Richardson on Evidence § 478 (10th ed.).

The second sentence states that leading questions "should not" be used on direct examination "except as may be necessary to develop" the witness's testimony. It is phrased as a suggestion to the court in the exercise of the discretion granted in the first sentence of the subdivision. Three reasons have been expressed for the general rule that a witness may not be led on direct examination: "[F]irst, that the witness is presumed to have a bias in favor of the party calling him; secondly, that the party calling a witness, knowing what the witness may prove, might by leading

bring out only that portion of the witness' story favorable to his own case; and, thirdly, that a witness, intending to be entirely fair and honest, might assent to a leading question which did not express his real meaning. . . ." Denroche, *Leading Questions*, 6 Crim. L. Q. 21, 22 (1963-64). Examples of when leading questions will be appropriate under this provision are when the witness is a child or a mentally or verbally handicapped adult or is confused; when the witness's recollection is exhausted;

and for undisputed preliminary matters. The provision is consistent with present practice. *See* Prince, Richardson on Evidence §§ 482, 484 (10th ed.).

The third sentence of the subdivision provides that leading questions "ordinarily" should be permitted on cross-examination. It, too, is phrased as a suggestion to the court in the exercise of the discretion granted in the first sentence of the subdivision. The word "ordinarily" is used in order to provide a basis for prohibiting the use of leading questions where a true cross-examination is not involved, as where a party is being examined by his own counsel after having been called to the stand by the opposing party, and to indicate that in all other instances the use of leading questions on cross-examination should be permitted. The provision is consistent with present practice. *See* Prince, Richardson on Evidence § 485 (10th ed.).

The last sentence provides that when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, or when a witness turns hostile, leading questions may be used. It is consistent with present practice. *See* *Becker v. Koch*, 104 N.Y. 394 (1887); *Cornwell v. Cleveland*, 44 A.D.2d 891, 355 N.Y.S.2d 679 (1st Dep't 1974); *Matter of Arlene W. v. Robert D.*, 36 A.D.2d 455, 324 N.Y.S.2d 333 (1971); Fisch, *Evidence* § 331 (2d ed.). Whether a witness is hostile is to be determined by the court, according to its impressions of the demeanor of the witness upon the trial, taking into consideration the relation of the witness to the party calling him and any other circumstances which might induce him to withhold testimony. *See* 3 Wigmore, *Evidence* §§ 769, 774 (Chadbourn rev. 1970); Prince, Richardson on Evidence § 483 (10th ed.). The underlying rationale is that in the enumerated instances the danger inherent in the use of leading questions when put to friendly witnesses is absent. *Id.*

#### § 612. Writing or object used to refresh memory

(a) While testifying. Any writing or object may be used by a witness to refresh the witness's memory while testifying. If, while a witness is testifying, a writing or object is used by the witness to refresh the witness's own memory, an adverse party is entitled upon request,

subject to subdivision (c) of this section, to inspect the writing or object, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness.

(b) Before testifying. If a witness, immediately before testifying, uses a writing or object to refresh the witness's memory solely for the purpose of testifying, unless the court determines that the interests of justice require otherwise, an adverse party is, subject to subdivision (c) of this section, entitled upon request: (1) to have the writing or object produced at the trial, proceeding, or hearing; (2) to inspect it; (3) to cross-examine the witness thereon; and (4) to introduce in evidence those portions which relate to the testimony of the witness.

(c) Claims of privilege or irrelevance. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine it in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objection shall be preserved and made available to the appellate court in the event of an appeal. If it is claimed that the writing or object contains privileged communications or matters, or that use of a writing or object to refresh recollection before testifying is privileged and thus not subject to cross-examination, the court shall rule on any claim of privilege raised.

(d) Failure to produce. If a writing or object is not produced or delivered pursuant to order under this section, to remedy such failure of production or delivery, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

#### Comment

##### (a) While testifying.

The first sentence of subdivision (a) codifies present law which provides that if a witness had personal knowledge of a relevant fact, but while testifying has difficulty in recalling it, the witness may use any writing or object without restriction as to authorship, guaranty of correctness, or time of making to stimulate recollection, and may thereafter testify to the fact from memory. *See McCarthy v. Meaney*, 183 N.Y. 190 (1905); *Howard v. McDonough*, 77 N. Y. 592 (1879); *Huffv. Bennett*, 6 N.Y. 337 (1852); *People v. Gold/eld*, 60 A.D.2d 1, 400 N.Y.S.2d 229 (4th Dep't 1977); Prince, Richardson on Evidence § 466 (10th ed.); Fisch, Evidence § 332 (2d ed.); McCormick, Evidence § 9 (3d ed.). Whether the witness's memory is unclear, and if so, whether the writing or object is likely to refresh it, is for the court to determine pursuant to CE 104(b). *See Morris v. New York City Ry. Co.*, 91 N.Y.S. 16 (Sup. Ct. App. Term 1904); McCormick, Evidence § 9 (3d ed.). Furthermore, the court may under CE 403 "decline to permit the use of the [writing or object] where [it] regards the danger of undue suggestion as outweighing the probable value." McCormick, Evidence § 9 (3d ed.). If a witness's recollection is not refreshed by the use of a particular memorandum or record, the memorandum or record may be admissible if it satisfies the requirements of CE 803(c)(4) ("recorded recollection").

The second sentence of the subdivision provides that an adverse party has the right, subject to subdivision (c), to inspect the writing or object used for refreshing recollection and to use it on cross-examination of the witness. The provisions of the second

sentence codify present law. *See People v. Gezzo*, 307 N.Y. 385, 121 N.E.2d 380 (1954); *People v. Reger*, 13 A.D.2d 63, 213 N.Y.S.2d 298 (1st Dep't 1961); Prince, Richardson on Evidence § 467 (10th ed.); Fisch, Evidence § 333 (2d ed.).

"Adverse party" as used in the subdivision refers to a party adverse to the party who has sought to refresh the witness's recollection. The procedure set forth is designed to afford protection against abuse. As one court has observed: "[I]f the witness cannot be compelled to produce it, he might use documents made for him by the party calling him, of the accuracy of which he knows nothing. . . . 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." *Tibbetts v. Sternberg*, 66 Barb. 201, 202-203 (1870). Additionally, the adverse party may introduce in evidence those portions of the writing or object "which relate to the testimony of the witness." This provision permits the writing or object to be introduced in order to shed light upon the credibility of the witness. *See McCormick*, Evidence § 9 (3d ed.); 3 Wigmore, Evidence § 763 (Chadbourn rev. 1970). It does not mean that the writing or object is to be given substantive effect in every instance. Whether the writing or object may be used substantively depends upon whether it is otherwise admissible.

(b) Before testifying.

Subdivision (b) provides that the right given an adverse party to inspect and introduce a writing or object used by a witness to refresh his recollection may also extend to a writing or object used by a witness immediately before testifying, even though the writing or object was not used while the witness was testifying. Unlike subdivision (a), however, an adverse party is not automatically entitled to inspect and introduce such writing or object, but may do so only if the "court determines that the interests of justice require." Present law governing the production and inspection of writing or objects used before trial by an adverse party is unclear, although the rule seems to be accepted in civil cases. *See Prince*, Richardson on Evidence § 467 (10th ed.); Fisch, Evidence § 333 (2d ed.).

The rationale justifying the cross-examiner's rights to inspect and use a writing or document used to refresh the witness's recollection while testifying is in large part equally applicable to a writing or document used by the witness to refresh recollection immediately before taking the witness stand. *See McCormick*, Evidence § 9 (3d ed.); Prince, Richardson on Evidence § 467 (10th

ed.); 3 Wigmore, Evidence § 762 (Chadbourn rev. 1970). Indeed, as one commentator has observed: “The dangers attendant on refreshing recollection are even more pronounced before trial when there is no bar against leading questions, no predetermined order in which questions must be asked, and no limitations on the kind of materials a prospective witness may be shown. By allowing a searching inquiry on cross-examination of the process by which the witness reached his [or her] present testimonial knowledge—other than the stock question ‘Did you discuss this case with anyone?’—the witness may be better



enabled to separate memory from suggestion. In addition to allowing the cross-examiner to test whether the witness has present knowledge, whether discrepancies exist between his testimony and the writing, and whether the writing is what the witness claims it to be, the opportunity to ascertain which writings the witness consulted prior to testifying may suggest an entirely new train of associations to counsel that may enable [counsel] to cross-examine along otherwise unsuspected avenues." Berger & Weinstein, 3 Weinstein's Evidence ¶ 612[01].

It should be noted that the rule is limited to refreshing recollection immediately before trial solely for the purpose of testifying and does not include the pretrial use of documents for purposes such as general case preparation.

Moreover, the right accorded under this subdivision is not absolute, as is the right accorded under subdivision (a), for refreshing recollection during trial. Flexibility is necessary, for example, in a case in which the witness has reviewed a considerable number of documents, or when the attorney might not have immediate access to all of the materials reviewed by the witness prior to trial. Of course, ordering a brief delay to secure the documents is well within the discretion of the trial court. Additionally, discretion is necessary in order to prevent the adverse party from embarking on a "roving tour" through the other party's files. *See People v. Gissendanner*, 48 N.Y.2d 543, 551, 423 N.Y.S.2d 893, 898 (1979). Furthermore, the grant of discretion gives the court the ability to assess properly a claim that the writing or object of which production and inspection is sought is exempt from discovery under CPL 240.10(2), (3) or CPLR 3101(c), (d), *i.e.*, "attorney's work product," "material prepared for litigation," and thus should not be ordered produced under this subdivision. In resolving such a claim, the court should decide whether the nature of the privilege absolutely bars any cross-examination about either the material or the act of refreshing memory and if there is no absolute bar, the court should weigh the significance of the testimony, the availability of other evidence for impeachment purposes, and the extent to which the witness consulted or relied on the writing or object.

(c) Claim of privilege or irrelevance.

The first sentence is intended to make clear that the provisions of this section cannot be read to override a valid claim that the writing or object should not be produced because it is protected from disclosure by a privilege. *See* Comment to CE 102(c). Whether a privilege is applicable is for the court to determine

pursuant to CE 104(b).

The second sentence recognizes that when a writing or object has been used to refresh the memory of a witness, whether before or while testifying, the adverse party's right of inspection extends only to those portions of the writing which are related to the subject matter of the witness's testimony. Thus, the trial court, when so requested, is to inspect the writing *in camera*, and to excise from it any portions "not so related." For purposes of review, any portions withheld over objection shall be "preserved" and "made available" to the reviewing court.

The subdivision does not preclude the inspection of a writing or object used by a witness to refresh recollection while testifying which would be exempt from discovery under CPL 240.10(2), (3) or CPLR 3101(c)(d), *i.e.*, "attorney's work product," "material prepared for litigation." In this situation a party should not be able to rely on those provisions in order to protect from inspection materials which it has used before the trier of fact. *Cf. United States v. Nobles*, 422 U.S. 225, 242-54, 95 S.Ct. 2160, 2172-2178 (1975) (White, J., concurring). On the other hand, it is to be noted that when a witness uses such a writing or object to refresh recollection before trial, the court may bar inspection. *See* Comment to subdivision (b) Before testifying, *supra*.

**(d) Failure to produce.**

This subdivision directs the court and parties to section 107 for the remedy when there is a failure to comply with the requirements of the section.

§ 613. Prior inconsistent statement of witness

(a) Examining witness concerning prior inconsistent statement. In examining a witness concerning a prior inconsistent statement made by such witness, whether written or not, the statement should be shown or its contents disclosed to such witness at that time.

(b) Extrinsic evidence of prior inconsistent statement of witness. Except when the interests of justice otherwise require, extrinsic evidence of a prior inconsistent statement by a witness is not admissible unless the witness is first afforded an opportunity to explain or deny the statement and the opposing party is afforded an opportunity to interrogate the witness thereon. This provision does not apply to admissions of a party-opponent as defined in subdivision (b) of section 803 of this chapter.

(c) Impeachment in a criminal case of own witness by proof of contradictory statement.

(1) Testimony tending to disprove the calling party's case. When, upon examination by the calling party, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of the party who called the witness, that party may introduce evidence that the witness has previously made a statement contradictory to his or her testimony in a written statement signed by the witness, a statement under oath or a statement recorded on a videotape, audiotape or their technological equivalent.

(2) **Admissible only for impeachment.** Evidence concerning a prior contradictory statement introduced pursuant to paragraph one of this subdivision may be received only for the purpose of impeaching the credibility of the witness with respect to the witness's 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.

(3) **Refreshing recollection by disclosing contents prohibited.** When a witness has made a prior signed or sworn statement, or a statement recorded on a videotape, audiotape or their technological equivalent, contradictory to the witness's present testimony in a criminal proceeding upon a material issue of the case but that testimony does not tend to disprove the position of the party who called the witness and elicited that testimony, evidence offered by that party that the witness made that prior statement is not admissible, and such party may not use that prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts.

#### Comment

This section governs foundation requirements for the introduction of prior inconsistent statements which are made by witnesses who have testified before the court, and which are admissible either as impeachment evidence, *see* CE 607(a), or as substantive evidence. *See* CE 803(a)(1).

#### (a) Prior inconsistent statements of a witness.

Subdivision (a) provides that when a witness is examined concerning a prior inconsistent statement, whether written or not, this statement should be shown or its contents disclosed to the witness at the time of the examination. This provision continues present law, which requires disclosure of the statement before the witness can be cross-examined concerning it. *See Larkin v. Nassau Electric R.R. Co.*, 205 N.Y. 267 (1912); Prince, Richardson on Evidence § 501 (10th ed.); Fisch, Evidence §§ 477, 478 (2d ed.). In continuing

present law, the suggestion of earlier code drafts to change the law has been rejected. The rejection is based on the absence of any reason to change present law.

(b) Extrinsic evidence of prior inconsistent statements.

Subdivision (b) provides that, with two exceptions discussed *infra*, extrinsic evidence of a witness's prior inconsistent statement is not admissible unless the witness is first afforded an opportunity to explain or deny the statement and the opposing party has an opportunity to question the witness thereon. The provisions of the subdivision codify present law. *See People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 344, *on remand*, 67 A.D.2d 737, 413

N.Y.S.2d 279 (1978); *Larkin v. Nassau Electric R.R. Co.*, 205 N. Y. 267 *supra*, Prince, Richardson on Evidence § 502 (10th ed.); Fisch, Evidence §§ 477, 478 (2d ed.).

The subdivision continues the present practice of providing the trial court discretion to dispense with the foundation requirement in the interest of justice which usually means that there exists in a witness's testimony an equivalent substitute for the foundation question. *See, e.g., People v. Bell*, 45 A.D.2d 362, 363, 357 N.Y.S.2d 539, 541 (1st Dep't 1974), *aff'd on other grounds*, 38 N.Y.2d 116, 378 N.Y.S.2d 686 (1975); *People v. Dadiille*, 14 A.D.2d 554, 218 N.Y.S.2d 156 (2d Dep't 1961). It should be noted that even assuming a proper foundation, the extrinsic proof of a prior inconsistent statement is limited by section 607 which prohibits extrinsic proof of collateral matters affecting only the credibility of a witness that has no direct bearing on the main issue or questions such as bias and the like. *See* CE 608(b)(3).

Generally, the subdivision exempts from its requirements inconsistent statements of a party opponent as defined in CE 803(b), since these statements may be admissible as admissions whether or not the party is a witness.

(c) Impeachment of own witness in  
a criminal case by  
contradictory statement.

Subdivision (c) restates virtually verbatim CPL 60.35 which prohibits a party in a criminal case from impeaching its own witness with a prior inconsistent statement unless the witness has given direct or redirect testimony affirmatively harmful to the calling party. *See People v. Fitzpatrick*, 40 N.Y.2d 44, 386 N.Y.S.2d 793 (1976); Prince, *Evidence, 1977 Survey of N. Y. Law*, 28 Syracuse L. Rev. 475, 484-85 (1977). The one change from present law is that the impeaching material has been expanded to include audio or video recall statements or their technological equivalent. Under present law only signed written statements or statements made under oath may be used for impeachment of a witness who disproves the calling party's case. Like those statements, the audio or video statement leaves no room to doubt that the statement was made and the trier of fact should be entitled to hear it to evaluate a witness's credibility even if, which is doubtful, the audio or video statement is not quite as reliable as the signed writing or the statement under oath.

§ 614. Calling and examination of witnesses by court

(a) Calling by court. When authorized by law, the court may, on its own motion or at the request of a party, call witnesses. Before calling a witness on its own, the court must afford the parties reasonable notice and the opportunity to be heard outside of the presence of the jury. Unless both sides agree, the jury shall not be told that a witness has been called by the court. All parties are entitled to cross-examine witnesses called by the court.

(b) Examination by court. When necessary to aid the jury in understanding the legal and factual issues, the court may examine witnesses, whether called by itself or by a party, provided that the court: should not generally conduct extended examination of a witness, should not assume the role of an advocate, and should refrain from exhibiting hostility, partiality, or bias.

(c) Objections. Objections to the calling of witnesses by the court or to examination by it may be made at the time or at the next available opportunity when the jury is not present.

#### Comment

This section governs the calling and examination of witnesses by the trial judge and objections by the parties to such action. It codifies present law. *See People v. Yut Wat Tom*, 53 N.Y.2d 44, 439 N.Y.S.2d 896 (1981); Prince, Richardson on Evidence § 514 (10th ed.); Fisch, Evidence § 345 (2d ed.).

#### (a) Witnesses called by the trial judge.

Subdivision (a) specifies the procedure to be used when a judge calls a witness *sua sponte* or at the request of a party. The subdivision is not the source of the judge's power to call a witness. That power, if it exists, must derive from a source outside of the code and is limited to rare and compelling situations. *See Comment to 706, infra*. The subdivision also provides that if a judge does call a witness, all parties are entitled to cross-examine the witness. The calling of such a witness by the court enables all parties, including one whose cause may be aided by the testimony to be given, to keep a certain distance. The right to cross-examine a judge-called witness, which this section secures to all parties, helps in this respect: it means that leading questions may be used not only to impeach the witness, but also to draw out testimony. 3 Louiseil and Mueller, Federal Evidence, § 364.

#### (b) Examination by the court.

Subdivision (b) authorizes a trial judge to question any witness, whether called by a party or by the court itself. It

recognizes that the role of the trial judge is not that of automaton. Rather, it reflects the trial judge's "vital role in clarifying confusing testimony and facilitating the orderly and expeditious progress of the trial." *People v. Yut Wai Tom*, 53 N.Y.2d 44, 57 , 439 N.Y.S.2d 896, 903-904, *supra*; *see also* Standard 6-1.1(a) of the ABA Standards Relating to the Administration of Criminal Justice (Special Functions of the Trial Judge). Nonetheless and just as important, the section recognizes and cautions as has our highest court, that judicial questioning is the exception, not the rule, and that the power to question must be exercised sparingly, without

partiality, bias, or hostility, as excessive interference or the suggestion of an opinion on the part of the judge might well be prejudicial to a party. *See People v. Yut Wai Tom, supra; People v. DeJesus, 42 N.Y.2d 519, 399 N.Y.S.2d 196 (1977); People v. Carter, 40 N.Y.2d 933, 389 N.Y.S.2d 835 (1976); People v. Bell, 38 N.Y.2d 116, 378 N.Y.S.2d 686 (1975).*

(c) **Objection to judicial participation.**

Subdivision (c) sets forth the procedure to be followed by a party who seeks to object either to the judge's calling of a witness or to questions posed by the court to witnesses. It provides an exception to the usual requirement that objections must be made at the earliest possible time, as counsel may object to the court's action at the next available opportunity when the jury is not present as well as at the time of the actions. The option is provided in order that counsel is not placed in the awkward position of protesting in front of the jury action by the court, and because it cannot be expected that counsel will make an immediate objection. *See People v. Yut Wai Tom, 53 N.Y.2d at 55, 439 N.Y.S.2d at 902, supra.*

§ 615. Exclusion of witnesses

The court may, or upon request shall, order prospective witnesses excluded so that they cannot hear the testimony of other witnesses. This section does not authorize exclusion of:

- (a) a party who is a natural person except that in a child custody proceeding the court may examine the child out of the presence of the parties;
- (b) an officer or employee of a party, other than the state in a criminal case, which is not a natural person if that officer or employee is designated as the representative of the party by its attorney; or
- (c) a person whose presence the court determines to be necessary to assist the attorney or the party, including the state in a criminal case in the presentation of a party's cause.

**Comment**

This section governs the exclusion of witnesses from the courtroom so that they may not hear the testimony of other witnesses. Under the section, exclusion is mandatory on the request of a party. Additionally, the section authorizes the court to order exclusion on its own initiative. The exclusion of witnesses is designed to prevent falsification and to uncover falsification that has already taken place. *See Prince, Richardson on Evidence § 460 (10th ed.); 6 Wigmore, Evidence §§ 1837, 1838 (Chadbourn rev. 1976).*



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Under the section not all witnesses may be excluded. The section contains three exceptions. First, a judge may not exclude "a party who is a natural person" from the courtroom. This provision is designed to eliminate problems of confrontation and due process which would otherwise arise. *See* N.Y. Const Art. I, § 6. Of course, a party by disruptive conduct may waive the right protected by the statute. *See, e.g., People v. Byrnes*, 33 N.Y.2d 343, 352 N.Y.S.2d 913 (1974). Subdivision (a) recognizes that in child custody cases the court may speak with the child in the absence of parties seeking custody. *See Lincoln v. Lincoln*, 24 N.Y.2d 270, 299 N.Y.S.2d 842 (1969).

Secondly, an officer or employee of a nongovernmental party which is not a natural person designated as its representative by its attorney cannot be excluded. This exemption extends parity of treatment to parties who are not natural persons. *See* Comment, California Evidence Code § 777.

Third, the section prohibits exclusion of "a person whose presence is shown by a party to be essential to the presentation of his cause." This provision has the effect of placing the burden on the party opposing exclusion to convince the court that a particular witness is essential to the presentation of its cause, and, therefore, should be exempted from an exclusion order. This exception will be most frequently involved in the case of expert witnesses, or prosecutorial case agents or officers in a criminal case, although its scope is not so limited.

While under present law a court is authorized to exclude witnesses subject to certain exceptions (*see* Prince, Richardson on Evidence §§ 460, 461 [10th ed.]), the issuance of an order of exclusion is committed to the discretion of the court and is not demandable as of right. *See* Fisch, Evidence § 347 (2d ed.). This section changes present law by making exclusion, if requested, a matter of right. Exclusion as a matter of right is preferable. As observed by Wigmore: "[Exclusion] seems properly to be demandable as of right, precisely as is cross-examination. In the first place, it is simple and feasible. In the next place, it is so powerful and practical a weapon of defense that no contingency can justify its denial as being a mere formality or an empty sentimentality. In the third place, in the case when it is most useful (namely, a combination to perjure), it is almost the only hope of an innocent opponent. After all is said and done, the fact remains (as Sir James Stephen has declared, out of a lengthy experience as a criminal judge) that successful perjury is always a possible feature of human justice. No rule, therefore, should ever be laid down which will by possibility deprive an opponent of the chance of exposing perjury. Finally, it cannot be left with the judge to say

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whether the resort to this expedient is needed; not even the claimant himself can know that it will do . . . service; [the claimant] can merely hope for its success. [The claimant] must be allowed to have the benefit of the chance, if [the claimant] thinks that there is such a chance. To require him to show some probable need to the judge, and to leave to the latter the estimation of the need, is to misunderstand the whole virtue of the expedient, and to deny it in perhaps that very situation of forlorn

hope and desperate extreme when it is most valuable and most demandable." 6 Wigmore, Evidence § 1839 (Chadbourn rev. 1976); cf. *People v. Cooke*, 292 N.Y. 185, 54 N.E.2d 357 (1944); *Levine v. Levine*, 83 A.D.2d 606, 441 N.Y.S.2d 297 (2d Dep't 1981).

The section does not specify the consequences of noncompliance with an exclusion order. The imposition of sanctions is a matter left to case law development.

Finally, this section does not by its terms address such questions as whether a court may bar counsel from informing his witness of other testimony, or prohibit a witness from reading transcripts of another witness's testimony, or bar a witness from conferring with other witnesses in the case. Other than ordering exclusion from the courtroom, the precise manner and extent of the court's power to prevent a witness from learning what another witness testified to cannot be reduced to a simple rule of evidence because of constitutional restrictions and other considerations. Compare *People v. Narayan*, 58 N.Y.2d 904, 906, 460 N.Y.S.2d 503, 504 (1983), with *Geders v. United States*, 425 U.S. 80, 96 S.Ct. 1330 (1976). In this regard, it must be recognized that the section does not preclude the court from taking any further action that the court deems appropriate in the circumstances and which is not otherwise prohibited by law to prevent a witness from learning what transpired in the courtroom. See *Capitol Cab. Corp. v. Anderson*, 194 Misc. 21, 85 N.Y.S.2d 767 (Mun. Ct. Bronx Co. 1949), *tiff'd*, 197 Misc. 1035, 100 N.Y.S.2d 39 (Sup. Ct, App. Term 1st Dep't 1950).

## Section

- 701. Opinion testimony by lay witnesses
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**Comment**

**Article 7 is composed of rules which set forth the conditions under which opinion testimony may be received from both lay and expert witnesses.**

**The article with but slight changes (*see* §§ 701 & 705) continues present law.**

**§ 701. Opinion testimony by lay witnesses**

If the witness is not testifying as an expert, the testimony of the witness in the form of opinions or inferences is limited to those opinions or inferences which are difficult to describe in more concrete terms, rationally based on the perception of the witness, and helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

### Comment

This section provides for the admissibility of opinions or inferences of a witness not testifying as an expert. It states what amounts to a principle of preference: lay witnesses should testify to facts rather than opinions or inferences, although the latter may be allowed when certain requirements are met. The opinion or inference is admissible if: (1) it is difficult to describe in more concrete terms; (2) it is based rationally on the perception of the witness; and (3) it is helpful in understanding the evidence or determining facts in issue. The difficult-to-describe-in-more-concrete-terms requirement reflects the preference for facts rather than opinion but recognizes that lay witnesses are not always able to provide, nor does the subject matter always permit, a simple reiteration of facts, not inferences or opinions. The rational basis requirement means only that the opinion or inference is one which a normal person would form on the basis of the perceived facts. Generally, an opinion of a lay witness is helpful when the witness has formed an accurate impression but cannot describe all of the details upon which that impression is based or, most importantly, when describing all of the details, the witness does not accurately convey the total impression. An opinion of a lay witness will not, however, be helpful when it concerns a matter which is beyond the realm of common experience and which requires the special skill and knowledge of an expert witness. Whether a particular opinion or inference is difficult to express in more concrete terms, rationally based, and helpful, will turn upon the facts of the case. This is a determination to be made by the court pursuant to CE 104(b).

Under this section, the topics upon which lay witnesses may express an opinion are extremely varied and include the appearance of persons or things, identity, the manner of conduct, the texture of objects, degrees of light or darkness, sound, size, weight, distance and an endless number of things that cannot be described factually in words apart from inferences. Also included are speed of a vehicle, the value of personal property, the nature of a substance, the witness's own physical, mental or emotional status, the identity and physical condition of another person including such things as age, height, weight, condition of health, ability to work, suffering, possession of mental faculties, hearing, eyesight, unconsciousness after an accident, and intoxication.

Under present law, lay witnesses must confine their testimony to a report of facts, and may testify in the form of inferences or opinions only when, from the nature of the subject matter, no better or more specific evidence can be obtained. Prince, *Richardson on Evidence* §§ 363 , 366 (10th ed.); Fisch, *Evidence* §

361 (2d ed). Confusion has resulted because this restrictive standard involves not only the difficult task of differentiating between fact and opinion, but, also between opinions which are necessary and those which are not. It has been held, for example, that the lay witness may state a conclusion as to the emotions of another but not that two people appeared to be fond of each other.

*Pearce v. Stace*, 207 N.Y. 506, 101 N.E. 434 (1913); *Blake v. People*, 73 N.Y.

586 (1878). The lay witness may not express an opinion as to the "sanity" of another no matter how long the occasion for personal observation, but the witness is permitted to describe a person's acts and then state whether the actor's conduct and declaration seemed "irrational." *People v. Pekarz*, 185 N.Y. 470, 78 N.E. 294 (1906). In addition, witnesses may testify that a person appeared to be intoxicated. *See* Prince, Richardson on Evidence § 364, at 33233 (10th ed.).

This section modifies the common law rule. It permits a witness to testify in familiar terms rather than in artificial circumlocutions. This change has been recommended by many judges, lawyers, and scholars. *See* Report of the Commission on the Administration of Justice in New York, Leg. Doc. No. 50, p. 298 (1934); 6 N.Y. Jud. Council Rep., pp. 333-365 (1940); N.Y. Adv. Comm. on Prac. and Proc., 2d Prelim. Rep., Leg. Doc. No. 13, pp. 261-262 (1958); Fisch, Evidence § 363 (2d ed.); Connors, *Lay Opinion Evidence: It's Time to Change Rule on Admissibility*, N.Y.L.J., January 13, 1981, p. 1, col. 2.

There seems no reason to fear that the proposed slightly broader standard of admissibility will lead to unduly conclusory lay opinions. An opinion in the form of a legal conclusion (for example, "he was negligent" or "she is guilty") would be excluded either because it is not difficult to break down the opinion into more concrete terms or because it is not helpful. *Cf.*

*People v. Ciaccio*, 47 N.Y.2d 431, 418 N.Y.S.2d 371 (1979); *People v. Grutz*, 212 N.Y. 72, 105 N.E. 842 (1914).

In sum, CE 701 is a rule of discretion. It replaces the orthodox rule of exclusion with a rule that requires the trial judge, on the basis of the posture of the particular case before him, to decide whether concreteness, abstraction or a combination of both will be most effective in enabling the jury to ascertain the truth and reach a just result. In making this determination, the trial judge should bear in mind that the aim of the rule is to eliminate time-consuming quibbles over objections that would not effect the outcome regardless of how they were decided. The emphasis belongs on what the witness knows and not on how the witness expresses herself or himself. Still, it bears emphasizing that even a lay witness opinion often requires a foundation of knowledge or experience. *See*,

*e.g., People v. Smith, \_\_\_\_\_ A.D.2d \_\_\_\_\_, 557 N.Y.S.2d 789 (4th Dep't 1990); Swoboda v. We Tty Harder, Inc., 128 A.D.2d 862, 513 N.Y.S.2d 781 (2d Dep't 1987); Prince, Richardson on Evidence § 364 (10th ed.).*

§ 702, Testimony by experts, scientific theories, tests and experiments, and psychiatric testimony in certain criminal cases

(a) Testimony by experts. A witness qualified as an expert by knowledge, skill, experience, training, education, or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical, or other specialized knowledge that is beyond the understanding or will dispel misconceptions of the typical trier of fact, thereby helping the trier of fact to understand the evidence or to determine a fact in issue.

(b) Scientific testimony. Testimony concerning scientific matters, or testimony concerning the result of a scientific procedure, test or experiment is admissible provided: (1) there is general acceptance within the relevant scientific community of the validity of the theory or principle underlying the matter, procedure, test or experiment; (2) there is general acceptance within the relevant scientific community that the procedure, test or experiment is reliable and produces accurate results; and (3) the particular test, procedure or experiment was conducted in such a way as to yield an accurate result. Upon request of a party, a determination pursuant to this subdivision shall be made before the commencement of trial.

(c) Psychiatric testimony in certain criminal cases.

(1) Diagnosis and opinion as to defendant's criminal responsibility. 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, such psychiatrist or licensed psychologist 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 the opinion of such psychiatrist or licensed psychologist 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 the diagnosis and opinion of such psychiatrist or licensed psychologist, and may be cross-examined as to any matter bearing on the competency, credibility or the validity of the diagnosis or opinion of such psychiatrist or licensed psychologist.

(2) Use of statements made by defendant in course of examination. Any statement

made by the defendant to a psychiatrist or licensed psychologist during the examination of the defendant by such psychiatrist or licensed psychologist 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. Upon receiving the statement 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.

#### Comment

##### (a) Expert testimony.

This section deals with testimony of a witness testifying as an expert. It sets the standard for the admissibility of such testimony. The section must be read in conjunction with CE 703 , 704, 705, and 901(b)(9).

Under this section two preliminary determinations must be made by the trial court pursuant to CE 104(b); those determinations are that: (1) there is a need for the testimony and (2) it will be helpful to the trier of fact. With respect to need, the subject matter of the testimony must be beyond the understanding of the ordinary juror or dispel misconceptions. This is a codification of present law. *See, e.g., People v. Taylor*, 75 N.Y.2d 277, 552 N.Y.S.2d 883 (1990); *Matter of Nicole V.*, 71 N.Y.2d 112, 524 N.Y.S.2d 19 (1987); *Brown v. Equitable Life Assur. Soc.*, 69 N.Y.2d 675, 512 N.Y.S.2d 12 (1986); *People v. Keindl*, 68 N.Y.2d 410, 509 N.Y.S.2d 990 (1986); *De Long v. County of Erie*, 60 N.Y.2d 296, 469 N.Y.S.2d 611 (1983); *People v. Cronin*, 60 N.Y.2d 430, 470 N.Y.S.2d 110 (1983); *Selkowitz v. County of Nassau*, 45 N.Y.2d 97, 408 N.Y.S.2d 10 (1978); *Dougherty v. Milliken*, 163 N.Y. 527, 533, 57 N.E. 757, 759 (1900); *Fisch*, *Evidence* § 413 (2d ed.). This provision departs from previous code drafts that required only a helpfulness standard. Despite the contrary views of some commentators {*see, e.g., Prince, Richardson on Evidence* § 367 [1985 Supp. Prince & Farrell ed.]; *Capra, Proposed New York Code (Part II)*, N.Y.L.J., May 15, 1990, p. 3, col. 1), a simple helpfulness standard does not seem to be the present law. *See People v. Taylor*, *supra*. Thus, the Code continues a necessity standard in addition to a requirement of helpfulness.

As to whether the matter in question is one on which expert testimony will be helpful, the section is not limited to academic, professional, technical, or scientific areas. Expertise predicated on any reliable basis will suffice. Depending on the facts and circumstances of the case, areas appropriate for expert testimony are as diverse as the following: valuation of property; financial management practices of a corporation; and the meaning of words used by professional gamblers and narcotics traffickers. Nonetheless, where the expert opinion merely tracks the same analytical process of which the trier of fact is hilly capable, it satisfies none of the need requirements of the section and should

be excluded. *See, e.g., People v. Grutz*, 212 N.Y. 72, 105 N.E. 842 (1942) (fire marshal's opinion that fire was arson and not an accident inadmissible to prove fire was deliberately set). Another example are opinions that are nothing more than a judgment on a witness's credibility for which there is no necessity.

*Compare People v. Ciacdo*, 47 N.Y.2d 431, 438-39, 418 N.Y.S.2d 371, 375 (1979), with *People v. Parks*, 41 N.Y.2d 36, 45-53, 390 N.Y.S.2d 848, 856-61 (1976); see also *United States v. Scop*, 846 F.2d 135 (2d Cir. 1988); see generally *Berger*, *The Common Law Approach to an Expert's Opinion About a Witness' Credibility Still Does Not Work*, 55 *Brooklyn L. Rev.* 559 (1989).

The decision to permit expert testimony rests in the sound discretion of the trial judge (*People v. Mooney*, 76 N.Y.2d 827, 560 N.Y.2d 115 [1990]), and the court must exercise that discretion either by permitting or precluding the testimony. See *People v. Cronin*, 60 N.Y.2d at 433, 470 N.Y.S.2d at 112. After determining that there is a need for expert testimony and that it will be helpful, the court must then decide whether the witness called is properly qualified to give the testimony. Without such qualifications, the testimony would not, of course, be helpful to the trier of fact. The section is worded broadly to include, as an expert, anyone with special knowledge or skills. The requisite knowledge or skills may be acquired by formal training or education, for example, medical school, or through on the job work and training, for example, as a mechanic. See *Prince*, *Richardson on Evidence* § 368 (10th ed.). Whether a witness is qualified to testify as an expert rests in the sound discretion of the trial judge but the calling party must be given the opportunity to demonstrate the witness's qualifications. See *Werner v. Sun Oil*, 65 N.Y.2d 839, 493 N. Y.S.2d 125 (1985). It must also be noted that expert testimony may be excluded under CE 403 when the court determines that it would be overly confusing, more prejudicial than probative, or needlessly time consuming. See *People v. Taylor*, 75 N.Y.2d 277, 293, 552 N.Y.S.2d 883, 890-91, *supra*.

The section specifies that the expert "may testify ... in the form of an opinion or otherwise." The expert is thus not required to testify in opinion form. The expert can, for example, give background information or provide data that was obtained as a result of an examination, leaving the trier of fact to draw its own inference or conclusion from the evidence presented. When the testimony is in the form of an opinion or inference, it is not objectionable because the expert does not indicate any particular degree of certainty regarding the opinion or inference. See *Matott v. Ward*, 48 N.Y.2d 455, 459, 423 N.Y.S.2d 645, 646-647 (1979). As long as the expert's "whole opinion" reflects an acceptable level of certainty, the testimony is admissible. See *Sitaras v. Rtcciardi & Sons, Inc.*, 154 A.D.2d 451, 453, 545 N.Y.S.2d 937, 939 (2d Dep't 1989).

(b) Scientific theories, tests and experiments.

Subdivision (b) continues present law, based upon *Frye v. United States*, 293 F. 1013 (D.C. Cir. 1923), governing the admissibility of scientific matters and theories or scientific procedures, tests or experiments and their results. *Compare People v. Taylor*, 75 N.Y.2d at

287, 552 N.Y.S,2d at 886-887, *supra* (rape trauma syndrome admissible) and *Matter of Nicole V.*, 71 NY.2d 112, 524 N.Y.S,2d 19 (1987) (sexually abused child syndrome admissible); *People*

*v. Mem*, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986) (breathalyzer test results admissible), and *Matter of Abe A.*, 56 N.Y.2d 288, 452 N.Y.S.2d 6 (1982) (results of blood grouping tests admissible), and *People v. Allweiss*, 48 N.Y.2d 40, 421 N.Y.S.2d 341 (1979) (identification based on hair analysis admissible) and *People v. Henson*, 33 N.Y.2d 63, 73-74, 349 N.Y.S.2d 657, 662 (1973) (battered child syndrome admissible), with *People v. Hughes*, 59 N.Y.2d 523, 466 N.Y.S.2d 255 (1983) (hypnosis not generally accepted as a valid method to refresh memory), *People v. Campbell*, 73 N.Y.2d 481, 541 N.Y.S.2d 756 (1989) (Dupont ACA not generally reliable for determining blood alcohol content); *People v. Tarsia*, 50 N.Y.2d 1, 427 N.Y.S.2d 944 (1980) (voice stress tests not generally reliable); *Pereira v. Pereira*, 35 N.Y.2d 301, 361 N.Y.S.2d 148 (1974) (reliability of lie detector test not sufficiently established); see also *People v. Castro*, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (1989) (theory under DNA testing is well accepted in scientific community); see generally *Giannelli, The Admissibility of Novel Scientific Evidence*; *Frye v. United States a Half Century Later*, 80 Colum. L. Rev. 1197 (1980). In determining the general acceptance in the scientific community of a scientific test or procedure, the court may rely on legal writings and judicial opinions. See *Matter of Lahey v. Kelly*, 71 N.Y.2d 135, 144, 524 N.Y.S.2d 30, 35 (1987). After a while, the scientific validity underlying some procedures or tests is so firmly established that it need not be established each time the evidence is offered, but the proper and correct operation of the particular device and the reliability of the test results must be established. See *People v. Knight*, 72 N.Y.2d 481, 534 N.Y.S.2d 353 (1988) (radar device).

(c) Psychiatric testimony in criminal cases.

Subdivision (c) restates verbatim CPL 60.55 governing psychiatric testimony in criminal cases involving the defense of mental disease or defect.

### § 703. Bases of opinion testimony by experts

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the trial, proceeding, or hearing. The facts or data need not be admissible in evidence if of a reliable type upon which experts in the particular field reasonably rely in forming opinions or inferences upon the subject or if the facts or data come from a person with personal knowledge who testifies and is subject to cross-examination at trial. The facts or data relied on pursuant to this section do not constitute substantive evidence, unless otherwise admissible as such evidence.

#### Comment

**This section generally codifies present law regarding the sources of underlying facts or data upon which an expert can base an opinion or inference.**

*See Hambsch v. N.Y.C. Transit Authority*, 63 N.Y.2d 723, 725, 480 N.Y.S.2d 195, 196 (1984); *People v. Sugden*, 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974); *Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 322 N.Y.S.2d 665, on remand, 37 A.D.2d 810, 324 N.Y.S.2d 852 (1971); *Weibert v. Hanan*, 202 N.Y. 328, 95 N.E. 688 (1911); *People v. Miller*, 57 A.D.2d 668, 393 N.Y.S.2d 679 (3d Dep't 1977).

An expert may base an opinion or inference on firsthand knowledge of facts. Thus, a physician who examines a patient may testify as to what that physician's observations reveal. The opinion or inference may also be based upon facts presented at trial. For example, the expert may attend the trial and actually observe the presentation of evidence, or the evidence may be conveyed to him by means of a hypothetical question. *See* CE 705. Additionally, an expert may base an opinion or inference on data or facts presented outside of court and by a perception other than his own. For example, a physician may base an opinion on information derived from other physicians and medical reports.

Regardless of how they are perceived, the facts or data need not be admitted or even admissible in evidence. It is required under the section, however, that the facts or data be reliable and of a type relied upon by experts in the particular field when forming inferences or opinions on the subject, and that the reliance in the particular case before the court on the particular subject is reasonable. These requirements provide a check on the trustworthiness of the opinion and its foundation. Pursuant to CE 104(b), the court must determine whether or not reliability and reasonable reliance have been demonstrated. *See Hambsch v. New York City Transit Auth.*, 63 N.Y.2d at 726, 480 N.Y.S.2d at 197, *supra*. In some cases, reasonable reliance may be established by a testifying expert who can explain how similar experts use the data or facts on a regular basis outside of court. In other cases, the court may take judicial notice of what experts rely upon or hear testimony from other witnesses about reliance. The opinion, however, is not admissible if only the expert customarily relies upon the material or it is relied upon only in preparation for litigation. Beyond the record facts from other sources may, however, be relied upon under the section if a witness with personal knowledge of the facts testifies at trial and is subject to cross-examination. *People v. Sugden*, *supra*. With regard to personal knowledge, lack of that knowledge may well render unreliable the statements of a hearsay declarant, upon which the expert has relied. The reliability of other beyond-the-record information is left to judicial determination with the aid of the expert. *See* CE 104(b).

In criminal cases, confrontation problems may arise because the professional reliability standard could be satisfied by an out-of-court statement of a witness who has not testified. When that out-of-court statement deals with scientific or similar material or data, there

is little confrontation concern because an expert, as an expert, absorbs the out-of-court data into his or her own experience and knowledge so that it becomes the expert's own opinion, and that he or she is on the stand subject to cross-examination. This absorption concept simply recognizes that "almost all expert opinion embodies hearsay indirectly, a matter which the courts recognize and accept." McCormick, Evidence § 15, at 41 (3d ed.).

On the other hand, a more serious confrontation question is presented when the out-of-court data relied on by the expert does not require any special expert knowledge for judgment and would have been or was excluded from the record as hearsay. Take, for example, an out-of-court statement of an accomplice who does not testify at trial. With respect to this kind of hearsay, a serious confrontation clause question may be presented, especially if the expert relies exclusively on the statement of the accomplice, and would be unable to render an opinion without such reliance. *Compare People v. Sugden, supra, with United States v. Rollins, 862 F.2d 1282, 1294 (7th Cir. 1988)*. In contrast to the accomplice hypothetical, an expert's out-of-court conversations with family members in a case involving the mental state of the defendant are often an important part of an expert's opinion on mental state and arguably raise less concern.

The Code has not chosen to deal with the confrontation problem simply because a uniform standard seems out of reach in cases calling for *ad hoc* decision making. Nonetheless, trial judges must remain sensitive to the confrontation concern in a number of settings and especially when an expert witness bases an opinion entirely on information from lay persons which is not introduced at trial.

The section also makes clear that beyond-the-record information is admissible only to explain the testifying expert's opinion and is not substantive evidence unless otherwise admissible under an exception to the hearsay rule. *Compare Carlson, Policing the Bases of Modern Expert Testimony, 39 Vand. L. Rev. 577 (1986), with Rice, Inadmissible Evidence as a Basis for Expert Testimony: A Response to Professor Carlson, 40 Vand. L. Rev. 583 (1987)*.

One other aspect of present law is worth noting. A physician who did not treat a party as a patient may not testify on behalf of that party to out-of-court statements made by that party to the physician to support in whole, or in part, the physician's expert opinion. *See Prince, Richardson on Evidence § 287 (10th ed.)*. This rule has been changed by statute in criminal cases involving expert testimony on the insanity defense. *Compare CE 702(c) codifying CPL 60.55, with People v. Hawkins, 109 N.Y. 408, 17 N.E. 371 (1888)*. On the civil side, however, the prohibition retains vitality. *See, e.g., Daliendo v. Johnson,*



147 A.D.2d 312, 320, 543 N.Y.S.2d 987, 992 (2d Dep't 1989); *Deluca v. Kameros*, 130 A.D.2d 705, 515 N.Y.S.2d 819 (2d Dep't 1987); *Nissen v. Rubin*, 121 A.D.2d 320, 504 N.Y.S.2d 106 (1st Dep't 1986). Despite the recent line of cases reflected in this section permitting experts in other contexts to base an opinion upon "professionally reliable" beyond-the-record facts and data, there is no intent to change the common-law prohibition on nontreating physicians testifying to a patient-party's statements that are not of a "reliable type" upon which experts can reasonably rely.

#### § 704. Opinion on ultimate issue

Testimony in the form of an opinion or inference otherwise admissible pursuant to a section of this article is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.

#### Comment

This section provides that an expert or lay witness will not be precluded from giving an opinion merely because the opinion embraces an ultimate fact issue to be determined by the trier of fact. It must be recognized that, under the section, testimony concerning the ultimate issue is permitted only if "otherwise admissible." Thus, lay opinion testimony embracing the ultimate issue must still comply with CE 701 and expert opinion embracing the ultimate issue must comply with CE 702 and, if applicable 703, as well as other appropriate sections, *e.g.*, CE 403. For example, a lay witness may testify whether a person appeared to be intoxicated even if the question of intoxication is an ultimate issue in the case. *See Prince, Richardson on Evidence* § 364, at 332-33 (10th ed.). Ofttimes, an expert opinion on an ultimate issue, including issues of fact simply will not satisfy the general section 702 standard for expert testimony because the jury is fully capable of reaching its own conclusion on the ultimate issue including issues of fact after being supplied with information by the expert and other sources. *See, e.g., People v. Ciacclo*, 47 N.Y.2d 431, 438-39, 390 N.Y.S.2d 848, 856-61 (1970) (excluding testimony that was nothing more than a judgment on a witness's credibility); *Chagoulias v. 240. E. 55th St. Ten. Corp.*, 141 A.D.2d 207, 533 N.Y.S.2d 440 (1st Dep't 1988) (no need for an expert to assess whether color and arrangement of building vestibule was dangerous or defective); *compare People v. Grutz*, 212 N.Y. 72, 105 N.E. 842 (1914) (a fire marshal could not testify that a fire was arson and not an accident), *with People v. Herrera*, 136 A.D.2d 567, 523 N.Y.S.2d 562 (2d Dep't 1988) (incendiary nature of fire established in part, by expert fire-marshal testimony "eliminating all nonsuspect causes") and *People v. Rivera*, 131 A.D.2d 518, 516 N.Y.S.2d 474 (2d Dep't 1987)

(fire marshall properly allowed to testify that investigation had reasonably eliminated all possible "natural" and "accidental" causes of fire without testifying that fire was caused by arson); *cf.* Prince, Richardson on Evidence § 367 (10th ed.). Notably, other sections of the Code expressly recognize the admissibility of both lay and expert testimony that touch on ultimate factual and legal issues. *See* CE 608(b) (character testimony about the truth and veracity of another witness) and 702(c) (expert testimony on insanity defense in criminal case).

The section rejects the common law rule which prohibits witnesses from expressing opinions on ultimate issues. *See 1 Wigmore, Evidence § 1920 (Chadbourn rev. 1974)*. The rationale for the ultimate issue prohibition is said to be that such testimony invades the province of the jury. The justification is unsound since jurors are free to reject opinions and draw their own conclusions. Moreover, difficulty in defining what constitutes an ultimate issue has led to conflicting results. Furthermore, courts uniformly disregard the rule, usually without explanation as to why it should not be applied, when, for example, value, sanity, intoxication, speed, handwriting and identity are in issue. McCormick, *Evidence § 12 (3d ed.)*.

Present New York law seemingly rejects the restriction on expressing an otherwise permissible opinion that might or does embrace the ultimate issue. *See People v. Cronin*, 60 N.Y.2d 430, 470 N.Y.S.2d 110 (1983); *People v. Keindl*, 68 N.Y.2d 410, 422, 509 N.Y.S.2d 790, 796 (1986); *Broun v. Equitable Life Assur. Soc.*, 69 N.Y.2d 675, 512 N.Y.S.2d 12 (1986); *Sitaras v. Ricciardi & Sons, Inc.*, 154 A.D.2d 451, 545 N.Y.S.2d 937 (2d Dep't 1989); *Doukas v. America On Wheels*, 154 A.D.2d 426, 545 N.Y.S.2d 928 (2d Dep't 1989); *but cf. People v. Taylor*, 75 N.Y.2d at 293, 552 N.Y.S.2d at 890-91, *supra*. Older cases expressly rejected the ultimate issue restriction. *See Van Wycklen v. Brooklyn*, 118 N.Y. 424, 429, 24 N.E. 179, 180-181 (1980). Several later decisions resurrected the prohibition. *See People v. Creasy*, 236 N.Y. 205, 222, 140 N.E. 563, 569 (1923); *People v. Grutz*, *supra*; *Kulak v. Nationwide Mutual Ins. Co.*, 40 N.Y.2d 140, 386 N.Y.S.2d 87 (1976); *Nelson v. X-Ray Systems, Inc.*, 46 A.D.2d 995, 361 N.Y.S.2d 468 (4th Dep't 1974); *Vispetto v. Bassuk*, 41 A.D.2d 958, 343 N.Y.S.2d 988 (2d Dep't 1973); *Strauch v. Hirschman*, 40 A.D.2d 711, 336 N.Y.S.2d 678 (2d Dep't 1972); *Bearss v. Westbury Hotel, Inc.*, 33 A.D.2d 47, 304 N.Y.S.2d 894 (1st Dep't 1969). Other decisions, often without comment on the matter, allow opinions which embrace the issue to be decided by the jury. *See Spier v. Barker*, 35 N.Y.2d 444, 363 N.Y.S.2d 916 (1974); *General Accident Fire & Life Assur. Corp. v. Kriegbaum*, 46 A.D.2d 713, 360 N.Y.S.2d 310 (3d Dep't 1974).

In codifying the recent approach and permitting an otherwise permissible opinion even though it might, or does, embrace the ultimate issue, the Code will avoid knotty questions over what is an ultimate issue and also provide the jury with information that they would not have even with the benefit of the opinion. Still, as noted *supra*, there are some opinions that have no value because they simply and conclusorily track verbatim in legal terminology the very questions the jury must decide and would be excluded under sections 701 or 702. On the other hand, caution is required because often expert testimony that embraces the ultimate issue will satisfy the requirements of 702 and should not be excluded. *See, e.g., Sitaras v. Ricciardi & Sons, Inc.*, 154 A.D.2d 451, 545 N.Y.S.2d 937 (2d Dep't 1989)

(defendant's accident reconstruction expert could testify that accident occurred in a certain way); *Doukas v. America on Wheels*, 154 A.D.2d 426, 545 N. Y.S.2d 928 (2d Dep't 1989) (expert can testify on adequacy of instruction given to novice rollerskaters).

### § 705. Disclosure of facts or data underlying expert opinion

Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state an opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, the adverse party may require the witness to specify the data and other criteria supporting the opinion. Provided, however, an expert, pursuant to section 703 of this article, may not render an opinion on an essential element of a crime, defense or cause of action based upon information not introduced at trial unless the basis for that opinion is first elicited from the expert.

#### Comment

This section restates without change CPLR 4515. The section is "designed to provide the trial judge with the discretion necessary to obtain the maximum benefits from the use of witnesses by limiting the abuse of hypothetical questions. It will permit the expert to state what [the expert] knows in a natural way; at the same time, it gives the cross-examiner full opportunity to discredit [the expert]. The rule is consistent with the major efforts by the medical and legal professions to cooperate in the administration of justice." 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. ¶4515.01.

While the section does not require the basis or data supporting an expert's opinion to be stated on direct examination, through a hypothetical question or otherwise, still, when no basis or data is given, the reasons for the opinion should be elicited. *See Tarlowe v. Metropolitan Ski Slopes*, 28 N.Y.2d 410, 322 N.Y.S.2d 665 (1971). In this context "reasons" mean the "intellectual steps between the basic facts and the ultimate conclusion." In short, "data are the 'what,' while 'reasons' are the 'why.'" McLaughlin, 1971 Practice Commentary to McKinney's CPLR 4515 (1990 Supp.).

In some situations, the court may decide that identification of underlying facts during direct examination is necessary to avoid placing too heavy a cross-examination burden upon the opposing party. In these cases, the court may require that the expert state, during direct examination, the data underlying his opinion either before or after the opinion is given. Alternatively, the court may permit a voir dire examination outside the presence of the jury so that the opponent may inquire into the underlying data. When an

expert bases a crucial opinion on information not introduced at trial, however, then the last sentence of the section requires that the basis for the opinion be given on direct examination. This codifies the apparent holding in *People v, Jones*, 73 N.Y.2d 427, 54 N.Y.S.2d 340 (1989), and expands that criminal case holding to civil

cases. The section, however, does not affect at all that portion of the *Jones* holding that a conclusory expert opinion without any supporting basis in the trial record is entitled to no evidentiary weight. See 73 N.Y.2d at 429-30, 431, 541 N.Y.S.2d at 341, accord *Caron v. Doug Urban Construction Co.*, 65 N.Y.2d 909, 493 N.Y.S.2d 453 (1985).

In *Jones*, the expert testified that a drug was a controlled substance without giving any basis for her conclusion. The drug in question could have been one of two substances, one which was a controlled substance and the other which was not. The court, relying on civil precedents, emphasizing that the case was a criminal prosecution and that the issue dealt with an element of the crime, held that "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." 73 N.Y.2d at 430, 541 N.Y.S.2d at 341, See *Capra, Permissible Bases of Expert Opinion*, N.Y.L.J., July 14, 1989, p. 3, col. 1. Read in context, this language seems to mean that such testimony is a condition for admissibility rather than merely requiring such testimony in order for the opinion to have any probative value, the view expressed by Judge Simmons's concurring opinion in *Jones*. See 73 N.Y.2d at 432-433, 541 N.Y.S.2d at 342-343.

Inexplicably, the court in *Jones* did not cite CPLR 4515, which would have permitted the expert to testify without first giving her basis, even though that basis was not in the record. See *McLaughlin*, 1989 Practice Commentary to CPLR 4515 (McKinney's Supp. 1990). The CPLR leaves it to defense counsel to decide whether to explore the non-record basis on cross-examination; a very risky business in civil or criminal cases. This kind of in-the-dark crossexamination is inherent in a rule that permits an opinion without requiring a basis for that opinion to be elicited by the offering party, a problem that is not limited to criminal cases. The reason for the rule not requiring a basis on direct is to avoid the myriad of problems raised by hypothetical questions. See *Sklar*, Practice Commentary to CPLR 4515 (McKinney's 1963). Requiring that an expert lay out facts beyond those in the record that are the basis for an opinion should not lead to resurrection of the problems usually involved with hypothetical questions.

The section continues the approach seemingly required by *Jones*. The *Jones* approach recommends itself to civil as well as the criminal context of *Jones*, especially since *Jones* itself relied on civil precedents. See *Weibert v. Hanan*, 202 N.Y. 328, 331, 95 N.E. 688, 688-89 (1911). Thus, an expert may not offer an opinion on an essential element of a crime, defense or cause of action based upon facts beyond the record, unless the basis for that opinion is first given by the expert. *People v. Jones*, 73 N.Y.2d at 430, 541 N.Y.S.2d at 341, *supra*.

## § 706. Court-appointed experts

(a) Appointment. When authorized by law, the court on its own motion or on the motion of any party may appoint one or more expert witnesses. The court may appoint any expert witness agreed upon by the parties or may appoint an expert witness of its own selection. Reasonable notice shall be given to the parties of the names and addresses of the experts proposed for appointment. Before appointing its own expert, the court must afford the parties reasonable notice and an opportunity to be heard outside of the presence of the jury. An expert witness shall not be appointed by the court unless the expert consents to act. The duties of a witness so appointed shall be communicated to such witness by the court in writing, a copy of which shall be furnished to each party, or at a conference in which the parties shall have the opportunity to participate. The findings, if any, of a witness so appointed shall be communicated by such witness to the parties; the deposition of such witness may be taken by any party; and such witness may be called to testify by the court or any party. A witness so appointed shall be subject to cross-examination by each party, including a party calling that person as a witness.

(b) Disclosure of appointment. With the consent of all parties, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.

(c) Parties<sup>9</sup> experts of own selection. Nothing in this section limits the parties in calling expert witnesses of their own selection.

**Comment**

**This section implements the power of the court to call its own witnesses in those rare and extraordinary cases when it is necessary to do so. The section, however, is not the source of that power, which must be found elsewhere. See, e.g., Judiciary Law § 35 (court appointment of psychiatrists, physicians, or psychologists to examine and report at habeas corpus or commitment proceedings); Judiciary Law § 148-a (appointment of physician to report to medical malpractice panel); *Kessler v. Kessler*, 10 N.Y.2d 445, 455-456, 225 N.Y.S.2d 1, 8-9 (1962) (recognizing inherent power of court to call qualified psychiatrists and psychologists to testify in child custody proceeding); *Zirinsky v. Zirinsky*, 138 A.D.2d 43, 529 N.Y.S.2d 298 (1st Dep't 1988) (upholding appointment of appraiser to assist court in equitable distribution decision in divorce proceeding); *Matter of Dara R.*, 119 A.D.2d 579, 500 N.Y.S.2d 746 (2d Dep't 1986) (family court should appoint expert to examine child concerning allegations of abuse). The section merely sets forth the procedure to be followed when a court decides to call a witness.**

## ARTICLE 8—HEARSAY

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**Art. 8**

**HEARSAY**

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**Comment**

**Article 8 contains the provisions of the hearsay rule and the most common exceptions to it. Other exceptions can be found in other statutes throughout the consolidated laws. Generally, the Article restates present New York law. Several, for the most part insignificant, changes have, however, been made. *See, e.g.*, 803(b)(1), 803(b)(3), (c)(2), (3), (4), (5)(A)-(D), (6), (7)(B), (12), (13), (16), (17), (21), 804(a), 804(b)(1)(B), 804(b)(4)(A)(U), 810.**

**Hearsay as used in Article 8 is defined as a statement—an oral or written assertion, or nonverbal conduct intended as an assertion—made by a person other than while testifying at a trial which is offered to prove the truth of the matter asserted. As a general proposition hearsay is not admissible under the provisions of Article 8. The hearsay rule expresses the common law preference that proof in lawsuits be elicited under conditions where the witness is physically present before the trier of fact and subject to cross-examination by the party against whom the proof is being offered. Observance of these conditions permits the party affected by the testimony to test before the trier of fact the trustworthiness of the witness's testimony, which includes the witness's perception, memory, narration, and more generally, veracity, *Le.*,**

**whether the witness is telling the truth. In other words, the hearsay rule is premised on a recognition that proof not elicited under these conditions lacks sufficient**

trustworthiness. *See* Prince, Richardson on Evidence § 201 (10th ed.). There are, however, situations where hearsay is not so suspect as to justify its exclusion because the circumstances in which it was made assure trustworthiness. *See* *People v. Edwards*, 47 N.Y.2d 493, 419 N.Y.S.2d 45 (1979). In these situations, which have been codified in Article 8 as exceptions to the hearsay rule, it is recognized that exclusion of the evidence would be more damaging to ascertaining truth than its admission. Accordingly, the approach of Article 8 is that hearsay should be excluded unless it satisfies the conditions of one of the exceptions.

The fact that certain evidence is not hearsay or qualifies as an exception to the hearsay rule will not necessarily make such evidence admissible. It only means that such evidence is not inadmissible under the hearsay rule. If there is some other evidence rule applicable, e.g., lack of relevancy (CE 401, 402), undue prejudice (CE 403), privilege (CE 504-514), authentication (CE 901), best evidence (CE 1002), those rules must be satisfied before the evidence may be admitted. Furthermore, in criminal cases, the evidence may be inadmissible under the confrontation clauses of the state and federal constitutions. *See Idaho v. Wright*, \_\_\_ U.S. \_\_\_, 110 S.Ct. 3139 (1990); *Lee v. Illinois*, 476 U.S. 530, 106 S.Ct. 2056 (1986); *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 210 (1980).

## § 801. Definitions

For purposes of this article the following definitions are applicable:

- (a) Statement. A "statement" is: (1) an oral or written assertion of a person; or (2) nonverbal conduct of a person if it is intended by such person as an assertion.
- (b) Declarant. A "declarant" is a person who makes a statement.
- (c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial, proceeding, or hearing, offered in evidence to prove the truth of the matter asserted.

### Comment

#### (a) Statement.

The definition of "statement" is important because of subdivision (c)'s definition of "hearsay" as being a "statement, other than one made by the declarant while testifying at the trial,

proceeding, or hearing, offered in evidence to prove the truth of the matter asserted." Subdivision (a) recognizes three types of statements that are included within the hearsay definition as enunciated in

subdivision (c): (1) an oral assertion; (2) a written assertion; and (3) nonverbal conduct intended as an assertion.

Oral and written assertions have long been subject to the hearsay rule. Prince, *Richardson on Evidence* § 200 (10th ed.). Similarly, nonverbal conduct intended as an assertion is considered to be hearsay. Thus, a statement made by sign language would be hearsay as would also be the act of a victim of a crime in pointing to identify the perpetrator of the crime in a police lineup. See *People v. Nieves*, 67 N.Y.2d 125, 131 n.l, 501 N.Y.S.2d 1, 4 n.l (1986). Subdivision (a), by contrast, excludes from the operation of the hearsay rule nonverbal conduct not intended as an assertion, which some New York courts have characterized as hearsay. See *Thomson Co., Inc. v. International Compositions Co., Inc.*, 191 App. Div. 553, 181 N.Y.S. 639 (1st Dep't 1920); *Altkrug v. William Whitman Co., Inc.*, 185 App. Div. 744, 173 N.Y.S. 669 (1st Dep't 1919); but see *People v. Salko*, 47 N.Y.2d 230, 417 N.Y.S.2d 894 (1979).

Nonverbal conduct not intended as an assertion is not regarded as hearsay for several reasons. First, a rule considering nonassertive conduct as hearsay is difficult to apply in the pressures of a trial, and is frequently overlooked. See *Deutschmalm v. Third Avenue R. R. Co.*, 87 App. Div. 503, 84 N.Y.S. 887 (1st Dep't 1903). Second, the principal reason for the hearsay rule—to exclude declarations where, *inter alia*, the veracity of the declarant cannot be tested by cross-examination—does not fully apply because such conduct, being nonassertive, does not involve the veracity of the declarant. Third, there is frequently a guarantee of the trustworthiness of the inferences to be drawn from such nonassertive conduct because the actor has based an action on the correctness of a belief, *i.e.*, actions speak louder than words. See generally, Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177 (1948); Comment, *California Evidence Code* § 1200.

Accordingly, nonverbal conduct not intended as an assertion is not covered by the hearsay rule and its admissibility is governed by other rules of evidence. For example, evidence that ten people opened up their umbrellas when offered to prove that it was raining is not a statement and is not affected by the hearsay rule. It would be admissible if it were relevant under CE 401 and 402.

The question of whether the conduct was intended as an assertion is one for the court to determine pursuant to CE 104(b).

(b) Declarant.

The definition of "declarant" as a person who makes a statement codifies present law. *See People v. Harding*, 37 N.Y.2d 130, 135, 371

N.Y.S.2d 493, 497 (1975) (concurring opinion); *see also* Prince, Richardson on Evidence § 255 (10th ed.).

(c) Hearsay.

The definition of "hearsay" as a statement other than one made by the declarant while testifying at the trial, proceeding or hearing when offered to prove the truth of the facts contained in the statement is consistent with present law. *People v. Edwards*, 47 N.Y.2d 493, 419 N.Y.S.2d 45 (1979); *People v. Caviness*, 38 N.Y.2d 227, 379 N.Y.S.2d 695 (1975); Prince, Richardson on Evidence § 200 (10th ed.).

The crucial issue under this definition is whether the statement is offered to prove the truth of the matter asserted. It is a question for the court to determine pursuant to CE 104(b). If the out-of-court statement is not offered for its truth, but is offered merely to show that the words were uttered, the hearsay rule has no application. The question of admissibility then becomes primarily a question of relevancy. Is the mere fact that the statement was made, the mere fact that the words were uttered, relevant? Illustrative situations where the mere utterance is relevant follow:

Words of legal significance a/k/a verbal acts. There are situations where as a matter of substantive law the mere utterance of words has legal significance. *See* Prince, Richardson on Evidence § 204 (10th ed.). Thus, in an action to recover damages for slander, where the plaintiff alleges that the defendant called him a thief, a witness who heard the defendant make that statement may testify to it. Similarly, words that make up a contract or words that constitute the agreement between co-conspirators may be the subject of testimony of any person who heard the words spoken. Statements offered for these purposes are not offered for their truth but are merely offered to prove that the words were said and the substantive law then renders the words significant. *See* McCormick, Evidence § 249, at 731-32 (3d ed. 1984).

Verbal parts of acts. Where an act is relevant but equivocal, a declaration accompanying the act and tending to explain or characterize it is admissible. *See* Prince, Richardson on Evidence § 280 (10th ed.). Thus, the act of A giving money to B is equivocal. The money may have been delivered in payment of a debt, or as a loan, or as a bribe, or as a gift. A declaration made by A at the time of the delivery that the money is an award to B for having achieved the highest grade in the course in evidence is admissible to establish



that it was delivered as a gift. The declaration is not offered or received for its truth, but is offered solely to characterize the transaction. It would, however, be hearsay when offered to prove who achieved the highest grade.

Circumstantial evidence of hearer's state of mind. The mere utterance of a statement, without regard to its truth, may cast light circumstantially upon the state of mind of the person who heard it. *See* Prince, Richardson on Evidence § 205 (10th ed.). For example, in *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996 (1958), the shoulder of the plaintiff was badly burned as a result of treatment administered to her by the defendants by means of X-ray therapy. At trial in her malpractice action, plaintiff, for the purpose of showing that she was suffering from cancerphobia, testified that a dermatologist who later examined her told her that she should have her shoulder checked every six months since the area of the bum might become cancerous. In affirming judgment in favor of the plaintiff, the court stated: "Since the statement of the dermatologist was introduced not for the purpose of proving that plaintiff would develop cancer but merely for the purpose of establishing that there was a basis for her anxiety, such testimony was not objectionable hearsay." *Id.* at 20, 176 N.Y.S.2d at 998; *see also* *People v. Minor*, 69 N.Y.2d 779, 513 N.Y.S.2d 107 (1987) (to prove entrapment, statements of an informant to defendant may be testified to by defendants); *People v. Gilmore*, 66 N.Y.2d 863, 498 N.Y.S.2d 752 (1985) (defendant should have been permitted to testify about a conversation with his mother-in-law to show that his flight may have been motivated by facts other than simply a consciousness of guilt).

Circumstantial evidence of speaker's state of mind. The mere utterance of a statement, without regard for its truth, may indicate circumstantially the state of mind of the speaker. *See* Prince, Richardson on Evidence § 205 (10th ed.). Thus, in *Loetsch v. N. Y.C. Omnibus Corp.*, 291 N.Y. 308, 52 N.E.2d 448 (1943), an action to recover damages for the wrongful death of a married woman, a statement in the deceased's will, executed a few months before her fatal accident, stating that because her husband had been cruel to her and failed to support her, she was leaving him only one dollar, was held admissible. The evidence was offered by the defendant for the purpose of showing the deceased's feelings toward her husband. Such evidence had "a bearing upon the pecuniary loss suffered by the person entitled to the recovery." *Id.* at 310, 52 N.E.2d at 449. As the court said: "No testimonial effect need be given to the declaration, but the fact that such a declaration was made by the decedent, whether true or false, is compelling evidence of her feelings toward, and relations to, her husband." *Id.* at 310 52 N.E.2d at 449.

**§ 802. Hearsay rule**

Hearsay is not admissible except as otherwise provided by this chapter or other statute.

Comment ;

This section states that hearsay is not admissible except as provided by the Code of Evidence or other statutes. Enumerated exceptions to the hearsay rule are set forth in CE 803, 804 and 805. Other statutory exceptions may be found elsewhere in the consolidated laws. *See, e.g.*, Agriculture and Markets § 96; CPLR 3117; Family Court Act § 1046(a)(vi); Judiciary Law § 148-a; Military Law § 321; Public Health Law § 4103; Real Property Actions and Proceedings § 1423. In certain instances, hearsay not otherwise coming within the enumerated exceptions may be admitted under CE 806.

**§ 803. Hearsay exceptions: prior statement by witness; admission by party-opponent; availability of declarant immaterial**

(a) **Prior statement by witness.** The following are not excluded by the hearsay rule if the declarant testifies at the trial, proceeding, or hearing and is subject to cross-examination concerning a statement previously made by the declarant unless the party objecting to the statement establishes its untrustworthiness by proof of circumstances involving the making of the statement, including but not limited to a motive to falsify by the declarant:

(1) **Prior inconsistent statement.** In a civil case when the requirements of subdivision (b) of section 613 of this chapter are satisfied, a statement by the declarant inconsistent with the declarant's testimony regarding any fact material to the determination of the action, provided that the prior statement by the declarant was in a writing signed by such declarant or recorded on videotape, audiotape or their technological equivalent, or the statement was made under oath and subject to the penalty of perjury.

(2) **Prior consistent statement.** A statement by the declarant consistent with the declarant's testimony if offered to rebut an express or implied charge of recent fabrication, including one based upon improper influence or motive and if made prior to the circumstances supporting that charge.

(b) **Admission by party-opponent.** The following are not excluded by the hearsay rule if offered against a party:

(1) By **party in individual or representative capacity.** The party's own statement made in the party's individual or representative capacity and offered against the party in that capacity, and statements made by a person through whom a party claims by

representation.

(2) Adoptive. A statement which the party has adopted or in which the party has manifested belief in its truth.

(3) Authorized. A statement by an agent or employee of a party authorized by that party to make a statement concerning the subject, provided that authorized statements to the employer or principal are made on the basis of personal knowledge.

(4) Co-conspirator. Subject to a determination made pursuant to paragraph two of subdivision (b) of section 104 of this chapter, and subject to decisional law requirements of unavailability, if any, a statement by a co-conspirator of the party made during the course and in furtherance of the conspiracy.

(c) Exceptions where the availability of declarant is immaterial. The following are not excluded by the hearsay rule, even though the declarant is available as a witness, provided (i) the declarant has personal knowledge, where such knowledge is required by the particular exception, and (ii) when the statement is a lay opinion, that opinion is rationally based on the perception of the declarant and is helpful to a clear understanding of the statement or to the determination of a fact in issue, or when the statement is an expert opinion it satisfies section 702 of this chapter, unless (iii) the party objecting to the statement establishes its untrustworthiness by proof of circumstances involving the making of the statement, including but not limited to a motive to falsify by the declarant:

(1) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition, that stilled the reflective powers of the declarant.

(2) Then-existing mental, emotional, or physical condition. An involuntary expression of pain or physical condition, a statement of a declarant's then-existing state of mind, or emotion (such as intent, plan, motive, design, mental feeling). Provided, however, none of the foregoing statements may include a statement of memory or belief to prove the fact remembered or believed and the admissibility of a declaration of intent to prove the conduct of a person other than the declarant shall be governed by paragraph five of subdivision (b) of section 804 of this article.

(3) Statements for purposes of medical diagnosis or treatment. Statements, reasonably pertinent to diagnosis or treatment of the declarant, made to a physician or an agent of a physician describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character or the cause or external source thereof, made with the expectation that they will be relied upon by a treating physician for purposes of medical diagnosis or treatment.

(4) Recorded recollection. A memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made when the matter was fresh in the memory of the witness and to reflect that knowledge correctly.

(5) Business records.

(A) General rule. 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 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.

(i) Exceptions and other circumstances. Records or reports prepared solely for purposes of litigation are not admissible under this paragraph. 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.

(ii) Businesses included. The term business includes a business, profession, occupation and calling of every kind.

(iii) Law enforcement records in criminal cases. In a criminal case, a business record of a law enforcement agency offered by the prosecution under this paragraph to prove directly an element of the crime charged or other crucial facts establishing guilt is admissible: (a) when the person who provided the information set forth in the writing or record testifies, or is unavailable to testify within the meaning of subdivision (a) of section 804 of this article, and (b) when the writing or record contains an expert opinion, if the person who rendered that opinion testifies, or if that person is unavailable to testify within the meaning of subdivision (a) of section 804 of this article and there is available no other witness who can provide equivalent testimony.

(B) Hospital bills. A hospital bill is admissible as evidence of the facts contained therein, 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 paragraph 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 189 of the lien law to determine the validity and extent

of the lien of a hospital, such certified hospital bills are admissible as 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 workers' compensation patients.

(C) Records of hospital, library, or department or bureau of a municipal corporation or of the state. All records, writings, and other things referred to in sections 2306 and 2307 of the civil practice law and rules and any record and report relating to the administering and analysis of a blood genetic marker test administered pursuant to sections 418 and 532 of the family court act are admissible as evidence of the facts contained therein without testimony of the custodian or other qualified witness, provided they bear a certification or authentication by the head of the hospital, laboratory, library, or 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) Bill for services or repairs. An itemized bill or invoice, receipted or marked paid, for services or repairs of an amount not in excess of two thousand dollars is admissible as evidence of the reasonable value and necessity of such services or repairs itemized therein in any civil case, provided it bears a certification by the person, firm, or corporation, or an authorized agent or employee thereof, rendering such services or making such repairs and charging for the same, and contains a verified statement that no part of the payment received therefor will be refunded to the debtor, and that the amounts itemized therein are the usual and customary rates charged for such services or repairs by the affiant or the affiant's employer. No more than one bill or invoice from the same person, firm, or corporation to the same debtor shall be admissible under this paragraph in the same case.

(E) X-rays in personal injury and wrongful death actions. In an action for personal injury, or for wrongful death, an X-ray of any party thereto or the decedent is admissible provided: (i) that there is photographically inscribed on such X-ray the name of the injured person, the date when taken, the identifying number thereof, and the name and address of the physician under whose supervision the same was taken; (ii) that the X-ray is accompanied by an affidavit of such physician identifying the X-ray and attesting to the information inscribed thereon, and further attesting that, if called as a witness in the action, such physician would so testify; and (iii) nothing contained in this section, however, shall prohibit the admissibility of an X-ray in evidence in a personal injury action where otherwise admissible.

(6) Absence of entry in records kept in accordance with the provisions of paragraph five of this subdivision. Evidence that a matter is not included in the writings, records, or data compilations kept in accordance with the provisions of paragraph five of



this subdivision, to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which otherwise a writing, record, or data compilation would have been regularly made and preserved.

(7) Public records and reports.

(A) General rule. Records, reports, or other writings or data compilations of public offices not prepared solely for purposes of litigation setting forth: (i) the activities of the office; or (ii) matters observed pursuant to a duty imposed by law as to which matters there was a duty to report, except that in a criminal case a law enforcement record or report offered by the prosecution under this paragraph to prove directly an element of the crime charged or other crucial facts establishing guilt is admissible: (a) when the person who provided the information set forth in the record or report testifies, or is unavailable to testify within the meaning of subdivision (a) of section 804 of this article; and (b) when the record or report contains an expert opinion, if the person who rendered that opinion testifies, or if that person is unavailable to testify within the meaning of subdivision (a) of section 804 of this article and there is available no other witness who can provide equivalent testimony; or (iii) in civil actions and proceedings, factual findings resulting from an investigation made pursuant to authority granted by law.

(B) Certificates concerning judgment of conviction and fingerprints.

(i) Certificates of judgment. 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 evidence of the facts stated therein.

(ii) Certificates of fingerprint identification. A report of a public employee 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 case constitutes evidence of the fact that such person has previously been convicted of such offense.

(8) Records of vital statistics. Records in any form of births, fetal deaths, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law.

(9) Absence of public record or entry. To prove the absence of a record, report, or other writing or data compilation or the nonoccurrence or nonexistence of a matter of which otherwise a record, report, or other writing or data compilation would have been regularly made and preserved by a public office, testimony or a certificate authenticated in

accordance with section 902 of this chapter, that diligent search failed to disclose the record, report, or other writing or data compilation, or entry therein.

(10) Records of religious organizations. Statements of births, marriages, divorces, deaths, legitimacy, ancestry, or relationship by blood or marriage contained in a regularly kept record of a religious organization.

(11) Marriage, baptismal, and similar certificates. Statements in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a member of the clergy, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purporting to have been issued at the time of the act or within a reasonable time thereafter.

(12) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of a public office and an applicable statute authorized the recording of documents of that kind in that office.

(13) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.

(14) Statements in ancient documents. Statements in a document in existence twenty years or more, the authenticity of which is established, if the statement has been acted upon as true by persons having an interest in the matter.

(15) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.

(16) Reputation concerning personal or family history. Reputation, existing before the controversy, among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning such person's birth, adoption, marriage, divorce, death, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of such person's personal or family history.

(17) Reputation concerning boundaries or general history. Reputation in a

community, existing before the controversy, as to boundaries of, or customs affecting, lands in the community, and reputation as to events of general history important to the community or state or nation in which the events took place.

(18) Reputation as to character. Reputation of a person's character among the person's associates or in the community.

(19) Judgment of previous conviction. Evidence of a final judgment, entered after trial or upon a plea of guilty (but not upon a plea of nolo contendere or its equivalent), adjudging a person guilty of a crime, to prove any fact essential to sustain the judgment, but not including judgments against persons other than the accused when offered by the prosecution in a criminal case for purposes other than impeachment. The pendency of an appeal may be shown but does not affect admissibility.

(20) Judgment as to personal, family, or general history or boundaries. Judgments as proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence of reputation.

(21) Standard of measurement used by surveyor. 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 such surveyor conformed to the state standard at the time a survey was made is admissible as 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 admissible as evidence of that fact.

(22) Certificate of population. Where the population of the state or a subdivision, or a portion of a subdivision of the state is required to be determined according to the federal or state census or enumeration last preceding a particular time, a certificate of the officer in charge of the census of the United States, attested by the United States secretary of commerce, as to such population as shown by such federal census, or a certificate of the secretary of state as to such population as shown by such state enumeration, is conclusive evidence of such population.

(23) Affidavit of publication in newspaper. An affidavit of the printer or publisher of a newspaper published within the state, or of the foreman or principal clerk of such printer or publisher, showing the publication of a notice or other advertisement authorized or required by law of the state or court order to be published in that newspaper, annexed to a printed copy of the notice or other advertisement, is admissible as evidence of publication and of statements showing that the deponent is authorized to make the affidavit.

#### Comment

##### (a) Prior statement by a witness.

Subdivision (a) provides an exception to the hearsay rule in civil cases for certain prior inconsistent statements of a witness testifying and subject to cross-examination at the trial, proceeding, or hearing at which the prior inconsistent statement is being offered. Additionally, the subdivision provides an exception for one other category of prior statements of a witness testifying and subject to cross-examination at the trial, proceeding, or hearing: consistent statements rebutting a claim of recent fabrication. This treatment is premised upon the view that the dangers against which the hearsay rule is designed to protect are to a large extent nonexistent in these two situations. *See McCormick, Evidence* § 251 (3d ed.). The trustworthiness clause at the end of subdivision (a) recognizes, however, that not all prior statements of a witness subject to cross-examination are excepted from the hearsay rule. *See Comment to (c) introductory requirements, infra*. It would be unwise to do so because such a broad definition would allow the admission of statements made under circumstances not conducive to trustworthiness, *e.g.*, a prior statement prepared with the assistance of investigators. *See Report, New Jersey Supreme Court, Committee on Evidence* 135 (1963); 4 Cal. L. Rev, Comm., Hearsay Evidence 313 (1962); *cf. Iannielli v. Consolidated Edison Co., IS A.D. 223*, 428 N.Y.S.2d 473 (2d Dep't 1980).

The treatment accorded prior statements of a witness in subdivision (a) differs from their treatment in the Federal Rules of Evidence. FRE 801(d)(1) provides that these statements, although meeting the definition of hearsay under FRE 801(c), are nonetheless to be treated as "not hearsay." Under present New York law, prior statements of a witness, when admissible, are admitted as an exception to the hearsay rule and the Code continues this approach. *See, e.g., Letendre v. Hartford Acc. & Ind. Co., 21 N.Y.2d 518, 524, 289 N.Y.S.2d 183, 188 (1968); People v. Singer, 300 N.Y. 120, 123-24, 89 N.E.2d 710, 711 (1949).*

(a) (1) Prior inconsistent statements.

Under this paragraph, a prior inconsistent statement of a declarant is admissible in civil cases as an exception to the hearsay rule, if the declarant is subject to cross-examination at the trial, proceeding, or hearing at which the statement is offered, and the foundation requirements of section 613(b) are met. The provisions of this paragraph seem consistent with present law. *See Letendre v. Hartford Acc. & Ind. Co.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968); *Vincent v. Thompson*, 50 A.D.2d 211, 377 N.Y.S.2d 118 (2d Dep't 1975). To the extent the paragraph excludes prior inconsistent statements as substantive evidence in criminal cases, it restates the law. *See* CPL 60.35(2).

The paragraph adopts the policy enunciated in *Letendre* and *Vincent* for treating these kinds of prior inconsistent statements as exceptions to the hearsay rule, namely that the dangers against which the hearsay rule is designed to protect are to a large extent nonexistent; *i. e.*, the declarant is in court and may be examined and cross-examined in regard to the statement; the trier of fact can observe the witness's demeanor and the nature of the testimony as the witness denies or attempts to explain away the inconsistency. Thus, the trier of fact is in virtually as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Furthermore, in many cases, the inconsistent statement is more likely to be accurate than the testimony of the declarant at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gives rise to the litigation or prosecution. Moreover, the paragraph will provide a civil party with desirable protection against the "turncoat" witness who changes his or her story on the witness stand and deprives the calling party of evidence essential to the case.

To avoid needless consumption of time and jury confusion, admissibility under this paragraph is limited to written statements signed by the declarant, videotaped or audiotaped statements or their technological equivalent and statements under oath subject to the penalty of perjury.

Most importantly, for purposes of this paragraph, the prior statement must be inconsistent with the witness "testimony regarding any fact of consequence to the determination of the action" and the foundation requirements of section 613(b) must be met. The language is intended to preclude admitting prior statements to prove the truth of their contents when they are inconsistent only with the witness's claimed failure of memory. The position is consistent with the standard stated in the New York cases admitting

prior statements only for impeachment: "[T]he testimony and the statement are inconsistent and tend to prove differing facts." *Larkin v. Nassau Elec. R.R.*, 205 N.Y. 267, 269, 98 N.E. 465, 466 (1912); accord, *People v. Wise*, 46 N.Y.2d 321, 413 N.Y.S.2d 334 (1978); *Nappi v. Falcon Truck Renting Co.*, 286 A.D. 123, 126, 141 N.Y.S.2d 424, 427 (1st Dep't 1955), *aff'd*, 1 N.Y.2d 750, 152 N.Y.S.2d 297 (1956). A prior statement not qualifying under any hearsay exception does not

have sufficient indicia of reliability to justify using it as substantive evidence unless the witness's testimony states material facts that can be compared with those in the statement through examination by the opponent of the party introducing the statement. Again it must be emphasized that the foundation requirements of CE 613(b), governing extrinsic proof of prior inconsistent statements for impeachment purposes, apply to prior inconsistent statements admitted for substantive proof under this paragraph.

(a) (2) Prior consistent statement.

Paragraph (a)(2) provides that a prior consistent statement of a declarant testifying at trial and subject to cross-examination concerning the statement is admissible as an exception to the hearsay rule if it was made prior to the circumstances supporting an express or implied charge of recent fabrication, including but not limited to one based upon an improper influence or motive. As observed by McCormick: "No sound reason is apparent for denying substantive effect when the statement is otherwise admissible. The witness can be cross-examined fully. No abuse of prepared statements is evident. The attack upon the witness has opened the door." McCormick, *Evidence* § 251 (3d ed.). The paragraph codifies present law which recognizes these kinds of statements as exceptions to the hearsay rule which would mean the statements are admissible for their truth. See *People v. Davis*, 44 N.Y.2d 269, 405 N.Y.S.2d 428 (1978); *Fishman v. Scheuer*, 39 N.Y.2d 502, 384 N.Y.S.2d 716 (1976); *People v. Singer*, 300 N.Y. 120, 123-24, 89 N.E.2d 710, 712 (1949); *Crawford v. Nilan*, 289 N.Y. 444, 46 N.E.2d 512 (1943).

Where no impeachment has occurred, a prior consistent statement is not, of course, admissible under this paragraph. See *Crawford v. Nilan*, *supra*. Additionally, not every inconsistency developed on cross-examination will trigger the exception provided by the paragraph. The exception is brought into play only by an impeaching effort which suggests recent fabrication, based upon an improper motive or influence or some other reason.

Furthermore, as is the case under present law, the paragraph provides that the prior statement is admissible only if it was made before the supposed influence or motive arose. See *People v. McClean*, 69 N.Y.2d 426, 515 N.Y.S.2d 428 (1984); 4 Wigmore, *Evidence* § 1128 (Chadbourn rev. ed.); McCormick, *Evidence* 49 (3d ed.); McLaughlin,

*New York Trial Practice*, N.Y.L.J., June 9, 1978, p. 1, col. 1.

(b) Admission by party-opponent.

Subdivision (b) provides that five kinds of admissions of a party are admissible as an exception to the hearsay rule. Treating admissions as exceptions is consistent with present law. *See* Prince, Richardson on Evidence § 210 (10th ed.); Fisch, Evidence § 790 (2d ed.); *see also*, Morgan, *Basic Problems of Evidence* 265. Other jurisdictions, it is to be observed, treat admissions as "non-hearsay," and thereby not barred by the hearsay rule, because their admissibility is based on the theory that the party against whom the evidence is offered cannot complain about the inability to cross-examine the declarant, since that party or his or her representative is the declarant. *See* FRE 801(b)(2); Minn. Stat. Ann. Evidence Rules, Rule 801(b)(2); 4 Wigmore, Evidence 1048 (Chadbourn rev.) As a practical matter, it is of no importance whether admissions are deemed to be exceptions to the hearsay rule or nonhearsay. In either event, they are admissible as substantive evidence. CE 801(b) continues the present practice of treating admissions as exceptions to the hearsay rule, a position taken by many other jurisdictions. *See* California Evidence Code 1220 *et seq.*; Florida Statutes Ann., 90.803(18); Kansas Statutes Ann., 60-460(g)(h)(i); New Jersey Rules of Evidence, rule 63(7), (8), and (9); McCormick, Evidence § 262 (3d ed.).

It is to be noted that the subdivision rejects privity as a ground of admissibility by making no provision for it. The elimination of privity in the area of admissions changes present law under which the admission of one joint owner is admissible against the other, *e.g.*, *Hayes v. Claessens*, 234 N.Y. 230, 137 N.E.2d 313 (1922); the admission of a former owner of real property made at the time he held title is admissible against those who claim under him, *e.g.*, *Chadwick v. Fonner*, 69 N.Y. 404 (1877); the admission of a former owner of personal property made at a time when he held title or apparent title is admissible against a subsequent holder, except when barred by the doctrine of *Paige v. Cagwin*, 7 Hill 361 (1843); and the admissions of a principal are receivable against surety under certain circumstances, *e.g.*, *Hatch v. Elkins*, 65 N.Y. 489 (1875), as modified by *Let endre v. Hartford Acc. & Indent n. Co.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968). As Morgan has said, there is no "magic" in privity that assures trustworthiness, and the privity principle leads to dubious distinctions. *See* Morgan, *Admissions*, 12 Wash. L. Rev. 181 (1937). The statements formerly admissible as admissions on the theory of privity would be admissible as declarations against interest if, under CE 804(b)(3), they were against interest at the time they were made, and if the declarant is unavailable. If the declarant is available, he or she may be called as a witness at trial. While there is no "magic in privity," the Code nonetheless continues admissions by persons through whom a party claims by representation, *see* Prince, Richardson on Evidence

§ 250 (10th ed.). The admissibility of this kind of admission, that might well not qualify as a declaration against interest, is based on the idea that, in a lawsuit to vindicate an interest of a person, evidence that would have been admissible against that person if he or she had brought suit should likewise be admissible against that person's representative.

Traditionally, in the situations governed by paragraphs (b)(1) and (b)(2) there has been no requirement that the party making the statement have personal knowledge of the facts underlying it. *See* Prince, Richardson on Evidence § 214 (10th ed.). This is justifiable on the ground that "admissions which become relevant in litigation usually concern some matter of substantial importance to the [party] upon which [the party] would probably have informed [itself] so that [the admissions] possess, even when not based on first-hand observation, greater reliability than the general run of hearsay." Berger & Weinstein, 4 Weinstein's Evidence 1801 [d][2][c][01]. With respect to certain authorized admissions made to the principal, (b)(3), and vicarious admissions, (b)(4), however, the possibility that an employee or agent might not be careful in making statements about an employer's business should require that statements by an employee or agent be based on personal knowledge.

(b) (1) Party in individual or representative capacity.

This paragraph codifies present law. A party's statement is, of course, admissible against that party. *Reed v. McCord*, 160 N.Y. 330, 337, 54 N.E. 737, 740 (1899); *Mindlin v. Dorfman*, 197 App. Div. 770, 189 N.Y.S. 265 (1st Dep't 1921). An admission made by a person in a representative capacity is admissible only against that person in that capacity. *Commercial Trading Co. v Tucker*, 80 A.D.2d 779, 437 N.Y.S.2d 86 (1st Dep't 1981).

It should be noted that this paragraph's federal counterpart, FRE 801(d)(2)(A), provides that a party's own statement is admissible against him "in either [an] individual or a representative capacity." Under the Federal Rule, if the party "has a representative capacity and the statement is offered against [the party] in that capacity, no inquiry whether [the party] was acting in the representative capacity in making the statement is required; the statement need only be relevant to representative affairs." Advisory Committees Note to Rule 801(d)(2)(A) of the Federal Rules of Evidence. The present New York rule is preferable. As one commentator has observed, "[the rule] avoids putting a party in the awkward posture of having to decide between his or her own personal interest and the interests of those whom he or she represents." McLaughlin, *New York Trial Practice*, N.Y.L.J., June 12, 1981, p. 1, col. 1. The New York rule also avoids prejudicing wrongful death beneficiaries by statements made by the



personal representative prior to appointment. The paragraph changes present law by eliminating as an admission statements made by persons in privity with a party. *See* Comment to 803(b), Admissions by party-opponent, *supra*. The paragraph, however, also continues present law by providing that statements made by a person through whom a party claims by representation are still admissions that may be introduced against the representative party. *See* Prince, Richardson on Evidence § 250 (10th ed.); *see also* Comment to (b) Admission by party-opponent, *supra*.

An admission may be in the form of an opinion and there is no requirement that the party have personal knowledge of the facts. *See* Prince, Richardson on Evidence §§ 214, 226 (10th ed.). A party may, of course, always explain that he or she had no personal knowledge of the facts contained in the statement. *See, e.g., Garsten v. MacMurray*, 133 A.D.2d 442, 519 N.Y.S.2d 563 (2d Dep't 1982); *see also* Prince, Richardson on Evidence, *supra* § 228.

(b) (2) Adoptive admission.

This paragraph codifies the familiar rule that a party can make an admission by adoption or acquiescence. *See* Prince, Richardson on Evidence §§ 222, 251, 252 (10th ed.). Adoption of or acquiescence in a statement made by another person can be manifested in any number of ways, including silence in the face of a statement that one would be likely to protest were it untrue. *See, e.g., Cohen v. Toole*, 184 App. Div. 70, 171 N.Y.S.2d 577 (1st Dep't 1918). Of course, the paragraph is not applicable when a criminal defendant's silence was during police custody after the defendant had been advised of the right to remain silent (*see Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240 [1976]), or when it is unreasonable to draw an inference of adoption or acquiescence because of the surrounding circumstances. *See People v. Conyers*, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981); *People v. Rutigliano*, 261 N.Y. 103, 184 N.E.2d 689 (1933).

(b) (3) Authorized admissions.

This paragraph codifies present law. Prince, Richardson on Evidence § 253 (10th ed.). Under its provisions, if a party authorizes an employee or someone else to make statements to other persons, those statements are treated as admissions of the party. The fact of agency or employment and authority to speak must be proved independent of the declarations by the agent or employee. *See id.* Additionally, the paragraph encompasses statements which were authorized to be made only to the party. The policy reason for having the provisions of the paragraph apply to such statements was cogently stated by McCormick: "While slightly less reliable as a class than the agent's authorized statement to outsiders, intra-organization reports are generally made as a basis for some action, and when this is so, they share the reliability of business records."

They will only be offered against the principal when they admit some fact disadvantageous to the principal, and this kind of statement by an agent is likely to be true. No special danger of surprise, confusion, or prejudice from the use of the evidence is apparent. There seems little basis, then, for shaping our rule of competency of admissions to exclude this type of statements." McCormick, Evidence § 267 (3d ed.).

Nonetheless, authorized statements by an agent are less reliable than statements of a party, given the direct interest of the party. Similarly, authorized statements to the principal, given the agent's duty to report rumors as well as facts, are less reliable than authorized statements to outsiders. To accommodate these differences, the Code continues the apparent common law requirement that statements to a principal must be based upon personal knowledge but authorized statements to outsiders need not be based upon personal knowledge. Compare *Cox v. Stare*, 3 N.Y.2d 693, 698, 171 N.Y.S.2d 818, 821-22 (1958), with *Anthus v. Rail Joint Co.*, 193 App. Div. 571, 185 N.Y.S. 314 (3d Dep't 1920), *aff'd* 231 N.Y. 557, 132 N.E. 887 (1921). See Prince, Richardson on Evidence § 214 (10th ed.).

(b) (4) Co-conspirator statements.

This paragraph codifies the traditional rule which admits into evidence hearsay statements of one co-conspirator against another co-conspirator as long as those statements were made during the course of and in furtherance of the conspiracy. *See People v. Salko*, 47 N.Y.2d 230, 417 N.Y.S.2d 894 (1979); *People v. Liccione*, 63 A.D.2d 305, 407 N.Y.S.2d 753 (4th Dep't 1978), *aff'd*, 50 N.Y.2d 850, 430 N.Y.S.2d 36 (1980); Prince, Richardson on Evidence § 244 (10th ed.). When a co-conspirator's statement is not offered for the truth of the facts asserted, for example, as a verbal part of an act "to attach legal significance to accompanying conduct," then the requirements for a coconspirator's statement need not be satisfied. *People v. Salko*, 47 N.Y.2d at 239-40, 417 N.Y.S.2d at 899-900, *supra*.

Present New York law has not yet resolved whether there must be a showing of the declarant's unavailability as a condition to the admissibility of a co-conspirator's hearsay statements. *See People v. Persico*, 157 A.D.2d 339, 556 N.Y.S.2d 262 (1st Dep't 1990) (showing of unavailability is required). Under federal law, there is no unavailability requirement for the admissibility of a co-conspirator's statement. *See United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986); *see also Bourjaily v. United States*, 483 U.S. 171, 107 S.Ct. 2775 (1987). This subdivision does not seek to resolve the question; its resolution is left to decisional law. *See Comment to CE 102*.

It must be recognized that under CE 104(b), before the statement is admissible (although it may be admitted conditionally), the existence of a conspiracy and defendant's participation in it must be established by a preponderance of the evidence and without recourse to the statement sought to be introduced.

(c) Exceptions regardless of whether the declarant is available.

Introductory requirements.

Subdivision (c) sets forth 26 exceptions to the hearsay rule. Unlike CE 804, there is no requirement that the declarant be unavailable. This represents a judgment that evidence covered by the exceptions contained in CE 803(c) is sufficiently trustworthy that it should be admitted without requiring the production of the declarant, even when available. *See also comment to CE 804*. Each exception specifies requirements considered to be sufficient assurances of trustworthiness to justify introduction of a hearsay statement. Where these individual requirements are not satisfied, or when, as the subdivision's introductory provision requires, certain specified circumstances demonstrate lack of trustworthiness, the

**hearsay statement may not be admitted under the subdivision.**

The introductory provision includes personal knowledge, a helpful, rationally based, otherwise admissible opinion when the declaration is in the form of an opinion, and the existence of circumstances demonstrating that the statement is untrustworthy. The requirement of personal knowledge is a restatement of present law and is satisfied if the circumstances are consistent with the opportunity for the declarant to have had personal knowledge. *See People v. Caviwss*, 38 N.Y.2d 227, 379 N.Y.S.2d 697 (1975). *See McCormick*, Evidence § 297 at 858 (3d ed.). The personal knowledge requirement applies to most exceptions, although there are a few for which there is no such requirement. *See, e.g.*, subd. (13) (records of documents affecting an interest in real property); subd. (14) (ancient documents); and subd. (15) (market reports). The introductory limitation on opinion would eliminate those opinions which could not be the subject of testimony if the declarant testified at trial, except there is no CE 701 requirement that the opinion or inference must be difficult to describe in more concrete terms. There is no such requirement in 803 because a witness who is testifying at trial can be afforded an opportunity to be more concrete, but there is no such opportunity with respect to the hearsay declarant. The rank hearsay opinion that is not rationally based upon the perception of the declarant, as well as otherwise inadmissible expert opinions would not satisfy the introductory requirement.

Under present law, opinions in hospital records are admissible. *See People v. Kohhneyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *Pekar v. Tax*, 43 A.D.2d 957, 352 N.Y.S.2d 39 (2d Dep't 1974); *Cioia v. State*, 22 A.D.2d 181, 254 N.Y.S.2d 384 (4th Dep't 1964). There is, however, some disagreement about "nonroutine opinions about which expert might differ." 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. f 4518.09 (1982); *See also McCormick*, Evidence § 313 at 884 (3d ed.). Authoritative New York case law has infrequently addressed opinions in other hearsay exceptions. *See Ellison v. N. Y. C. Transit Auth.*, 63 N.Y.2d 1029, 484 S.2d 797 (1984) (error to exclude transit authority report with first-hand knowledge of officer that decedent appeared intoxicated). Like present law (*see, e.g., People v. Nisonoff*, 293 N.Y. 597, 59 N.E.2d 420 (1944), *cert. denied*, 326 U.S. 745 [1945] [factual portion of autopsy report admitted as public record but coroner's opinion on cause of death excluded]), the requirements of Article 7, that are incorporated in the hearsay article as well as the requirements of section 403 that also apply, seem stringent enough to limit unreliable or otherwise inadmissible hearsay opinions.

The final introductory limitation on otherwise admissible hearsay is that the statement is untrustworthy because of the declarant's strong motive to falsify or other circumstances demonstrating the untrustworthiness of the statement; this limitation gives a judge discretion to exclude unreliable hearsay even if it satisfies an exception. In this regard, the interplay between the

introductory requirement of trustworthiness and the business record (5) and public records exception (7) is worth noting. Under these two subdivisions, reports prepared solely for litigation are not admissible. Even if a report is not prepared solely for litigation and hence admissible under those exceptions, it still may be

inadmissible under the introductory trustworthiness requirement. For example, untrustworthiness could be shown if the employee making the report, on the employee providing information to the maker of the report, has been negligent or otherwise culpable and is simply attempting to "create a record." *See* Prince, Richardson on Evidence § 304 (10th ed.).

The burden of establishing personal knowledge and a qualified opinion rests with the proponent, while the burden with respect to the hearsay declaration's lack of trustworthiness rests on the objecting party. Placing the burden of establishing untrustworthiness upon the adverse party is appropriate because, even though hearsay may be generally unreliable, once a hearsay statement satisfies all the requirements of a particular exception, there arises a rebuttable presumption of reliability. This presumption operates to shift the burden of proof to the adverse party. *See* CE 302 and comment thereto. When reasonable people could disagree over trustworthiness, the court should submit it to the jury with appropriate instructions. Under CE 104, the burden of proof with respect to each introductory requirement is a preponderance of the evidence.

This general trustworthiness requirement may be new to New York law, although under present New York law, with respect to business records (804[5]), and declarations against penal interest offered against a criminal defendant (804[b][3]), there are decisional law trustworthiness limitations that are continued in those Code exceptions. In one opinion, the Court of Appeals mentioned in passing a general reliability requirement but the authority cited for the proposition does not support it and the opinion went on to deal with reliability in the context of the particular exception at issue—a declaration against penal interest. *See People v. Brensic*, 70 N.Y.2d 9, 14, 517 N.Y.S.2d 120, 122 (1987), *citing People v. Nieves*, 61 N.Y.2d 125, 131, 501 N.Y.S.2d 1, 4 (1986). There is limited other authority for a general reliability requirement above and beyond the literal requirements of the particular exception, especially where there is little doubt about the hearsay's unreliability. *See Iannielli v. Consolidated Edison Co.*, 75 A.D.2d 223, 428 N.Y.S.2d 473 (2d Dep't 1940); *see also* Prince, Richardson on Evidence § 304 (10th ed.).

Each of the introductory limitations is concerned with the making and substance of the out-of-court statement and not the credibility of a testifying witness who is reporting that he or she heard the statement. The focus on the declarant and not the reporter-witness is because concern over hearsay deals with the memory, perception and narrative skill of the declarant and not whether the witness in fact heard the statement, a fact which can be tested by cross-examination of the reporter-witness. *Compare* 5 Wigmore, Evidence § 1363 (Chadbourn rev. 1974), *with* McCormick, Evidence § 224, at 257 (1st ed. 1954).

As noted earlier, whether the requirements of the introductory limitations or that of a hearsay exception contained in CE 803(c) have been satisfied is a question to be determined by the court pursuant to CE 104(b).

(c) (1) Excited utterances.

This paragraph codifies New York's well-recognized exception for statements made spontaneously under the stress of excitement engendered by the startling event to which they relate and while reflective faculties of the declarant have been stilled. *See, e.g., People v. Nieves*, 67 N.Y.2d 125, 135, 501 N.Y.S.2d 1, 7 (1986). The rationale underlying this exception is expressed in *People v. Caviness*, 38 N.Y.2d at 230-31, 379 N.Y.S.2d at 698-699: "It is established that spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while . . . 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. . . . They are admitted because, as the impulsive and unreflecting responses of the declarant to the injury or other startling event, they possess a high degree of trustworthiness, and, as thus expressing the real tenor of said declarant's belief as to the facts just observed . . . may be received as testimony of those facts."

The requirements for admissibility under this exception are: (1) the occurrence of an event or condition sufficiently startling; (2) a statement brought about by the event or condition and relating to it; and (3) the absence of time to fabricate. As the Court of Appeals has emphasized: "'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. Brown*, 70 N.Y.2d 513, 519, 522 N.Y.S.2d 837, 840 (1987) (emphasis in original), quoting *People v. Edwards*, 47 N.Y.2d 493, 497, 419 N.Y.S.2d 45, 47 (1979).

There is no requirement that the declarant be a participant in the event or condition. Thus, the statement may be made by a bystander who merely observed the startling event. *See People v. Caviness, supra*. The declarant, however, must have personal knowledge of the facts contained in the declaration. *Id.*

With respect to the element of time, the important consideration is the nature of the event and the duration of the state of excitement and not any temporal duration. *See People v. Brooks*, 71 N.Y.2d 877, 527 N.Y.S.2d 753 (1988); *People v. Brown, supra*; *People v. Edwards, supra*; *People v. Culhane*, 45 N.Y.2d 757, 408 N.Y.S.2d 489, cert. denied, 439 U.S. 1047 (1978), *People v. Sostre*, 51 N.Y.2d 958, 435 N.Y.S.2d



**702 (1980). The amount of time elapsed between observing and speaking is just one factor. A variety of factors including the nature of the event, the nature of the injury, shock,**

unconsciousness, or pain should also be considered along with other factors that may prolong or reduce the period during which the risk of fabrication is at an acceptable minimum. *See People v. Norton*, 164 A.D.2d 343, 563 N.Y.S.2d 802 (1st Dep't 1990).

(c) (2) Then-existing mental, emotional, or physical condition.

Paragraph (c)(2) provides an exception to the hearsay rule for statements of present state of mind, emotion, or physical condition. The paragraph encompasses such things as intent, plan, motive, design, or feeling. These statements are considered trustworthy because of their spontaneous nature and the factor of contemporaneousness eliminate the risk of faulty memory and provide some assurance against deliberate fabrication. The statements often concern the subjective physical or mental state of the declarant which are directly observable only by the declarant. Extrajudicial declarations of these impressions at the time they exist will often be more reliable than statements made later by declarant in court at a time when memory may be impaired and external pressures brought to bear.

Three kinds of declarations are embodied in this paragraph. First are involuntary expressions of pain. This restates New York law. *See Prince, Richardson on Evidence* § 287 (10th ed.). Second, the paragraph would admit statements of mental or emotional state to show the declarant's state of mind when such state of mind is in issue. Examples would be statements to show intent to establish a particular domicile, to show motive, to show malice, or to prove or disprove fraud. This is consistent with present law. *See, e.g. Re Newcomb's Estate*, 192 N.Y. 238, 80 N.E. 950 (1908); *Prince, Richardson on Evidence* § 388 (10th ed.). In earlier drafts of the Code, this paragraph included voluntary statements of present pain, sensation or bodily condition. The general exception for those statements when made to a person other than a treating or diagnosing doctor has been moved to 804 because present law has an unavailability requirement for that exception. When such statements are made to a doctor for purposes of diagnosis or treatment they generally are within the exception contained in 803(c)(3) which has no unavailability requirement.

Third, the paragraph would admit declarations of intention offered to show subsequent acts of the declarant. A two-step reasoning process is involved. The statement of the declarant is admitted to show an existing intent; from this intent the trier of fact is permitted to infer that the intended act was carried out. The latter inferential step is a matter of relevancy rather than a concern of the hearsay rule. Admissibility of these intent statements derives from

the well-known decision in *Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285, 12 S.Ct. 909 (1892), which has been followed in New York. See *People v. Conklin*, 175 N.Y. 333, 67 N.E. 624 (1903); *Stokes v. People*, 53 N.Y. 164 (1873); *People v. Dixon*, 138 A.D.2d 929, 526 N.Y.S.2d269 (4th Dep't 1988);

*Land on v. Preferred Accident Ins. Co.*, 43 App Div 487, 60 N.Y.S. 188 (1899), *affd*, 167 N.Y. 577 (1901).

While a declaration of intent or a state of mind is admissible as noted above, a declarant's memory or belief is not admissible to prove prior acts remembered. See *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22 (1933). *People v. Reynoso*, 73 N.Y.2d 816, 818, 537 N.Y.S.2d 113, 114 (1988) (upholding exclusion as hearsay defendant's statement to his sister, within two hours of a shooting, that defendant believed that the victim had been armed); see also Prince, Richardson on Evidence § 289 (10th ed.). Accordingly, the limiting language of this paragraph, that a statement of memory or belief is not admissible to prove the fact remembered or believed, reflects generally accepted principles.

In accordance with present law, there is no exception, like that provided in the Federal Rules of Evidence, 803(3), to admit these statements of memory or belief when they relate to execution, revocation, identification or the content of declarants will. *In re Will of Bonner*, 17 N.Y.2d 9, 266 N.Y.S.2d 971 (1966); *In re Kennedy's Will*, 167 N.Y. 163, 69 N.E. 442 (1901); *Waterman v. Whitney*, 11 N.Y. 157 (1854); *In re Kent's Will*, 169 App. Div. 388, 155 N.Y.S. 894 (4th Dep't 1915); Surrogates Court Procedure Act 1407.

Finally, declarations of intent to show the conduct of a person other than the declarant is governed by CE 804(5) (requiring a showing of unavailability) because it is one thing to use such a statement to prove the subsequent conduct of the declarant, it is another matter when it is used to show the conduct of someone else. Placing reliable declarations of intent to prove the conduct of another in CE 804(5) is based upon the need for the statement because the declarant is unavailable.

(c) (3) Statements for purposes of  
medical diagnosis and  
treatment.

This paragraph provides a hearsay exception for statements of medical history, symptoms, sensations, or their cause, if made to a physician or the agent of physician for purposes of diagnosis or treatment, even if the statements concern past physical conditions, as long as they are reasonably pertinent to diagnosis or treatment. With respect to statements concerning the cause of a physical condition, the reasonable pertinency requirement would, for example, permit a patient's statement that he or she was stabbed

with a knife but the identity of the assailant would not generally be pertinent for treatment or diagnosis. *See Williams v. Alexander*, 309 N.Y. 283, 287-88, 129 N.E.2d 417, 420 (1955). The statement may be made to a physician, or anyone else participating in the diagnosis or treatment, *e.g.*, ambulance attendant, physicians, receptionist. Trustworthiness of such statements is usually assured by the patient's belief that the treatment received may depend upon the accuracy of the information provided.

This paragraph changes present law in one respect. Although declarations relating to present pain are admissible as an exception to the hearsay rule, *see Prince, Richardson on Evidence* § 287 (10th ed.), statements as to past pain are not admissible, *see Davidson v. Cornell*, 132 N.Y. 228, 30 N.E. 573 (1892). Since a patient who comes to a physician for purposes of treatment has the same incentive to speak truthfully of his past symptoms as the patient has of present ones, *see Younger, Admissibility of Statements of Past Physical Condition*, N.Y.L.J., Dec. 5, 1980, p. 1, col. 3, this paragraph admits both types of statements. This exception, like present law, does not encompass statements made to a non-treating physician consulted solely for purposes of testimony and it accords with present law under which such statements are not admissible as proof of the facts stated. *See Prince, Richardson on Evidence* § 287 (10th ed.).

(c) (4) Recorded recollection.

Paragraph (c)(4) codifies present law. *See People v. Raja*, 11 A.D.2d 322, 433 N.Y.S.2d 200 (2d Dep't 1980); *Prince, Richardson on Evidence* § 469 (10th ed.). Under its provisions, a recorded recollection is admissible as an exception to the hearsay rule if four foundation requirements are established. The trustworthiness of such a statement is usually assured when these requirements are met. *See Halsey v. Sinsebaugh*, 15 N.Y. 485 (1857).

First, it must be shown that the witness once had personal knowledge of the recorded events. A memorandum or record cannot be received into evidence under this paragraph where it appears that it was made by the witness from facts reported to him by another, *see Peck v. Valentine*, 94 N.Y. 569 (1884); *Muth v. J & T Metal Products Co.*, 74 A.D.2d 898, 425 N.Y.S.2d 858 (2d Dep't 1980), unless the other also testifies to the accuracy of the facts reported to the witness who made the memorandum or record.

Second, it must be shown that the witness presently lacks a sufficient recollection to testify fully and accurately to the event. There is, however, no requirement that the witness's memory be completely exhausted. *See People v. Weinberger*, 239 N.Y. 307, 146 N.E.2d 434 (1925). Thus, when a witness, having been shown the memorandum, testifies that it has not refreshed his recollection so as to enable the witness to testify from present memory, this

requirement will be satisfied.

Third, the memorandum or record must have been made or adopted by the witness when the event was "fresh" in the witness's memory. Whether, in a given case, the memorandum or record satisfies this requirement can be determined only on the particular facts of that case. *See Calandra v. Norwood*, 81 A.D.2d 650, 438 N.Y.S.2d 381 (2d Dep't 1981); *People v. Caprio*, 25 A.D.2d 145, 268 N.Y.S.2d 70 (2d Dep't 1966), *aff'd*, 18 N.Y.2d 617, 272 N.Y.S.2d 385 (1966).

Last, it must be shown that the memorandum or record accurately reflects the past memory and knowledge of the witness, i.e., the memorandum was accurate when made. In this regard, the witness may testify either that the witness remembers making an accurate recording of the event in question which the witness presently does not sufficiently remember, or, if the witness does not remember making the memorandum or report, that the witness is confident that the witness would not have made or adopted the recording unless it accurately described the witness's observations at the time. Prince, Richardson on Evidence § 471 (10th ed.). As stated by McCormick, "[I]t is sufficient if [the witness] testifies that [the witness] knows it is correct because it was [the witness's] habit or practice to record such matters accurately or to check them for accuracy. At the extreme, it is even sufficient if [the witness] testifies that [the witness] recognizes the signature on the statement as [that of the witness] and believes it correct because [the witness] would not have signed it if [the witness] had not believed it true at the time." McCormick, Evidence § 303 (3d ed.).

Importantly, a memorandum or record may be admissible under this paragraph if it reflects the recollection of the witness and was recorded by another person even if the witness did not actually adopt the memorandum or record after it was made. In such a case, if the witness testifies that she or he accurately told the recorder what she or he observed and the recorder testifies that she or he accurately recorded what had been reported to the recorder, the memorandum or record is admissible, provided the other foundation requirements are satisfied. *See Mayor, etc. of New York v. Second Avenue R. R. Co.*, 102 N.Y. 572, 7 N.E. 905 (1886); McCormick, Evidence § 303 (3d ed.).

The memorandum or record may be received as an exhibit because New York decisions draw no distinction between recorded recollections and other forms of documentary evidence. *People v. Weinberger*, *supra*; *Howard v. McDonough*, *supra*; *Halsey v. Sinnebaugh*, *supra*; *Wisniewski v. New York Central R. R. Co.*, 228 App. Div. 27, 31, 238 N.Y.S. 429 (4th Dep't 1930); *Douler v. Prudential Ins. Co.*, 143 App. Div. 537 (2d Dep't 1911); Prince, Richardson on Evidence § 473 (10th ed.); *contra* FRE 803(5). There seems to be no reason to interfere with the trial court's normal discretionary power to control jury access to exhibits which constitute documentary evidence.

(c) (5) Business records.

(A) General rule.

Subparagraph (c)(5)(A) restates CPLR 4518(a) verbatim with two additions discussed below: one addressing records prepared solely for litigation and the other addressing law enforcement reports sought to be introduced in a criminal case.

First, the record must be "made at or near the time" of the event being recorded or at a time reasonably thereafter. Second, the record must be kept in the course of a regularly conducted business activity. Third, it must be shown that it was the regular practice of the business to make the record. Finally, the maker of the record must either have personal knowledge and a duty to record, or must have received the information from another person or persons who have personal knowledge and are under a duty to transmit the information. In the alternative, the substance of a business record would be admissible if the maker was under a business duty to record the information and the information provided satisfied some other hearsay exception. These requirements guarantee trustworthiness since business records are customarily checked; the regularity and continuity of such entries produce habits of precision; the business activity functions in reliance on the records; and employees of the entity are charged with recording and reporting accurately as part of their job. *See* Fisch, Evidence § 831 (2d ed.).

In satisfying the foundation requirements, it is not necessary to call, as witnesses, all those persons who had a part in the making of the record. *See Johnson v. Lutz*, 253 N.Y. 124, 128, 170 N.E. 517, 518 (1930). The requirements may be satisfied by the testimony of anyone who is familiar with the manner in which the record was prepared. Additionally, the requirements for qualification as a business record can be met by documentary evidence, affidavits, admissions of the parties, circumstantial evidence, or a combination of direct and circumstantial evidence.

The form which the record may take is described broadly as any "writing or record," regardless of its form. This includes any means of storing information in addition to the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. Thus, the paragraph is not limited to books of account. *See Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 538 N.Y.S.2d 367 (1974).

Entries in the form of medical opinion or diagnosis are included in the terms; acts, events, and conditions; hence those opinions are admissible under the paragraph, assuming they satisfy the introductory limitation (803[c]) on opinions, *see* Comment to 803(c), *supra*. Under present law qualified medical opinions in business records are admissible. *See People v. Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *Pekar v. Tax*, 43 A.D.2d 957, 352 N.Y.S.2d 39 (2d Dep't 1974); *Gioia v. State*, 22 A.D.2d 181, 254 N.Y.S.2d 384 (4th Dep't 1964). Other reliable opinions in business records that satisfy the introductory limitation, *see* Comment to 803(c), *supra*, would also be admissible, as seems to be the case under present law. *See Ellison v. N.Y.C. Transit Auth.*, 63 N.Y.2d 1019, 484 N.Y.S.2d 797 (1984).

Present law encompasses entries recorded by a person under a business duty to make that record in the regular course of business based upon information supplied by a person with personal knowledge who has a business duty to so inform the entrant. *See, e.g., Hayes v. State*, 40 N.Y.2d 1044, 392 N.Y.S.2d 282 (1976). When the person providing the information is not under a business duty, the exception is still satisfied provided that person's statement complies with the requirements of another hearsay exception and the entrant is under a business duty to record the information provided. *See Cover v. Cohen*, 61 N.Y.2d 261,274, 473 N.Y.S.2d 378, 384 (1984); *Matter of Leon HR, supra*; *Kelly v. Wasserman, supra*; *Murray v. Donlan*, 77 A.D.2d 337, 433 N.Y.S.2d 184 (2d Dep't 1980); *Toll v. State*, 32 A.D.2d 47, 49-51, 299 N.Y.S.2d 589, 592 (3d Dep't 1969); *see also* Comment to CE 808, *infra*. Even when the declarant's statement in a business record does not satisfy another exception to the hearsay rule, it still may be used for impeachment purposes if the person making the entry was under a business duty to record and the requirements of CE 613 are met. *See Donohue v. Losita*, 141 A.D.2d 691, 529 N.Y.S.2d 813 (2d Dep't 1988). The requirement of a business duty to record the information provided should not be taken lightly because, unless that duty exists, the record will not be admissible for any purpose. *See Williams v. Alexander*, 309 N.Y. at 287-88, 129 N.E.2d at 419, *supra*.

(A) (i) Reports prepared solely for litigation and other circumstances affecting reliability.

Reliability problems of the type explored in *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477 (1943), are posed by self-serving exculpatory accident reports which are prepared when litigation was known to be likely. Decisional law has emphasized that even though an otherwise proper business record is self-serving this does not, by itself, provide a reason for exclusion. The cases have, however, excluded records or reports prepared solely with a view to litigation. *See e.g. People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384 (1970); *Galanek v. New York City Transit Authority*, 53 A.D.2d 586, 385 N.Y.S.2d 62 (1st Dep't 1976); *Toll v. State, supra*; *Bromberg v. New York*, 25 A.D.2d 885, 270 N.Y.S.2d 425 (2d Dep't 1966); *Bishin v. New York Central R. R. Co.*, 20 A.D.2d 921, 249 N.Y.S.2d 778 (2d Dep't 1964). This clause expressly provides that records or reports prepared solely for litigation purposes should be excluded. Even if a report is not prepared exclusively for litigation, application of the introductory trustworthiness may in some circumstances still require exclusion. *See* Comment to CE 803(c), *supra*.

(A) (ii) Businesses encompassed.



In accordance with present law, the term "business" is intended to mean any business, institution, association, profession, occupation, and calling of any kind, legal or illegal, whether or not conducted for profit, including government or public entities. *See People v. Kennedy*, 68 N.Y.2d 569, 510 N.Y.S.2d 853 (1986); *People v. Mertz*, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986); *People v. Farrell*, 58 N.Y.2d 637, 458 N.Y.S.2d 514 (1982); *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384 (1970); *People v. Nisonoff*, 293 N.Y. 597, 59

N.E.2d 420 (1944), *cert. denied* 326 U.S. 745, 66 S.Ct. 22 (1945); *Matter of Leon RR*, 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); *Kelly v. Wasserman*, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959); *People v. Nisonoff*, 293 N.Y. 597, 59 N.E.2d 420, *supra*, *Zaulich v. Thompkins Square Holding Co., Inc.*, 10 A.D.2d 492, 200 N.Y.S.2d 550 (1st Dep't 1960); *Tenpas v. Uhl*, 276 App. Div. 641, 97 N.Y.S.2d 566 (4th Dep't 1950); *Bowes v. First Trust & Deposit Co.*, 266 App. Div. 712, 40 N.Y.S.2d 420 (4th Dep't 1943); *Zinaman v. Stivelman*, 246 App. Div. 851, 285 N.Y.S. 20 (1936), *affd*, 272 N.Y. 580, 4 N.E.2d 813 (1936).

By including governmental or public bodies, the Code continues present law (*see, e.g., People v. Mertz, supra; People v. Foster, supra; People v. Farrell, supra*) and rejects 1982 proposed code provisions that would have, in effect, excluded law enforcement records from this exception when those records were offered against an accused in a criminal case. *See Comment to 1982 Proposed Code of Evidence §§ 803(c)(5) & (7) at pp. 196, 198 (McKinney's 1982).*

(A) (iii) Law enforcement records

As noted, records of law enforcement agencies may qualify as a business record and are admissible against a defendant in a criminal case. *See, e.g., People v. Mertz*, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986); *People v. Farrell*, 58 N.Y.2d 637, 458 N.Y.S.2d 513 (1982); *People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384 (1970); *cf. People ex rel. McGee v. Walters*, 62 N.Y.2d 317, 476 N.Y.S.2d 803 (1984). There is no sound reason to exclude these reports that objectively describe routine activities, such as maintenance of a breathalyzer (*Mertz*), speedometer deviations (*Foster*) and test results of sample breathalyzer ampoules (*Fairell*) that are made for legitimate business reasons. Still, other law enforcement reports about nonroutine matters focusing on a particular suspect that might qualify as a business record contain crucial evidence of guilt that make it desirable for the hearsay declarant, if available, to testify. *See People v. Nisonoff, supra*. Accordingly, this clause provides that qualified law enforcement business records offered to prove directly an element of a crime or other crucial evidence are admissible only if the declarant testifies or is unavailable to testify. *See People ex rel. McGee v. Walters, supra*. Thus, for example, an otherwise qualified business record detailing a police officer's personal recollection of a statement satisfying a hearsay exception, a chemist's report that

tested substances are illegally controlled substances, or a fingerprint report reciting that the fingerprints of defendant match the fingerprints found at the crime scene are all reports that require the declarant's testimony or a showing of unavailability as that term is defined in CE 804(a). Moreover, with respect to expert opinions, even if the expert-declarant is unavailable, the paragraph precludes admissibility of a report if there is available an expert who can give equivalent testimony. Thus, for example, if there remains a sufficient amount of substance that can be retested by another expert, the original report is not admissible even though the expert-declarant is unavailable. On the other hand, if there is insufficient substance available for retesting and the chemist who prepared the report testifies or is unavailable to testify, then the report is

admissible as a business record. It bears repeating, however, that reports created solely for litigation purposes are excluded under this section.

Finally, it should be noted that, as under present law, if a law enforcement report qualifies as a business record, it is admissible even if it cannot satisfy the requirements of another exception, *e.g.*, subd. (7) for public records. Earlier drafts of the Code that reflected a different view and sought to change the law have been rejected.

(B) Certified hospital bills.

This subparagraph is designed to facilitate the proof of the contents of hospital bills. The subparagraph: (1) creates an exception to the hearsay rule for hospital bills and the accompanying certification; and (2) contains its own authentication procedure for such bills, thereby dispensing with the need for the testimony of the person who prepared the bill or otherwise resorting to the provisions of Article 9.

The subparagraph is derived from CPLR 4518(c). Its provisions differ from that section in that a hospital bill is "evidence" rather than "*prima facie* evidence" of the facts contained therein. Thus, once writings are admitted under this subparagraph, they are merely "evidence" of certain facts, which the jury is free to disbelieve even though the adverse party offers no evidence on the point. As noted this is contrary to present law, CPLR 4518(b). What was intended by "prima facie" is uncertain. To be sure, legislative history with respect to some sections containing *prima facie* indicates that by use of the term the intent was only to create a presumption which would shift the burden of going forward (*see* NY Adv. Comm. on Prac. and Proc., 2d Prelim. Rep., Leg. Doc. No. 13, p. 267 (1958); Practice Commentary to CPLR 4533-a by McLaughlin in McKinney's Consol. Laws of NY, Book 7B, Pocket Part). As to other sections of the CPLR, however, the intent is unclear, as demonstrated by decisional law. The term has been construed to mean that the writing is "entitled to be received as evidence without further proof." *Matter of Pirie*, 198 N.Y. 209, 213, 91 N.E. 587, 588 (1910). The term has also been interpreted to mean that a "sufficient case" is made for the jury. *Rogers v. Pell*, 154 N.Y. 518, 530, 49 N.E. 75 (1898). Yet another interpretation is that once a writing is "prima facie evidence," not only is the burden of going forward shifted but its effect can be overcome only by proof so clear and convincing as to amount to a moral certainty. *Albany Co. Savings Bank v. McCarty*, 149 N.Y. 71, 80, 43 N.E. 427 (1896). This lack of consistency of treatment is undesirable as there is no sufficient reason why these writings should not be treated uniformly. Furthermore, in view of the specialized nature of this and other kinds of writings, there is no need to provide impact beyond admissibility. The factual inferences that are desired to be drawn from them upon

their introduction are so strong that the trier of fact will in the absence of evidence to the contrary draw them. In this regard, omission of the term "prima facie" will not mean that different results will occur than would have if it were retained.

Accordingly, the term "prima facie" has been deleted and writings of this kind, once admitted, are merely "evidence."

Notably, compliance with the subparagraph will generally overcome objections based on hearsay, authentication, or best evidence grounds. If there is some other rule of evidence, *e.g.*, hearsay with respect to information set forth in the bill, lack of relevancy, undue prejudice, or privilege, which might properly be invoked and make the writing inadmissible, the court is not authorized to admit the writing merely because it falls within this section.

Furthermore, this subparagraph is not intended to provide the exclusive manner by which a hospital bill is admissible. Where other rules of evidence will provide for its admission, a writing otherwise within the scope of this subparagraph will be admissible pursuant to those provisions without the necessity of satisfying the requirements of this subparagraph.

(C) Certified hospital, library or public records.

This subparagraph is designed to facilitate the proof of the contents of transcripts or reproductions of hospital records, and records or certified photostatic copies thereof of a library, or a department or bureau of a municipal corporation or of the state, the writings referred to in CPLR 2306 and 2307. Subparagraph (1) creates an exception to the hearsay rule, CE 802, for these writings and the accompanying certifications; (2) contains its own authentication procedure, thereby dispensing with the need for the testimony of the person who prepared the writings or otherwise resorting to the provisions of Article 9; and (3) provides an exception to the best evidence rule, CE 1002, for transcripts, reproductions, or photostatic copies. It should be recognized that these writings are admissible even when they have not been subpoenaed under CPLR 2306 and 2307, but have been voluntarily produced. *Joyce v. Kowalcewski*, 80 A.D.2d 27, 437 N.Y.S.2d 809 (4th Dep't 1981).

The subparagraph is derived from CPLR 4518(c). Its provisions differ from that section in that the writings are "evidence" rather than "prima facie evidence" of the facts contained therein, for the reasons discussed in the comments to subparagraph (B) above.

Notably, compliance with the subparagraph will generally overcome objections based on hearsay, authentication, or best evidence grounds. *See People v. Kinne*, 71 N.Y.2d 879, 527 N.Y.S.2d 754 (1988) (certificate must state that the documents it authenticates were produced in the normal course of business at or near the time the event recorded in those documents occurred but the authenticating certificate itself need not be dated or produced at or

near the event). If there is some other rule of evidence, *e.g.*, hearsay with respect to information contained in the record, CE 802, lack of relevancy, CE 401 & 402, undue prejudice, CE 403, privilege, CE 507-509, which might properly be invoked and make the writing inadmissible, the court is not authorized to admit the writing merely because it falls within this section.

Furthermore, this subparagraph is not intended to provide the exclusive manner by which a hospital bill is admissible. Where other rules of evidence will provide for its admission, a writing otherwise within the scope of this subparagraph will be admissible pursuant to those provisions without the necessity of satisfying the requirements of this subparagraph.

(D) Certified bills for service or repairs.

This subparagraph is designed to facilitate proof of damages in certain situations. With respect to an itemized bill not in excess of \$2000 for services or repairs rendered, the paragraph: (1) creates an exception to the hearsay rule, CE 802, for such a bill and the accompanying certification; and (2) contains its own authentication procedure, thereby dispensing with the need for the testimony of the person who prepared the bill or otherwise resorting to the provisions of Article 9. Once admitted, the bill is evidence of the reasonable value and necessity of the services or repairs rendered. The bill is not admissible as evidence that the services or repairs rendered were incurred as a result of another party's conduct (McLaughlin, *The Admissibility of Professional and Repairs Bills Under CPLR 4533-a*, in 15th Ann. Rep. of Jud. Conf., 241, 245-247 [1970]). Although no more than one bill from the same person may be introduced under this paragraph, there is no limitation upon the aggregation of bills from different persons.

The subparagraph is derived from CPLR 4533-a. It differs, however, in two respects. First, a bill is "evidence" rather than "prima facie evidence" of the reasonable value and necessity of the services or repairs, for the reasons discussed in subparagraph (B). Second, the CPLR notice requirement has been omitted and the one contained in section 810 has been substituted. The CPLR requirement of notice at least 10 days before trial is not consistent with the flexible notice provision specified in other sections of the Code of Evidence.

Notably, compliance with the subparagraph will generally overcome objections based on hearsay, authentication, or best evidence grounds. If there is some other rule of evidence, *e.g.*, hearsay with respect to information set forth in the bill, CE 802, lack of relevancy, CE 401, 402, undue prejudice, CE 403, privilege, CE

507-509, which might properly be invoked and make the writing inadmissible, the court is not authorized to admit the writing merely because it falls within this section.

Furthermore, this subparagraph is not intended to provide the exclusive manner by which a hospital bill is admissible. Where other rules of evidence will provide for its admission, a writing otherwise within the scope of this subparagraph will be admissible pursuant to those provisions without the necessity of satisfying the requirements of this subparagraph.

(E) X-rays.

This subparagraph is designed to facilitate the introduction into evidence of X-rays. The subparagraph: (1) creates an exception to the hearsay rule, CE 802, for the writings inscribed on the X-rays and the accompanying affidavit; and (2) contains its own authentication procedure for X-rays, thereby dispensing with the need for the testimony of the physician under whose supervision the X-rays were taken, or otherwise resorting to the provisions of Article 9. See *Galuska v. Arbazia*, 106 A.D.2d 543, 482 N.Y.S.2d 846 (2d Dep't 1984).

The subparagraph is derived from CPLR 4532-a. It differs, however, in two respects. First, its provisions are extended to wrongful death actions. To be sure, while instances where X-rays will be relevant in wrongful death actions will be few, there is no good reason why the paragraph should be limited to personal injury actions. Second, the CPLR notice requirement has been omitted and the one contained in section 810 is now applicable. The present requirement of notice at least 10 days before trial is not consistent with the flexible notice provision specified in other sections of the Code of Evidence.

(c) (6) Absence of entry.

This paragraph changes present decisional law which holds that evidence of lack of entry is inadmissible. See *Boor v. Moschell*, 8 N.Y.S. 583 (Sup. Ct. 5th Dep't. 1889); *Gravel Products v. Suntiudale Acres, Inc.*, IOMisc. 2d 323, 171 N.Y.S.2d 519 (Sup. Ct. Erie Co. 1958). The New York rule has been criticized and rejected in almost every other jurisdiction. See 5 Wigmore, Evidence § 1531 (Chadbourn rev. ed.); McCormick, Evidence § 307 (3d ed.). The assurance of trustworthiness which underlies the use of business records to prove the occurrence or existence of a matter logically applies with equal force to the use of business records to prove the nonoccurrence or nonexistence of a matter. Of course, for an absence of entry to be admissible as a hearsay exception, the record from which the entry is absent must satisfy the introductory trustworthy provision of 803(c) as well as all of the requirements of

the business records exception, 803(c)(5), itself.

While in many instances an absence of an entry might not be hearsay under CE 801(a) and (c), a hearsay exception is provided to assure uniform treatment and admissibility.

(c) (7) Public records.

(A) General rule.

Subparagraph (c)(7)(A) provides an exception to the hearsay rule for various reports made by public offices and generally reflects present law. *See* CPLR 4520; Prince, Richardson on Evidence §§ 342, 346 (10th ed.). The trustworthiness of these reports "is found in the declarant's official duty and the

high probability that the duty to make an accurate report has been performed." McCormick, Evidence, § 315 (3d ed.); *see also* Prince, Richardson on Evidence § 342 (10th ed.). Of course, if trustworthiness appears to be lacking, a court may exclude a report pursuant to the introductory clause of the subdivision. *See* Comment to CE 803(c), *supra*. The public offices encompassed by this subparagraph include the courts, legislature, departments, boards, and other governmental offices of this state, the United States, other states, foreign countries, or of a political subdivision thereof. Reports prepared solely for purposes of litigation are not admissible as is the case under present law. *See, e.g., People v. Foster*, 27 N.Y.2d at 52, 313 N.Y.S.2d at 388, *supra*; *see* 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. ¶ 4518.

(i) Records of activities.

Clause (i) encompasses records of "activities" of a public office. Records of activities refer to those records which focus exclusively, or at least primarily, upon the functions of the public office. Illustrative examples would be records setting forth receipt and disbursement of funds, *e.g., Loughran v. Markle*, 242 App. Div. 331, 275 N.Y.S. 721 (1934), *aff'd*, 266 N.Y. 601, 195 N.E. 219 (1935), and acknowledgements or certificates attesting to the correctness of copies of public records. *See, e.g., Fisch*, Evidence § 954 (2d ed.).

(ii) Matters observed pursuant to duty.

Clause (ii) encompasses "matters observed pursuant to duty imposed by law as to which matters there was a duty to report." Records that set forth "matters observed" refer to records recording actions of persons or events, and conditions other than the functioning of the public office which are factual in nature as opposed to interpretive or evaluative in nature. Illustrative examples would include weather bureau records and economic statistics



concerning prices. Paragraphs (A) and (B) are substantially in accord with present New York decisional and statutory law. *See People v. Foster*, 27 N.Y.2d 47, 313 N.Y.S.2d 384 (1970); *People v. Nisonoff*, 293 N.Y. 597, 59 N.E.2d 420, *supra*; *Consolidated Midland Corp. v. Columbia Pharmaceutical Corp.*, 42 A.D.2d 601, 345 N.Y.S.2d 105 (2d Dep't 1973); CPL 60.60; CPLR 4518, 4520, 4522, 4527, 4528, 4529, 4530, 4534, 4540, 4541, 4542.

The 1982 proposed code excluded all such reports in criminal cases on behalf of the prosecution. This would have been a marked change in New York law and is rejected here. Still, to protect an accused's state and federal confrontation rights, subparagraph (B) restricts the admissibility of official law enforcement reports concerning nonroutine matters against the accused in criminal cases in a manner identical to that provided for law enforcement reports under the business record exception. *See Comment to 803(c)(5), supra*.

(iii) Factual findings.

Clause (iii) encompasses public records setting forth "factual findings resulting from an investigation made pursuant to authority granted by law" and their introduction in a civil proceeding. These records refer to the results of the investigative and fact-finding operations of public employees. The records have essentially no subject matter limitation, provided that they relate to matters which the public office is authorized to investigate. While "factual findings" does not include legal conclusions that have been reached, it does include opinions in the sense of inferences regarding facts which are the product of official expertise as well as recitations of facts. *See Beech Aircraft Corp. v. Rainey*, 48 U.S. 153, 109 S.Ct. 439 (1988). Present law regarding such reports is unclear. Some decisions have indicated that the findings in an official report must be based on the official's personal knowledge and not reflect expert inferences. *See, e.g., Kelly v. Diesel Constr. Div. of Carl A. Morse, Inc.*, 35 N.Y.2d 1, 358 N.Y.S.2d 685 (1974); *People v. Nisonoff*, 293 N.Y. 597, 59 N.E.2d 420, *supra*; *People v. Hampton*, 38 A.D.2d 772, 327 N.Y.S.2d 961 (3d Dep't 1972). Other decisions have, however, admitted similar findings under the business records or official records exceptions. *See, e.g., Stein v. Lebowitz- Pine View Hotel, Inc.*, 111 A.D.2d 572, 489 N.Y.S.2d 635 (3d Dep't 1985); *Kozlowski v. Amsterdam*, 111 A.D.2d 476, 478, 488 N.Y.S.2d 862, 865 (3d Dep't 1985); *Gioia v. State*, 22 A.D.2d 181, 254 N.Y.S.2d 384 (4th Dep't 1966); *Lichtenstein v. Montefiore Hospital & Medical Center*, 56 A.D.2d 281, 392 N.Y.S.2d 18 (1st Dep't 1977); *Duffy v. 42nd St. M. & S. N. Av. R.R. Co.*, 266 App Div 865, 42 N.Y.S.2d 534 (2d Dep't 1943); *Iannucci v. John Hancock Mut. Life Ins. Co.*, 83 Misc. 2d 733, 373 N.Y.S.2d 256 (Sup. Ct. West. Co. 1975).

There is no governing authority with respect to the admissibility of factual findings by non-law enforcement public officer investigations in criminal cases and it seems best to have each side offer live witnesses with personal knowledge. In cases

where the declarant is unavailable, resort to the 807 residual exception may well be appropriate.

The public records exception in subparagraph (c)(7) is to be distinguished from the business records exception in CE 803(c)(5) in one respect; the foundation evidence is simpler. Paragraph (c)(7) requires only official action and authority, while in paragraph (c)(5), regularity of observation, record-making, and record-keeping must be shown. It should be remembered that even if a report does not qualify as a public record it still may qualify as a business record under 803(c)(5).

(B) Certificate of judgment and  
fingerprint identification.

This subparagraph is designed to facilitate proof of previous convictions. The paragraph creates an exception to the hearsay rule, CE 802, for a certificate certifying a prior conviction or a fingerprint report showing a prior conviction. The offering party must, of course, still prove that the person named in the certificate is the person in question. *See People v. Vollick*, 75 N.Y.2d 877, 554 N.Y.S.2d 473 (1990); Preiser, Practice Commentary to CPL 60.60 (McKinneys Supp. 1990).

The subparagraph is derived from CPL 60.60. Its provisions differ in that the certificate or report is "evidence" rather than "presumptive evidence" of the prior conviction. This change codifies present judicial interpretation of "presumptive evidence." *See People v. Lemmons*, 40 N.Y.2d 505, 387 N.Y.S.2d 97 (1976), *aff'd sub nom. County Court of Ulster County v. Allen*, 442 T.J.S. 140, 99 S.Ct. 2213 (1979).

(c) (8) Vital statistics.

This paragraph provides for the admission of records of births, deaths, or marriages, if the report thereof was made to a public office pursuant to requirements of law, as an exception to the hearsay rule. This exception builds upon article 41 of the Public Health Law and article 3 of the Domestic Relations Law which require medical personnel and others to report such matters, and also provides for their recording. The underlying theory is that such records are commonly made by persons with no motive to misrepresent. 5 Wigmore, Evidence § 1632 (Chadbourn rev. ed.).

These records are admissible as evidence not only of the fact of birth, death, or marriage, but also as evidence of the facts contained in the records. For example, facts contained in a death record stating the medical cause of death are admissible as proof of the cause of death. Where, of course, circumstances indicate a lack of trustworthiness, the evidence may be excluded pursuant to the introductory requirements of GE 803(c). The public offices

encompassed by this paragraph include those of this state, the United States, other states, and foreign countries, or of a political subdivision thereof.

The paragraph is in accord with present decisional and statutory law. *See* CPLR 4526; DRL 14-a; Public Health Law 4103; *People v. Nison off*, 293 N.Y. 597, 59 N.E.2d 420, *supra*; *Anderson v. Commercial Travelers Mutual Accident Ass.*, 73 A.D.2d 769, 423 N.Y.S.2d 542 (3d Dep't 1979); *Matter of Esther T.*, 86 Misc. 2d 452, 382 N.Y.S.2d 911 (Nassau Co. Surrogates Ct. 1976).

(c) (9) Absence of public record or entry.

This paragraph provides that evidence in the form of a certification in accordance with CE 902 or testimony that diligent search failed to disclose the record or entry is admissible as a hearsay exception to prove the absence of a record, or the nonoccurrence or nonexistence of a matter for which a record otherwise would have been regularly made and preserved by a public office.

The public records encompassed by this paragraph are those specified in CE 803(c)(7) and 803(c)(8).

The basis of this exception to the hearsay rule is the same assumption of trustworthiness which forms the basis for the public records exception in CE 803(c)(7)—the fulfillment of the legal duty to record, which is assumed to have been fulfilled accurately. It is assumed that the duty to record has also been fulfilled and thus proof of the absence of the entry is reliable evidence that the entry was not made or that the event did not occur. *See, e.g.*, 5 Wigmore, Evidence § 1633(6) (Chadbourn rev. ed.).

The paragraph restates present statutory law (*e.g.*, CPLR 4521) with one exception. Presently, a certificate stating that diligent search failed to disclose the record or entry is inadmissible. *See* 5 Wigmore, Evidence 1678(7) (Chadbourn rev. ed.). Rejection of this rule is justified by the likelihood that the certificate is accurate and by the necessity of providing a method of proof which will not be unduly burdensome or expensive for the parties or the public office.

(c) (10) Records of religious organizations.

Records of a religious organization are generally admissible as business records under CE 803(c)(5). Under that paragraph, they would be admissible to prove the occurrence of the church activity (*e.g.*, the baptism, confirmation, or marriage), recorded in the record. CE 803(c)(5) would not, however, permit such records to be used to prove the truth of statements contained in them relating to certain matters of personal or family history (*e.g.*, birth dates, marital

histories, or relationships), since the business records exception requirement that the person providing the information was under a business duty to do so could not be met.

This paragraph creates an exception to the hearsay rule for regularly kept records of a religious organization concerning such matters as birth, marriage, divorce, death, legitimacy, or similar facts of personal or family history, regardless of whether the person who made the record is under a business duty to do so. In this respect, it supplements CE 803(c)(5). The underlying theory of this exception is the unlikelihood of the fabrication of information furnished to a religious organization.

Present decisional law, while permitting the introduction into evidence of records of religious organizations, places limits as to what facts may be proved by them. For example, presently, baptism records are admissible only to prove the fact of baptism, but not to establish the date of birth of the baptized child. *See Abbondola v. Church of St. Vincent De Paul*, 205 Misc. 353, 123 N.Y.S.2d 32 (Sup. Ct. Kings Co. 1953). The underlying theory of the exception does not justify limitations of this sort. Of course, the evidence may be excluded pursuant to the introductory provision of CE 803(c).

(c) (11) Marriage, baptismal and similar certificates.

This paragraph provides for the admission as an exception to the hearsay rule of statements contained in a certificate issued by an authorized person attesting that she or he performed a marriage or other ceremony or administered a sacrament. The theory underlying this subdivision is similar to that of CE 803(c)(10) (records of religious organizations), namely the unlikelihood of fabrication under the circumstances. *See 5 Wigmore, Evidence § 1645* (Chadbourn rev. ed.). Prior Code drafts rendered admissible all facts contained in the certificate but the most reliable of those facts are those reflecting the event recorded and only those facts are admissible under the exception.

It should be noted that to the extent the authorized person is required to file a report of his action, this paragraph provides an alternative to proof pursuant to CE 803(c)(8) (public records exception). Instead of obtaining a copy of the public record of vital statistics, a party pursuant to this paragraph may introduce the certificate which the authorized person has given to the participants.

(c) (12) Records of documents affecting an interest in property.

This paragraph is a narrow, but important, exception to the

hearsay rule which admits a record of a document establishing or affecting an interest in property as proof of the contents, execution, and delivery of the original document.

Since the County Clerk is under a statutory duty to accept and record duly executed documents, *see* Real Property Law §§ 291, 292, the public records exception, CE 803(c)(7), can be used to render those records eligible for admission as evidence of the contents of the document. 5 Wigmore, Evidence §§ 1639, 1648 (Chadbourn rev. ed.). This paragraph goes beyond the public record basis of admissibility and provides a basis for admitting the record for the additional purpose of proving execution and delivery of the underlying original document. Most common law courts admitted records of title documents to prove a fact of which the recorder had no first-hand knowledge (such as execution and delivery) by implying a legislative intent from the early recording statutes which required certain formalities and safeguards prior to recording. 5 Wigmore, Evidence §§ 1648, 1651 (Chadbourn rev. ed.). Presently, express statutory authorizations permit receipt of this kind of record in most jurisdictions. 5 Wigmore, Evidence § 1651 (Chadbourn rev. ed.). Therefore, if the particular record meets the recording requirements of the appropriate statute, receipt of the record to prove execution and delivery of the recorded document is warranted as an exception to the hearsay rule. Despite this rationale, New York practice under CPLR 4522 only permitted receipt of maps, surveys and official records affecting real property which had been on file

with the state for more than ten years. The items were received as *prima facie* evidence of the contents which could be rebutted by opposing testimony. *Manchik v. Pinelawn Cemetery*, 33 N.Y.S.2d 714 (1941), *aff'd*, 263 App. Div. 961 (2d Dep't 1942), *aff'd*, 291 N.Y. 816 (1944). There is no sufficient reason why any document, duly executed, acknowledged, and recorded should not also be admitted as evidence of the truth of its contents. This is particularly persuasive in light of New York Real Property Actions and Proceedings Law §331, permitting receipt of certain recorded or filed documents relating to realty as *prima facie* evidence of the validity of an execution or writ by virtue of which a sale by a sheriff has been made, and Real Property Actions and Proceedings Law 341, providing that recitals in certain instruments more than 15 years old shall be presumptive evidence of heirship facts contained therein.

(c) (13) Statements in documents  
affecting an interest in  
property.

This paragraph provides that a statement contained in a document purporting to establish or affect an interest in property, if the matter stated was relevant to the purpose of the document, is

admissible as an exception to the hearsay rule, unless dealings with the property since the document was made cast doubt upon the truth of the statement or the purport of the document. The theory is that such evidence is trustworthy because of: (1) the circumstances under which the document was made and the related financial interest at stake; (2) the requirement that the document be in writing; (3) the fact that a protest to the statement is likely to be raised at the time of conveyance; (4) the requirement that the statement must be germane to the purpose of the instrument; and (5) the fact that any later inconsistent dealings eliminate the exception. *See* Berger & Weinstein, 5 Weinstein's Evidence 803[15][01]. There is no requirement that the document be of a certain age, as there would be under the ancient documents exception of CE 803(c)(14).

This paragraph is a reasonable extension of accepted New York statutory and common law. New York recognized an exception to the hearsay rule for recitals in documents falling under its common law exception for ancient documents. *See e.g., Jackson ex dem. Livingston v. Neely*, 10 Johns. 374 (Sup. Ct. 1813). New York statutes liberalized the traditional 30-year period for classification as ancient documents and recognized certain recitals in documents of lesser age as follows: references to a writ of execution contained in a certificate of sale following a sheriff's sale for enforcement of a judgment lien as *prima facie* evidence of execution of the writ; sales over 20 years old (Real Property Actions and Proceedings Law § 331); recitals of heirship in instruments transferring an interest in real property as *prima facie* evidence of heirship; instruments over 15 years old (Real Property Actions and Proceedings Law § 341); and maps, surveys, and official records affecting real property on file in certain public places for more than 10 years as *prima facie* evidence of their contents. CPLR 4522.

(c) (14) Statements in ancient documents.

This paragraph provides that statements in a document at least 20 years old, whose authenticity is established, are admissible as an exception to the hearsay rule if the statements have been acted upon as true by persons having an interest in the matter. The theory is that such a writing is trustworthy because it will almost invariably have been created prior to the existence of any motive to falsify arising from the present litigation.

The federal counterpart to this paragraph, FRE 803(16), was rejected because it created an exception to the hearsay rule for statements in documents merely because they have aged twenty years. Age alone does not appear to be a sufficient guarantee of trustworthiness. Thus, this paragraph requires, as does the California statute upon which it is based, as a precondition to admissibility that the proponent of the document establish that persons having an interest in the subject matter be shown to have acted on the statements as if true. *See* Comment, California Evidence Code 1331.

Present law as to the status of ancient documents is unclear. *See* Prince, Richardson on Evidence § 341 (10th ed.).

(c) (15) Market reports.

This paragraph provides a hearsay exception for market quotations, tabulations, lists, directories, or other compilations used and relied upon by the public or by persons in particular occupations. The theory is that such compilations are trustworthy because they are published without consideration of their possible use in litigation but for the use of persons in a trade or profession who use and rely upon them in their everyday business. The paragraph codifies present decisional law (*see* Prince, Richardson on Evidence § 349 [10th ed.]), and restates present statutory law (*see* CPLR 4533).

(c) (16) Reputation concerning personal or family history.

This paragraph broadens the permissible use of reputation evidence to prove certain facts of personal or family history. Under present law and Code section 804(b)(6)(A), the pedigree declaration exception to the hearsay rule permits receipt of testimony of family descent, relationship, birth, marriage and death, provided the declarant is dead, was related by blood or affinity to, or intimately associated with, the family concerning which the declarant spoke, and the declarations were made *ante litem motam*. *Aalholm v. People*, 211 N.Y. 406, 105 N.E. 647 (1914); Prince, Richardson on Evidence §§

**319-324 (10th ed.). This paragraph expands on that practice as it permits a witness testifying about reputation to be a member of the family, an associate, or a member of the community who has knowledge of the reputation of a person's personal or family history. Like the common law, there is no requirement that the reputations had been established before the controversy arose. This change is**



justified since direct evidence of intra-family matters is frequently unavailable. 5 Wigmore, Evidence §§ 1580, 1602 (Chadbourn rev. ed.). Of course, where circumstances indicate a lack of trustworthiness, the evidence may be excluded pursuant to the introductory provision of CE 803(c).

(c) (17) Reputation concerning  
boundaries or general history.

Present law recognizes that reputation is admissible as an exception to the hearsay rule to prove boundaries or customs. *See* Prince, Richardson on Evidence § 331 (10th ed.). The reputation, however, must be 'ancient." *Id.* This paragraph codifies present law except that it does not require that the reputation be ancient. This is a desirable change since the requirement that the reputation be ancient is merely an additional, but not essential, device to ensure trustworthiness. The requirement of antiquity, in other words, should relate to the weight of the evidence rather than to its admissibility.

While reputation concerning boundaries must have arisen prior to the controversy, there is no similar requirement for events of general history. The very condition that they be historical dispenses with the need to pre-date the controversy.

(c) (18) Reputation as to character.

This paragraph authorizes the admission over a hearsay objection of character evidence permitted by CE 404(a), 608(a). The paragraph codifies present law. *See People v. Bouton*, 50 N. Y.2d 130, 428 N.Y.S.2d 218 (1980); *People v. Colantone*, 243 N.Y. 134, 152 N.E. 700 (1926).

(c) (19) Judgment of previous conviction.

This paragraph provides that evidence of a final judgment entered after a trial or upon a plea of guilty judging the person guilty of a crime can be introduced as an exception to the hearsay rule to prove any fact essential to sustain the judgment. The theory is that the law's fact-finding process leads to decisions that are trustworthy.

The paragraph is not intended to deal with the substantive effect of a judgment as a bar or collateral estoppel. *See Gilberg v. Barbieri*, 53 N.Y.2d 285, 441 N.Y.S.2d 49 (1981); *S. T. Grand, Inc. v. City of New York*, 32 N.Y.2d 300, 344 N.Y.S.2d 938 (1973). Under this paragraph, a judgment may be admissible even in cases in which the judgment has no collateral effect. It does not dictate the weight to be given to facts admitted pursuant to the paragraph.

The paragraph applies only to prior criminal judgments. Prior

civil judgments are inadmissible except to the extent provided in CE 803(c)(22). The judgment of conviction must have been entered after trial or have been based upon a plea of guilty. Consistent with CE 410, judgments of conviction based upon pleas of *nolo contendere* or its equivalent are not included. The criminal judgment must be one for a felony or misdemeanor conviction. In this respect, the paragraph differs from its federal counterpart, FRE 803(22), which provides that the judgment must be a felony conviction. A conviction for an offense which is neither a felony nor misdemeanor is excluded because it cannot be assumed that proceedings regarding such crimes are conducted with the care and deliberation attendant to felony and misdemeanor criminal proceedings. Consequently, the basis for trustworthiness does not appear sufficiently strong to include judgments other than for felonies or misdemeanors. Prince, Richardson on Evidence § 348 (10th ed.). In addition, the paragraph, in accord with the confrontation right of an accused (*see Kirby v. United States*, 174 U.S. 47, 19 S.Ct. 574 [1899]), excludes from its provisions conviction of another person offered against an accused in a criminal case to prove any fact essential to sustain the judgment of conviction.

Under the paragraph, evidence of a prior felony or misdemeanor conviction is admissible in both civil and criminal actions. While this is consistent with present law in civil cases, its effect upon present law in criminal cases is unclear. *See* Prince, Richardson on Evidence § 348 (10th ed.). The high burden of proof in criminal cases and the fact that a criminal defendant has not only the opportunity, but also the motive to defend, gives substantial assurance of trustworthiness and warrants reception of the evidence in a criminal as well as a civil case.

(c) (20) Judgment as to personal  
history, family, general  
history or boundaries.

This paragraph provides a hearsay exception for a prior judgment as proof of matters of personal, family, general history, or boundaries that are essential to the judgment, to the extent that these matters would be provable by reputation evidence pursuant to CE 803(c)(17) and 803(c)(18). The theory is that the judgment is at least as trustworthy as reputation evidence.

Under present law, reputation evidence is admissible to prove the kinds of facts covered by this paragraph. *See* Comment to CE 803(c)(17), 803(c)(18). CE 803(c)(17) and 803(c)(18) continue and expand that method of proving matters of personal, family, general history, or boundaries. This paragraph therefore complements those paragraphs.

(c) (21) Standard of surveyor measurement.

This paragraph is designed to facilitate proof of the accuracy of a surveyor's instruments. Its provisions create an exception to the hearsay rule, CE 802, for an official certificate of a state or municipal sealer, a statement under oath of a surveyor that the chain or measure used by the surveyor

conformed to the applicable state standard, and a certificate made by a sealer that the implement used in measuring the chain or measure was the one provided the sealer.

The paragraph is derived from CPLR 4534. Its provisions differ from those of that section's in that a certificate or oath is "evidence" rather than "prima facie evidence" of the facts contained therein, for the reasons discussed in the Comment to 803(c)(5)(B), *supra*.

(c) (22) Certificate of population.

This paragraph is designed to facilitate the introduction into evidence of the population figures of a federal or state census or enumeration where the population of the state or a political subdivision thereof is required to be determined according to the latest federal or state census or enumeration. The paragraph creates an exception to the hearsay rule, CE 802, for the specified certificate attesting to the population. Additionally, it provides that such a certificate is conclusive evidence of the population.

The paragraph restates without change CPLR 4530(b). It should be noted that CPLR 4530(a) dealing with a census certificate of population, is not retained as the specified certificate is covered by CE 803(c)(7).

(c) (23) Affidavit of publication in newspaper.

This paragraph creates an exception to the hearsay rule, CE 802, for an affidavit stating that certain notices have been published in a newspaper, provided the affidavit is made by a party specified in the paragraph and a copy of the notice is annexed. Once admitted, the affidavit is evidence that such notices have been published and the deponent was authorized to make the affidavit.

The paragraph is derived from CPLR 4532. Its provisions differ from those of that section's in that the affidavit is "evidence" rather than "prima facie evidence" of publication and of statements showing the deponent's authority to make the affidavit, for the reasons discussed, *supra*.

#### § 804. Hearsay exceptions: declarant unavailable

(a) Definition of unavailability. "Unavailability as a witness", except for subparagraph (B) of paragraph one of subdivision (b) of this section, includes but is not limited to situations in which the declarant:

(1) is exempted by ruling of the court on the ground of privilege or incompetency from testifying concerning the subject matter of the statement;

(2) is unable to be present or to testify at the trial, proceeding, or hearing because of death or then existing physical or mental illness or infirmity; or

(3) is absent from the trial, proceeding, or hearing and the proponent of the statement has been unable to procure the declarant's attendance by process or other reasonable means. A declarant is not unavailable as a witness if the declarant's exemption, inability, or absence is procured by the proponent of the statement, or results from the proponent's culpable neglect or wrongdoing,

(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness, provided (i) the declarant had personal knowledge, where such knowledge is required by the particular exception, and (ii) when the statement is a lay opinion, that opinion is rationally based on the perception of the declarant and is helpful to a clear understanding of the statement or to the determination of a fact in issue, or when the statement is an expert opinion it satisfies section 702 of this chapter, unless (iii) the party objecting to the statement establishes its untrustworthiness by proof of circumstances involving the making of the statement, including but not limited to a motive to falsify by the declarant:

(1) Former testimony,

(A) Civil cases. In a civil case, testimony given as a witness at another trial, proceeding, or hearing of the same subject matter in the same or in a different case, or in a deposition taken in compliance with statute in the course of the same or another proceeding, if the party against whom the testimony is now offered, or a person in privity with that party, had an opportunity and motive to develop or limit the testimony by direct, cross, or redirect examination. Former testimony may be proved by an authenticated transcript or recording; if an authenticated transcript or recording cannot be obtained by the exercise of reasonable diligence, other evidence of the testimony may be admitted.

(B) Criminal cases.

(i) Prior proceedings. Under circumstances prescribed in this section, testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to section 180.60 of the criminal procedure law, or (c) an examination of such witness conditionally, conducted pursuant to article six hundred sixty of the criminal procedure law, 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 or testify by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal, state, or foreign custody and cannot with due

diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape, audiotape or technologically equivalent recording thereof played. Where any recording is received into evidence, the stenographic transcript of that examination shall also be received.

(ii) Subsequent proceedings. 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 clause (i) of this subparagraph is challenged.

(iii) Procedure. 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 clause (i) of this subparagraph, 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, audiotape or technologically equivalent 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 clause (i) of this subparagraph. 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.

(iv) 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 clause (i) of this subparagraph, 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 clause (i) of this subparagraph.

(2) Statement under belief of impending death. In a homicide prosecution or wrongful death action, a statement, 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 what the declarant believed to be the declarant's impending death.

(3) Statement against interest. A statement 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 civil or criminal liability, or to render invalid a claim by the declarant against another. A statement tending to expose the declarant to criminal liability and offered against the accused in a criminal case is not admissible under this paragraph unless the interest compromised is of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify and other evidence independent of the statement assures its trustworthiness and reliability. A statement tending to expose the declarant to criminal liability and offered by the accused in a criminal case is not admissible under this paragraph unless other evidence independent of the statement assures its trustworthiness and reliability.

(4) Then-existing sensations and physical conditions. A statement of a then-existing sensation or physical condition (such as pain or bodily condition).

(5) Intent to engage in conduct with another. A declaration of intent to engage in conduct with another person to establish the conduct of that other person made under circumstances that make it: probable that the expressed intent was a serious one; realistically likely that the person other than the declarant would engage in the conduct; and the statement is corroborated by other evidence tending to show that the person other than the declarant engaged in the conduct in question.

(6) Statement of personal or family history and family records.

(A) Family history.

(i) Statement relating to declarant's family. A statement, made prior to the controversy, concerning declarant's own birth, adoption, marriage, divorce, legitimacy, relationship by blood, adoption or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated.

(ii) Statement relating to another family. A statement, made prior to the controversy, concerning any of the foregoing matters or the death of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.

(B) Family records. Statements of fact concerning personal or family history, made prior to the controversy and contained in family bibles, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.

(7) Affidavit of service or posting notice. An affidavit by a person who served, posted, or affixed a notice, showing such service, posting, or affixing, is admissible as evidence of the service, posting, or affixing.

#### Comment

This section provides for several hearsay exceptions. Each exception shares the requirement that the declarant be "unavailable as a witness." By specifying a requirement of unavailability, the section expresses a rule of preference. If the declarant is available, then testimony in court is required. But if a witness is not available, then the witness's out-of-court statement satisfying the requirements of one of the exceptions provided for in the section is preferable to losing all evidence from that source. In addition to the requirements of the particular exception, the introductory clause to subdivision (b), like its counterpart in 803(c), provides for further guarantees designed to assure trustworthiness.

Whether the requirements of a hearsay exception contained in CE 804 have been satisfied is a question to be determined by the court pursuant to CE 104(b).

#### (a) Unavailability.

Subdivision (a) states some of the situations of unavailability, including: (1) excusal from testifying on the ground of privilege or incompetency such as the dead person statute; (2) death, physical, or mental illness; and (3) absence and the inability to procure attendance despite the exercise of reasonable diligence. The section leaves room for future judicial decisional recognition of other grounds of unavailability. *See* Commentary to CE 102. In this regard it is important to note that earlier drafts of the Code included an unprivileged refusal to testify and a failure of memory as grounds of unavailability. This section does not include those grounds but instead leaves it to decisional law to decide whether these grounds are appropriate in the particular case. Finally, the subdivision makes clear that this definition of unavailability will not govern the exception for prior testimony in criminal cases (b)[1][B]) that has a more limited definition.

Under subdivision (3), a witness will not be considered



unavailable if unavailability is the result of the proponent's procurement, culpable neglect, or wrongdoing. Inclusion of "culpable neglect" as a basis for treating a declarant as not unavailable broadens the responsibility of the proponent of hearsay to offer it only when genuinely necessary.

The same rule of unavailability is applicable to all the hearsay exceptions set forth in subdivision (b). This is contrary to present law which recognizes different rules of unavailability for different exceptions. These differences do not seem to be based upon sound analytical distinctions, and, accordingly, the subdivision treats unavailability uniformly for all of the exceptions. This treatment results in several changes in present law:

**Former Testimony.** Present law employs both statutory and common law definitions for the unavailability necessary to admit former testimony. CPLR 4517 defines unavailability for civil actions as including privilege, death, physical or mental illness, absence beyond the jurisdiction, inability to find with due diligence, and incompetence to testify by reason of the dead persons statute. *See* CE 602(e). The common law recognizes only death of the declarant as constituting unavailability. *See Fleury v. Edwards*, 14 N.Y.2d 334, 251 N.Y.S.2d 647 (1964).

While the Court of Appeals in *Fleury* held that death was the only excuse for unavailability expressly recognized under the common law, nothing in that opinion suggested that the courts could not permit other excuses for unavailability, even going beyond those listed in the statutes, if necessary in an appropriate case. There is no reason why all of the grounds of unavailability contained in the subdivision should not be applicable to the former testimony exception.

In the case of former testimony, a declarant's unavailability due to the exercise of a privilege is, of necessity, limited to the privilege against self-incrimination, since the existence of former testimony as to a privileged communication would necessarily mean that the privilege had been waived. *See* CE 502; Prince, Richardson on Evidence §§ 268, 439 (10th ed.).

**Dying Declarations.** Present law recognizes only death of the declarant as unavailability for the purpose of admitting dying declarations. *See People v. Becker*, 215 N.Y. 126, 109 N.E. 127 (1915). In this situation unavailability is intertwined with the factor which gives the exception its circumstantial guarantee of reliability—the awareness of impending death.

Careful analysis, however, makes clear that it is the belief in death at the time of declaration which makes the statement reliable. If the requisite belief is present at that time, the fact that death does not occur before trial will not affect the statement's reliability. Thus, any of the grounds of unavailability expressed in this subdivision should be effective.

**Declarations Against Interest.** The Court of Appeals in *People v. Brown*, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1970), recognized death, absence

beyond the jurisdiction, and a privileged refusal to testify as sufficient unavailability for declarations against interest. The Court did not have to extend the rule further for purposes of its decision in *Brown*, and there is no reason to suppose, if the need had arisen, that it would not do so and this subdivision continues its power to do so.

**Pedigree Statements and Statements in Family Records.** Present decisional law on grounds for unavailability of the declarant of pedigree statements appears to be in conflict. In *Young v. Shulenberg*, 165 N.Y. 385, 59 N.E. 135 (1901), the Court of Appeals recognized three grounds: death, incompetency, and absence beyond the jurisdiction. However, in *Aalholm v. People*, 211 N.Y. 406, 105 N.E. 647 (1914), the Court stated that the declarant must be dead. This conflict was recognized and the more expansive position of *Young v. Shulenberg*, *supra*, followed in *In re Strong's Estate*, 168 Misc. 716, 6 N.Y.S.2d 300 (Surrog. Ct. N.Y. Co. 1938), *aff'd*, 256 App Div 971, 11 N.Y.S.2d 225 (1st Dep't 1939). There is no good reason why all the grounds of unavailability mentioned in this subdivision should not be effective.

(b) Exceptions.

This subdivision sets forth the seven specific exceptions to the hearsay rule which share the requirement that the declarant be "unavailable." Under its provisions, even if a declarant is unavailable, a statement will not be admissible if either the requirements of the subdivision's introductory trustworthiness provision or the requirements of the pertinent exception are not satisfied. The introductory provision includes personal knowledge and an otherwise admissible opinion which must be established by the proponent. *See* Comment to CE 803(c). In addition, under the introductory provision, the objecting party is entitled to exclusion if that party can establish the untrustworthiness of the statement. *See id.* In the 1982 proposal, there was an exception for present sense impression that has been eliminated from the Code with the intent that development of that exception be under the unenumerated

hearsay exception contained in section 806.

(b)(1) Former testimony.

(A) Civil cases.

This paragraph contains the traditional hearsay exception for former testimony in civil cases and is very similar to that contained in CPLR 4517. The prior testimony rule in criminal cases is contained in paragraph (B) and repeats verbatim CPL article 670.

The instant section recognizes that this form of hearsay is among the most reliable (as the statements were made subject to oath and cross-examination) conditions which are lacking in almost all other hearsay.

A basic requirement is that the testimony be "given as a witness." This means that the evidence must have been given on oath or affirmation. Although an oath alone would not make the hearsay admissible, the implicit requirement of an oath functions as one of the indicia of the reliability of former testimony. Testimony "as a witness" also means being subject to cross-examination. Actual cross-examination is not required, but merely the opportunity to exercise the right of cross-examination. *Bradley v. Mirick*, 91 N.Y. 293 (1883); 5 Wigmore, Evidence § 1371 (Chadbourn rev. ed.). For that reason, neither an affidavit, even though made on oath {see 5 Wigmore, Evidence § 1384 [Chadbourn rev. ed.]}, nor grand jury testimony (see *People v. Johnson*, 51 A.D.2d 884, 380 N.Y.S.2d 187 [4th Dep't 1976]), is admissible as former testimony. When the conditions of oath and cross-examination are met, however, the character of the tribunal and the nature of the hearing at which testimony was given are immaterial. These provisions are in accord with present law. See CPLR 4517; NY Adv. Comm, on Prac. and Proc., 2d Prelim. Rep., Leg. Doc. No. 13, p. 265 (1958); *Fleury v. Edwards*, 14 N.Y.2d 334, 251 N.Y.S.2d 647 (1964); *Rothman v. City of New York*, 273 App Div 780, 75 N.Y.S.2d 151 (2d Dep't 1947).

The paragraph admits former testimony in all cases in which the party against whom the testimony is offered or a person in privity with that party had an opportunity and motive to develop the testimony.

Under present law in civil cases, former testimony is admissible if the party against whom it is now offered was present when it was given, regardless of the capacity in which that party participated in the former hearing, or if the present party is in privity with the party in the former action. See, e.g., *In re White's Will*, 2 N.Y.2d 309, 160 N.Y.S.2d 841 (1957); *Shaw v. New York Elevated R.R. Co.*, 187 N.Y.

186, 79 N.E. 984 (1907); *Cohen v. Long Island R.R. Co.*, 154 App. Div. 603, 139 N.Y.S. 887 (1st Dep't 1913); Prince, Richardson on Evidence § 270 (10th ed.); CPLR 4517. This paragraph, in substance, continues those requirements. The present CPLR 4517 requirement that the former testimony is admissible "upon any trial of the same subject matter," CPLR 4517, is expressly provided for as are the case law requirements of opportunity and motive. See *Healy v. Rennert*, 9 N.Y.2d 202, 213 N.Y.S.2d 44 (1961); 5 Wigmore Evidence § 1388 (Chadbourn rev. ed.); cf. Model Code of Evidence rule 511.

Notably, the paragraph permits the admission of former testimony when offered against its original proponent. In this situation, the opportunity for introducing and developing the testimony on direct and redirect examination on the prior occasion is an adequate substitute for cross-examination at the present trial even though at the present trial the party seeks to exclude rather than introduce the testimony as was the case at the first trial. See *In re White's Will*, 2 N.Y.2d at 314, 160 N.Y.S.2d at 845, *supra*. Abolition of the rule against impeaching one's own witness, see CE 607, and the provisions controlling the

asking of leading questions, *see* CE 611, provide further justification for the instant provision.

Depositions under present law in civil actions may be admitted into evidence in the same proceeding, or in a parallel or subsequent proceeding between the same parties or their successors in interest, in the circumstances prescribed in CPLR 3117(a), (c). In addition, depositions admitted into evidence in one hearing may be admitted as former testimony under CPLR 4517, or as adoptive admissions. *See* CE 803(b)(2); Prince, Richardson on Evidence § 217 (10th ed.). Depositions not admitted at a prior hearing nor admissible under CPLR 3117, however, are not admitted as former testimony. *See Bocchert v. Greyhound Corp.*, N.Y.L.J., March 20, 1974, p. 18, col. 6.

There is no intent to restrict present law governing the use of depositions, but rather to expand it. The language of the paragraph is designed to avoid any overlap problem with CPLR 3117. There will be, however, some minor differences in the admissibility of depositions taken in the same proceeding under CPLR 3117 and in depositions taken in another action under this paragraph. For example, CPLR 3117(a) admits depositions when the witness is out of state or more than 100 miles from the place of trial (CPLR 3117[a][3][ii]), a circumstance not constituting "unavailability" under the paragraph.

The former testimony is to be proved, when possible, by a verbatim transcript or recording authenticated pursuant to the provisions of Article 9. The general availability and the increased reliability and accuracy of transcripts and recordings make them preferable to a witness recollection of former testimony. The preference for transcripts or recordings is more restrictive than present New York law in civil cases, which permits proof by oral testimony of one who heard the testimony given, by notes of past recollection recorded, and by memory refreshed from minutes or other memoranda, as well as by a reporter's transcript.

Finally and importantly, that former testimony is admissible as an exception to the hearsay rule does not guarantee its admission for it must still satisfy other evidentiary requirements, *see, e.g.*, CE 401, 403, and may even be excluded if the prior testimony itself contains inadmissible hearsay. *Accord* CPLR 4517; *see* Prince, Richardson on Evidence § 274 (10th ed.).

#### (B) Criminal cases.

This paragraph restates virtually verbatim CPL article 670 governing the admissibility of prior testimony in a criminal case.

The one change is adding, as a basis for unavailability, witnesses in state and foreign custody, whose attendance cannot be secured by the exercise of due diligence. The change has been made because in this context there is no reason to distinguish between state or foreign and federal custody. Like other statutory restatements

throughout the Code, there is no intent to change the governing judicial interpretation. *See, e.g., People v. Ayala*, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990) (testimony at a pre-trial identification hearing is not prior testimony within the meaning of CPL 670.10; hence, identification hearsay testimony of an unavailable witness is not admissible at trial); *see also People v. Gonzalez*, 54 N.Y.2d 729, 442 N.Y.S.2d 980 (1981) (grand jury testimony not admissible); *People v. Harding*, 37 N.Y.2d 130, 371 N.Y.S.2d 493 (1975) (prior testimony at an administrative hearing not admissible). That former testimony is admissible as an exception to the hearsay rule does not guarantee its admission for it must still satisfy other evidentiary requirements, *see, e.g., CE 401, 403*, and may even be excluded if the prior testimony itself contains inadmissible hearsay. *See Commentary to paragraph (A) above.*

(b) (2) Dying declarations.

This paragraph provides that "dying declarations" are an exception to the hearsay rule. New York courts have traditionally recognized that "[s]afety in receiving such declarations lies only in the fact that the declarant is so controlled by a belief that his death is certain and imminent that malice, hatred, passion and other feelings of like nature are overwhelmed and banished by it." *People v. Sanano*, 212 N.Y. 231, 234, 106 N.E. 87, 88 (1914). While the original basis of this attitude was doubtless a religious fear of the consequences of lying, the secular fear of death seems equally to place a dying declarant in a unique position which may be recognized in principle by the law of evidence. *See 5 Wigmore, Evidence §§ 1438, 1443 (Chadbourn rev. ed.)*. As in the common law, this paragraph recognizes the source of reliability of such declarations by excepting from the reach of hearsay rule only those statements made by those *in extremis* under an absolute belief of impending death without the slightest hope of recovery. *See People v. Nieves*, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986); *People v. Allen*, 300 N.Y. 222, 90 N.E.2d 48 (1949); *People v. Ludkowitz*, 266 N.Y. 233, 194 N.E. 688 (1935), *People v. Sarzano, supra*.

Under the provisions of this paragraph, dying declarations are admissible in civil wrongful death actions as well as homicide prosecutions. This is contrary to present law which provides that dying declarations are admissible only in homicide actions for the death of the declarant. *See People v. Becker*, 215 N.Y. 126, 109 N.E. 127 (1915); *People v. Davis*, 56 N.Y. 95 (1874); Fisch, *Evidence § 917 (2d ed.)*. The traditional refusal to receive dying declarations in actions other than for homicide is probably an historical anomaly. This exception to the hearsay rule was developed in homicide cases as a result of the evident need for such testimony in situations where

often only circumstantial evidence would otherwise be available. Refusal to extend the exception to civil wrongful death actions fails to recognize that the rationale for the exception, necessity and reliability, remains essentially the same as in homicide cases.

Only those portions of a qualifying statement which deal with the cause of declarant's impending and imminent death are included. The aversion of one *in extremis* to falsehood may well extend to any subject, but the reliability of statements not referring to the cause of death, and the necessity of admitting them, is generally deemed less.

Finally, this limited expansion of the dying declarations exception is not intended to affect in any way the right of the opponent to an instruction to the jury that a dying declaration is not to be regarded as having the same value and weight as the sworn testimony of a witness in open court. *See* Prince, Richardson on Evidence § 316 (10th ed.).

(b) (3) Statements against interest.

This paragraph governs "statements against interest." The assumption that people do not make false statements damaging to themselves is the basis for the exception. 5 Wigmore, Evidence § 1457 (Chadbourn rev. ed.). As stated by the Court of Appeals: "[A]ssurance (of trustworthiness) flows from the fact that a person ordinarily does not reveal facts that are contrary to [one's] own interest. Therefore, the reasoning goes, absent other motivations, when he does so, [a person] is responding to a truth revealing compulsion as great as that to which [that person] would likely be subjected if cross-examined as a witness." *People v. Maerling*, 46 N.Y.2d 289, 295, 413 N.Y.S.2d 316, 320 (1978),

This paragraph includes statements against pecuniary, proprietary and penal interest and codifies present law. *See People v. Thomas*, 68 N.Y.2d 194, 507 N.Y.S.2d 973 (1986), *cert. denied*, 480 U.S. 948, 107 S.Ct. 1609 (1987); *People v. Maerling*, *supra*; *People v. Settles*, 46 N.Y.2d 154, 412 N.Y.S.2d 874 (1978); *People v. Brown*, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1970); *Gottwald v. Medinger*, 257 App. Div. 107, 12 N.Y.S.2d 241 (4th Dep't 1939); Prince, Richardson on Evidence §§ 259, 260 (10th ed.). Although there are no New York cases which expressly accept statements exposing the declarant to civil liability or invalidating the declarant's claim against another, these circumstances are involved in most cases of pecuniary interest, as when one admits conversion of the property of another, *Kittredge v. Grannis*, 244 N.Y. 168, 155 N.E. 88 (1926), or admits that a debt has been paid, *e.g.*, *Schenck v. Warner*, 37 Barb. 258 (Supreme Court, Ontario Co. 1862). Thus, the paragraph, by making the two last



mentioned statements admissible, is consistent with the principles underlying present law.

The paragraph does change one aspect -of present law under which declarations against interest of the former owner of personal property are not admissible when offered against a subsequent transferee for value. Prince, Richardson on Evidence § 249 (10th ed.). The basis for the rule seems to be that a former owner should not be able to cause harm to rights which he has himself conveyed to the transferee and for which value was paid. The principle is not applied to real property or when the declaration is offered against one other than

a transferee for value. It was early recognized that there is no ground for the distinction between the rules as to real and personal property, but the distinction was defended on stare decisis grounds in *Merkle v. Beidleman*, 165 N.Y. 21, 58 N.E. 757 (1900). Of course, statements of a former owner must have been against interest when made, and perhaps would not be if a transfer of the property has been already arranged. The present rule, which by making inadmissible all declarations against interest of a former owner of personal property, excludes reliable evidence from consideration by the court.

The paragraph continues the present requirement that the declarant had to have been aware at the time the statement was made that it was against interest. *See People v. Maerling, supra*. Although subjective awareness may be difficult to establish, it is the knowledge that the statement is against interest which provides the circumstantial guarantee of reliability. *People v. Maerling, supra*. Proof that the statement was known to be against interest may be either direct or circumstantial. *Id.*

The Court of Appeals has recognized, and the paragraph expressly provides, that these kinds of declarations, when offered against a criminal defendant, must all but rule out a motive to falsify on the part of the declarant and the subdivision continues the rule. *See, e.g., People v. Thomas*, 68 N.Y.2d at 198, 507 N.Y.S.2d at 975, *supra*-, *People v. Morgan*, 76 N.Y.2d 493, 561 N.Y.S.2d 406 (1990). The paragraph also recognizes that a statement against the penal interest of the absent declarant poses special problems of reliability in a criminal action, *People v. Settles, supra*, and requires that, regardless of whether a statement is exculpatory or inculpatory of the accused, other evidence besides the declaration itself must corroborate the facts contained in the statement. It is in accord with the present law. *See People v. Maerling, supra; People v. Bresnic, supra; People v. Shortridge*, 65 N.Y.2d 309, 491 N.Y.S.2d 298 (1985).

On the question of what portions of a declaration against interest are admissible, there are statements in New York cases that collateral facts and circumstances in the declaration are admissible. *See, e.g., Livingston v. Arnoux*, 56 N.Y. 507, 519 (1874). Recent decisions of the Court of Appeals make clear, however, that generally in criminal cases, at least with respect to custodial declarations, only the disserving parts of a compound statement are admissible. *People v. Bresnic*, 70 N.Y.2d 9, 16, 517 N.Y.S.2d 120, 123 (1987); *People v. Geoghegan*, 51 N.Y.2d 45, 49, 431 N.Y.S.2d 502, 504 (1980); *see also People v. Thomas*, 68 N.Y.2d at 198, 507 N.Y.S.2d at 975, *supra*. There is no intent to change these case law requirements.

(b) (4) Then-existing sensation and bodily

condition.

Section 803(c)(2) recognizes a hearsay exception for involuntary expressions of pain or physical condition without regard to the declarant's availability. *See also* 803(c)(3) (statements for purposes of medical diagnosis

and treatment). This subdivision includes voluntary statements of a declarant's present bodily feelings, conditions, or symptoms provided the declarant is unavailable to testify within the meaning of subdivision (a). This slightly changes present law which admitted declarations of present pain, conditions, or symptoms only when the declarant was dead. *See Roche v. Brooklyn City & Newtown R. R. Co.*, 105 N.Y. 294, 11 N.E. 630 (1887); *Tromblee v. North American Acc. Ins. Co.*, 173 A.D. 174, 158 N.Y.S. 1014 (3d Dep't 1916), *aff'd*, 226 N.Y. 615 (1919). Broadening the grounds of unavailability reflects a modest but desirable change in the law. It is important to note that statements of then-existing pain, sensation or bodily condition to a treating physician are admissible under paragraph (3) without regard to the declarant's availability.

(b) (5) Statements of intent to show conduct of another.

Section 803(c)(2) recognizes a hearsay exception for declarations of intent to prove the declarant's intent or state of mind, regardless of the declarant's availability. This paragraph deals with declarations of intent to prove the subsequent conduct of the declarant, conduct that necessarily will involve and hence prove the conduct of another person. The paragraph requires unavailability of the declarant and adopts the limitations imposed by the court in *People v. Malizia*, 92 A.D.2d 154, 460 N.Y.S.2d 23 (1st Dep't 1983), *aff'd on other grounds*, 62 N.Y.2d 755, 476 N.Y.S.2d 825, *cert. denied* 469 U.S. 932, 105 S.Ct. 327 (1984), with an additional corroboration requirement. Crucially, the hearsay declaration must reflect the intent of the declarant and not the intent of the other person who may have spoken to the declarant. *See People v. Chambers*, 125 A.D.2d 88, 512 N.Y.S.2d 89 (1st Dep't 1987); *appeal dismissed*, 70 N.Y.2d 694, 518 N.Y.S.2d 1031 (1987). The admissibility of one person's declaration of intent to show the conduct of another person is based as much on necessity as reliability.

(b) (6) (A) Pedigree statements.

(i) Family history of the declarant.

This subparagraph is both a codification and reasonable expansion of the present common law hearsay exception for pedigree declarations. *See Prince, Richardson on Evidence* §§ 319-329 (10th ed.). It is intended to deal with two types of statements: (1) statements about the declarant's own personal history; and (2) statements about the personal history of another.

The subparagraph also broadens the present exception by expanding the types of statements to which the exceptions apply. Traditionally, pedigree had to be directly at issue, *i.e.*, the controversy had to be essentially genealogical. *See Eisenlord v. Clum*, 126 N.Y. 552, 27 N.E. 1024 (1891); Note, *Pedigree*, 46 Iowa L. Rev. 414, 422-24 (1961). This paragraph, on the other hand, follows the trend of recent judicial decisions and expands the exception "to

encompass the whole area of family history." *See* Berger & Weinstein, 4 Weinstein's Evidence [804[6][4][01].

Under the subparagraph, when the statement in question relates to the declarant's own personal history, it is admissible regardless of whether the declarant had personal knowledge of the facts of which he spoke. In so providing, the paragraph expressly follows the common law, and in effect allows the hearsay statement to be admissible even though the hearsay statement is itself based on hearsay. *See Eisenlord v. Clum, supra.*

(ii) Family history of persons other than the declarant.

When the statement sought to be admitted relates to the personal history of one other than the declarant, the provision requires additionally that the declarant's competency be established by a showing that he probably had knowledge of the matters of which he spoke, either because of relationship or intimate association. This broadens present law, which admitted this type of pedigree statement only upon independent evidence of relationship. *Aalholm v. People*, 211 N.Y. 406, 105 N.E. 647 (1914); *Young v. Shulenberg*, 35 A.D. 79, 54 N.Y.S. 419 (3d Dep't 1898), *aff'd*, 165 N.Y. 385, 59 N.E. 135 (1901).

Even if certain evidence is not admissible under this paragraph, the evidence may be admissible under one or more of the exceptions of CE 803, e.g., 803(c)(5) (business records); 803(c)(7) (public records and reports); 803(c)(8) (records of vital statistics); 803(c)(10) (records of religious organizations); 803(c)(11) (marriage, baptismal, and similar certificates); 803(c)(14) (statements in ancient documents); 803(c)(16) (reputation concerning personal or family history); and 804(b)(4)(B) (family records).

(b) (6) (B) Statements of personal  
and family history in  
private records.

This subparagraph provides an exception to the hearsay rule for statements concerning personal or family history contained in certain private records. The theory is that a family would not allow an untruthful statement to be made or remain without protest. It complements CE 804(b)(5) which makes other types of statements concerning a declarant's personal or family history admissible if the declarant is unavailable.

Hearsay evidence has long been admissible to prove family relationship and history whenever pedigree is directly in issue.

Prince, *Richardson on Evidence* § 319 (10th ed.); Fisch, *Evidence* § 975 (2d ed.). However, the paragraph, beyond broadening the grounds for unavailability (*see* comment to [a]), liberalizes present law in two respects. First, there is no requirement that the controversy be genealogical where the pedigree is directly in issue. Second, present law makes no distinction between oral and written declarations. Either could qualify for admission, and both were governed by the same rules of

qualification. Prince, *Richardson on Evidence* § 327 (10th ed.). Unless the declaration is inscribed on the records described, the declaration, if it otherwise qualifies, is admissible only if the declarant is unavailable.

**(b) (7) Affidavit of service.**

This paragraph indicates an exception to the hearsay rule (CE 802) for an affidavit of service, posting, or affixing a notice by the person who performed such act. Once admitted, the affidavit is evidence that such service, posting, or affixing was made.

The paragraph is derived from CPLR 4531. Its provisions differ from those of that section in that the affidavit is "evidence" rather than "prima facie evidence" of the service, posting, or affixing, for the reasons discussed in the comment to 803(c)(5)(B). Additionally, to be consistent with the applicability section of the Code of Evidence (CE 101[b]) "proceeding or hearing" has been added after "trial."

§ 805. Prior identification

(a) Inability to make identification at proceeding. In any criminal proceeding in which the defendant's commission of an offense is in issue, testimony as provided in subdivision (b) of this section may be given by a witness when: (1) such witness testifies that: (A) such witness 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 a subsequent occasion such witness 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 whom such witness recognized as the same person who had been observed on the first or incriminating occasion by such witness; and (C) such witness is unable at the proceeding to state on the basis of present recollection, whether or not the defendant is the person in question; and (2) it is established that the defendant is in fact the person whom 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 the witness's recognition on such occasion. Such testimony, together with the evidence that the defendant is in fact the person whom the witness observed and recognized on the second occasion, constitutes evidence in chief.

(b) Form of testimony. Under circumstances prescribed in subdivision (a) of this section, such witness may testify at the criminal proceeding that the person whom the witness observed and recognized on the second occasion is the same person whom the witness 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 on the second occasion, constitutes evidence in chief.

(c) Identification at the proceeding. In any criminal proceeding in which the defendant's commission of an offense is in issue, a witness who testifies that (1) such witness 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 (2) on the basis of present recollection, the defendant is the person in question, and (3) on a subsequent occasion such witness observed 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 the defendant as the same person whom such witness 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 such witness observed on the first or incriminating occasion, also describe the previous recognition of the defendant by such witness and testify that the person whom such witness observed on such second occasion is the same person whom such witness had observed on the first or incriminating occasion. Such testimony constitutes evidence in chief.

(d) Civil proceedings. Subdivisions (a), (b) and (c) of this section apply to any civil proceedings involving the identification of a person as the perpetrator of criminal conduct.

#### Comment

**This section repeats verbatim CPL 60.25 and 60.30 governing prior identification testimony in a criminal case and subdivision (d) brings the criminal rules to civil cases. There is no authoritative present law dealing with the issue in a civil case. Like other verbatim restatements throughout the Code, there is no intent to change the governing judicial interpretations. See, e.g., *People v. Bayron*, 66 N.Y.2d 77, 495 N.Y.S.2d 24 (1985) (under CPL 60.25, a third party may testify as to a witness's out-of-court identification only if that witness cannot make an in-court identification based on present recollection; a failure to make an in-court identification because the witness fears retribution is not a failure based upon a lack of present recollection); compare *People v. Caserta*, 19 N.Y.2d 18, 277 N.Y.S.2d 647 (1966) (identifying witness may not testify to prior photographic identification), and *People v. Griffin*, 29 N.Y.2d 91, 323 N.Y.S.2d 964 (1971) (identification witness may not testify to a prior sketch identification) with *People v. Edmonson*, 75 N.Y.2d 672, 555 N.Y.S.2d 666 (1990) (permissible under CPL 60.30 for the complaining witness to testify that she had made an out-of-court identification of defendant from a videotape taken by the police, who had canvassed a particular neighborhood and videotaped numerous passersby, since there was nothing suggestive in the videotape or the manner in which it was presented to the witness).**

**§ 806. Unenumerated exceptions to the hearsay rule**

In a criminal case a statement of an unavailable declarant, or in a civil case a statement of a declarant, regardless of that person's availability, not specifically encompassed by sections 803, 804 or 805 of this article and not intentionally excluded from those sections because of its unreliability, is not excluded by the hearsay rule if the court determines that the statement: (i) is within a definable category of statements that possesses substantial guarantees of trustworthiness and that is separate and distinct from the categories set forth in this article; (ii) has substantial guarantees of trustworthiness; and (iii) there is a substantial need for the statement to establish an essential part of the proponent's case. In admitting a statement under this section, the court shall make specific findings of the facts and circumstances supporting the substantial guarantees of trustworthiness and the substantial need for receipt of the particular statement as well as specific conclusions of law demonstrating the substantial guarantees of trustworthiness of the general category encompassing the particular statement. The decision to recognize a new category or the decision to expand, restrict or modify a category recognized under this section is solely a question of law. A statement may not be admitted under this section unless the proponent of it makes known to all parties the proponent's intention to offer the statement and its particulars, including the name and address of the declarant, sufficiently in advance of offering the statement to provide them with a fair opportunity to meet it.

**Comment**

**This section provides the court with discretionary authority in limited circumstances to admit hearsay of an unavailable declarant, which do not fall within any of the other exceptions of Article 8. Inclusion of the section allows the court to carry out the goals of CE 102 regarding the "promotion and development of the law of evidence." In not limiting admissible hearsay to exceptions recognized to date but still emphasizing categorized exceptions, the section is generally consistent with present law. See *People v. Nieves*, 67 N.Y.2d 125, 131, 501 N.Y.S.2d 1, 4-5 (1986); *People v. Arnold*, 34 N.Y.2d 548, 354 N.Y.S.2d 106 (1974); *People v. Brown*, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1970); *Letendre v. Hartford Accident & Indent. Co.*, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968).**

**This section recognizes that the listed categories of admissible hearsay do not encompass every situation in which the reliability and appropriateness of a particular extra-judicial statement merit its receipt into evidence. The section can be used only in limited circumstances. Trial judges are not given a broad license to admit hearsay which does not fall within one of the specific exceptions. Major judicial revisions of the hearsay rule are not envisioned. Indeed, vesting trial judges with virtually unlimited**

**and unreviewable discretion to admit so-called reliable hearsay will lead to the admissibility of unreliable**



evidence, a lack of uniform application, and most importantly, an absence of meaningful review by the Court of Appeals which has limited power to review discretionary determinations, mixed questions of fact and law, and virtually no power to review factual determinations. *See* N.Y. Const, art. 6, § 3; CPL § 450.90(2)(a); Cohen & Karger, *Powers of the New York Court of Appeals*, pp. 447-89, 603-04 (1953); *see also* *People v. Mooney*, 76 N.Y.2d 827, 560 N.Y.S.2d 115 (1990); *People v. Albro*, 52 N.Y.2d 619, 439 N.Y.S.2d 836 (1981); *People v. Shields*, 46 N.Y.2d 764, 413 N.Y.S.2d 649 (1978); *People v. Beige*, 41 N.Y.2d 60, 390 N.Y.S.2d 867 (1976).

Under the section, in criminal cases, because of constitutional confrontation concerns, only hearsay statements of unavailable witnesses can qualify. *Compare* *Idaho v. Wright*, \_\_\_ U.S. \_\_\_, \_\_\_, 110 S.Ct. 3139, 3146 (1990), and *Ohio v. Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1981), with *United States v. Inadi*, 475 U.S. 387, 106 S.Ct. 1121 (1986). In civil cases, where there is no constitutional right of confrontation, admissibility under the section does not turn on unavailability. The section requires that a trustworthy statement fit into a defined category which itself has substantial guarantees of trustworthiness. This requirement is designed to limit the admissibility of hearsay under the section and to provide further assurance of reliability. *See* *People v. Nieves*, 67 N.Y.2d at 131, 501 N.Y.S.2d at 4-5, *supra*. Moreover, the category requirement calls for a determination which is solely a question of law, thereby assuring review by the Court of Appeals.

The subdivision also limits admissibility by precluding new categories of hearsay statements if, because of their unreliability, those statements were excluded from the exception recognized in Article 8. For example, grand jury testimony is excluded from the prior testimony exception of section 808 because the lack of cross-examination renders it unreliable. Thus, creating a category for grand jury testimony would not be permissible under this section. In contrast to grand jury testimony, there is no intent to preclude judicial development of the present sense impression exception under this section if the judiciary deems it desirable to do so. *See* *People v. Watson*, 100 A.D.2d 452, 474 N.Y.S.2d 978 (2d Dep't 1984); *People v. Luke*, 136 Misc. 2d 733, 519 N.Y.S.2d 316 (Sup. Ct., Bx. Co. 1987). A statement of present sense impression is not admissible under the excited utterance exception because that statement is not a spontaneous and unreflective response to a startling event. *See* *People v. Brown*, 70 N.Y.2d 513, 519, 522 N.Y.S.2d 837, 840 (1987). However, there may be other reasons why present sense impression, as a category, would be as trustworthy as an excited utterance. Thus, the failure to satisfy the requirements for excited utterance does not mean that a present sense impression has been determined unreliable.

The development of a learned treatise exception also might be appropriate under this section. An exception for learned treatise relied on or recognized as authoritative by a testifying expert was contained in the 1990 draft of the Code but was eliminated because it changed present law and the necessity

for the change could not overcome the drafting presumption to continue existing law. The decision not to codify the exception for learned treatises had nothing to do with the reliability of learned or treatises or the desirability of such an exception.

In permitting the judiciary to recognize other categorical exceptions which are substantially trustworthy both in a general and a case-specific sense, it is intended that evidence corroborating the truth of the statement fully supported by circumstances of reliability surrounding the statement itself may satisfy the case-specific requirement but that the general requirement may be satisfied only by the trustworthiness of the statement itself without regard to corroborative evidence. While corroborating the truth of the statement would not satisfy present constitutional confrontation requirements, the other particular circumstances showing reliability as well as the general categorical trustworthy requirement should satisfy any confrontation concern. *See Idaho v. Wright*, U.S. at \_\_\_, 110 S.Ct. at 3150-51, *supra*; Capra, *Child-Witness Statements and the Right to Confrontation*, N.Y.L.J., July 13, 1990, p. 3, col. 1.

Finally, the proponent must give adequate notice of his intention to offer the statement along with a description of its particulars. This notice requirement is present in other sections of the Code, *e.g.*, CE 608(b)(4), 609(c)(1)&(2); 810; . 902(b); 1003(b); 1006.

§ 807. Rendering hearsay admissible by causing the unavailability of a witness

(a) Misconduct causing unavailability. Reliable statements by a potential witness which would otherwise be inadmissible hearsay are admissible as direct evidence against a party whose criminal misconduct has caused that witness to be unavailable within the meaning of subdivision

(a) of section 804 of this article.

(b) Misconduct causing a change in testimony. When the criminal misconduct of a party has caused a witness in a criminal case to give testimony upon a material issue of the case which tends to disprove the position of the party who called the witness, prior contradictory reliable statements of that witness are admissible as evidence in chief, without regard to the limitations contained in subdivision (c) of section 613 of this chapter.

(c) Procedure. Whenever a party alleges specific facts based upon reliable sources of information which demonstrate reasonable cause to believe that another party's misconduct has caused a witness to be unavailable or to change his or her testimony under the circumstances outlined in subdivisions (a) and (b) of this section, the court shall hold a hearing pursuant to subdivision (b) of section 104 of this chapter. The determination of whether a defendant has engaged in criminal misconduct shall be based upon clear and convincing evidence.



**Comment**

**(a) The unavailable witness.**

This section codifies recent state and federal court decisions holding that prior statements of a witness which would otherwise be excluded as hearsay are admissible as direct evidence against a party who has caused that witness to be unavailable to testify. By causing or inducing the witness to be unavailable, the party has waived any objection, on either hearsay or confrontation clause grounds, to the admission of the witness's prior statements. *See, e.g., People v. Hamilton*, 70 N.Y. 2d 987, 526 N.Y.S.2d 421 (1988) (implicit holding); *Holtzntan v. Hellenbrand*, 92 A.D.2d 405, 460 N.Y.S.2d 591 (2d Dep't 1983); *People v. Banks*, 146 Misc.2d 601, 551 N.Y.S.2d 1011 (Sup. Ct. Kings Co, 1989); *People v. Okafor*, 130 Misc. 2d 536, 495 N.Y.S.2d 895 (Sup. Ct. Bx. Co. 1985); *People v. Sweeper*, 122 Misc. 2d 386, 471 N.Y.S.2d 486 (Sup. Ct. N.Y. Co. 1984); *United States v. Mastrangelo*, 693 F.2d 269 (2d Cir. 1982), *cert. denied*, 467 U.S. 1204, 104 S.Ct. 2385 (1984); *Steele v. Taylor*, 684 F.2d 1193 (6th Cir. 1982); *United States v. Thevis*, 665 F.2d 616, 630\*33 (5th Cir. 1982), *cert. denied*, 459 U.S. 825, 103 S.Ct. 57 (1982).

The policy consideration underlying this rule is that "[n]either in criminal nor in civil cases will the law allow a person to take advantage of his own wrong." *Diaz v. United States*, 223 U.S. 442, 458, 32 S.Ct. 250, 255 (1912). Thus, as the Second Circuit stated in *Mastrangelo*, *supra*: "[I]f a witness' silence is procured by the defendant himself, whether by chicanery (citation omitted), by threats [citation omitted], or by actual violence or murder [citation omitted], the defendant cannot then assert his confrontation rights in order to prevent prior grand jury testimony of that witness from being admitted against him. Any other result would mock the very system of justice the confrontation clause was designed to protect." 693 F.2d at 272-73; *see also United States v. Thevis*, 665 F.2d at 633, *supra*.

In addition to permitting the introduction of the rendered-unavailable witness's sworn grand jury testimony, this section could also permit the admission of reliable unsworn statements by the witness, such as those made to law enforcement officers. *See, e.g., Steele v. Taylor*, *supra*. The only limitation the subdivision places on the admission of statements is that they be reliable. This standard is designed to permit the admission of statements which are usually insufficiently reliable to be admissible as hearsay exceptions. Nonetheless, the standard is appropriate because the section is conceived as a deterrent to behavior "which strikes at the heart of the justice system itself." *United States v. Mastrangelo*, 693 F.2d at 273, *supra*.



In determining whether a hearsay statement meets the reliability test, the court may, among other things, take into consideration: the basis of the declarant's knowledge, the motive of the declarant to falsely implicate the defendant, the circumstances under which the statement was made, including whether the statement was made under oath and the extent to which the statement is corroborated. *See, e.g., People v. Sweeper*, 122Misc.2d at 394, 471 N.Y.S.2d at 491. The determination of reliability is a preliminary question to be decided under a preponderance of evidence standard. *See* CE 104(b).

(b) Causing witnesses to change their testimony.

This subdivision governs the slightly different situation in which a party, through misconduct, has caused or induced a witness to change his or her testimony at trial. In a criminal proceeding, in the absence of such misconduct, section 613(c) would permit the party calling the witness to introduce sworn, written, audiotaped, or videotaped prior contradictory statements of the witness only to impeach the witness's credibility and not as substantive evidence. When a party's misconduct has caused the witness to change his or her testimony, however, that party should not be permitted to claim the protection of section 613(c). *See People v. Colon*, 122Misc. 2d 1084, 473 N.Y.S.2d 301 (Sup. Ct. Kings Co. 1984) (witness's grand jury testimony admitted as evidence in chief at trial after prosecution showed that threats by the defendant had caused the witness to repudiate his earlier testimony). The same policies underlying the rule in subdivision (a), when a party's misconduct causes a witness to be unavailable to testify at trial, also applies to a situation when a party's misconduct causes a witness to change testimony. This provision permits any reliable hearsay evidence to be introduced as substantive proof when a party's misconduct causes a witness to change testimony.

(c) Ordering a hearing.

This subdivision provides that an evidentiary hearing in the absence of the jury is necessary before a finding can be made that a party has caused a witness to be unavailable or to change his or her testimony. The language requiring a preliminary showing by the moving party of "specific facts which demonstrate a reasonable cause to believe that such misconduct took place" is adopted from the decision of the Appellate Division, Second Department, in *Holtzftan v. Hellenbrand*, 92 A.D. 2d at 415, 460 N.Y.S.2d at 597, *supra*. Placing the burden upon the prosecution to prove the defendant's misconduct by clear and convincing evidence accords with *Holtzman v. Hellenbrand*, *id.*; *People v. Hamilton*, 127 A.D.2d 691, 511

N.Y.S.2d912(2dDep't 1987), *aff'd*, 70 N.Y.2d 987, 526 N. Y.S.2d 428, *supra*; accord *United States v. Thevis*, 665 F.2d at 630-31, *supra*; contra *United States v. Mastrangelo*, *supra* (imposing a preponderance standard).

(d) Evidence of misconduct.

This subdivision ensures that this section is not read to preclude the admission of evidence of the misconduct when it is otherwise relevant. For example, the party's misconduct may be admissible as evidence of consciousness of guilt. See *People v. Shililano*, 218 N.Y. 161, 178-79, 112 N.E. 733, 739 (1916); *People v. Place*, 157 N.Y. 584, 598, 52 N.E. 576, 581 (1899); Prince, Richardson on Evidence §§ 167, 220 (10th ed.).

§ 808. Hearsay within hearsay

Hearsay included within hearsay is not excluded by the hearsay rule if each part of the combined statement conforms to an exception to the hearsay rule provided by statute or the code of evidence.

Comment

The hearsay rule should not exclude a hearsay statement which includes a further hearsay statement when each component satisfies the requirements of a hearsay exception. Codification of this principle by this section alerts the court and counsel to the existence of multiple hearsay and to the basis for its admission.

Multiple hearsay most frequently occurs in records of regularly conducted activities, which may contain information provided by persons not routinely involved in these activities. For example, a hospital record may include a statement given by the patient for purposes of medical diagnosis, *e.g.*, CE 803(c)(3). Likewise, a police accident report, *e.g.*, CE 803(c)(4), may contain declarations against interest, *e.g.*, CE 804(b)(3), by participants. See Comment to 803(c)(5), *supra*.

The section codifies present law {see *Flynn v. Manhattan & Bronx Surface Transit Oper. Auth.*, 61 N.Y.2d 769, 770-71, 473 N.Y.S.2d 154, 155-56 [1984]}, although, it is to be noted, the courts have not always precisely analyzed situations involving hearsay within hearsay. The leading case, *Kelly v. Wasserman*, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959), involved a social worker's case report which recounted a statement from the client's landlord. The court held that the case report was admissible as a business record, but did not analyze the admissibility of the landlord's included statement. The court's

decision was clearly correct, however, since the statement by the landlord, who was defendant in the action, was an admission by a party-opponent. Such a statement is a hearsay exception. *See* CE 803(b); Prince, Richardson on Evidence § 275 (10th ed.). The *Kelly* analysis has been applied in several cases. *E.g.*, *Hayes v. State*, 50 A.D.2d 693, 376 N.Y.S.2d647 (3d Dep't 1975), *aff'd*,

40 N.Y.2d 1044, 392 N.Y.S.2d 282 (1976) (statements contained in hospital record excluded because there was neither proof that informant had a business duty to report facts to the recording employee, nor that any hearsay exception applied); *Penn v. Kirsh*, 40 A.D.2d 814, 338 N.Y.S.2d 161 (1st Dep't 1972) (plaintiff's statement in police report about accident held admissible as admission); *Toll v. State*, 32 A.D.2d 47, 49-50, 299 N.Y.S.2d 589, 591-592 (3d Dep't 1969) (statements contained in state trooper's accident report excluded because there was neither proof that informant had a business duty to report facts to trooper nor that any hearsay exceptions applied); *see also Cover v. Cohen*, 61 N.Y.2d 261, 274, 473 N.Y.S.2d 378, 384 (1984).

### § 809. Attacking and supporting credibility of declarant

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant be afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if on cross-examination.

#### Comment

This section recognizes that the value of hearsay evidence depends on the credibility of the declarant who made the statement. Thus, evidence attacking or supporting the witness's credibility is admissible under the section just as if the declarant has testified in court. In other words, the methods by which a witness can be impeached or by which credibility can be supported under Article 6 are also methods by which a hearsay declarant can be impeached or his credibility supported. This is in accord with present law. *E.g.*, *In re Hesdra's Will*, 119 N.Y. 615, 616, 23 N.E. 555 (1890) (subsequent inconsistent statements to impeach subscribing witness's signature); *People v. Conde*, 16 A.D.2d 327, 331-32, 228 N.Y.S.2d 69, 71-72 (3d Dep't 1962), *aff'd*, 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963) (subsequent inconsistent statements to impeach statements of medical history in hospital record); *People v. Ricken*, 242 App. Div. 106, 109-10, 273 N.Y.S. 470, 473 (2d Dep't 1934) (conviction of crime to impeach dying declaration); *see generally* Prince, Richardson on Evidence §§ 317, 355, 502 (10th ed.).

The section also provides that when impeachment is by the use of an inconsistent statement or conduct, there is no requirement that the declarant be given an opportunity to deny or

explain the statement or conduct, as under CE 613. In instances when there has been no opportunity to cross-examine the declarant, and thus it is impossible to comply with the foundation requirements, this provision codifies present law. *See In re Hesdra's Will, supra; People v.*

*Conde, supra; Prince, Richardson on Evidence § 355 (10th ed.); McCormick, Evidence § 37 (3d ed.).* The provision changes present law, however, in those instances when there was an opportunity to cross-examine the declarant and thus the foundation questions could possibly have been asked, as in situations where depositions and prior testimony are admitted under CE 804(b)(2) and the inconsistent statement was made before the deposition was taken or the testimony given. *See People v. Hines, 284 N.Y. 93, 29 N.E.2d 483 (1940); Prince, Richardson on Evidence § 355 (10th ed.).* The provision of CE 806, dispensing with foundation requirements in all situations involving impeachment by the use of inconsistent statements, is an improvement over present law. *See Prince, Admissibility of Contradictory Statements to Impeach Unavailable Witness, 10 Brooklyn L. Rev. 133 (1940).*

The last sentence permits a party, against whom hearsay has been offered and who then calls the declarant to testify, to question the declarant by cross-examination techniques. Permitting a party to do so is a corollary of general principles of cross-examination, *e.g.*, CE 611(c) (allowing leading questions to hostile witnesses), and is in accord with abandonment of the rule against impeaching one's own witness. *See, e.g.*, CE 607.

### § 810. Notice

Except for a written hearsay statement admissible under subdivision (a) or (b) of section 803 of this article, the proponent of a written hearsay statement shall, subject to a protective order, make known to all parties the proponent's intention to offer the statement and its particulars, including the name and address of the declarant, sufficiently in advance of offering the statement to provide them with a fair opportunity to meet it. To remedy the prejudice from the failure to give such notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

#### Comment

To provide a meaningful opportunity to examine written hearsay statements such as business and public records, which in many instances may be voluminous and complex in nature, this section requires that timely notice be given of a party's intent to offer a written hearsay statement. *See Matter of Leon R.R., 48 N.Y.2d 117,*

123-24,421 N.Y.S.2d 863, 867-68 (1979); McLaughlin, *Hew York Trial Practice*, N.Y.L.J., March 13, 1981, p. 1, col. 1; 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. t 4517.13; cf. Meyer, *Should Notice Be a Prerequisite to Use of Prima Facie Evidence?* 19 N.Y.L. Sch. L. Rev. 785 (1974). This notice requirement is present in other sections of the Code. *See, e.g.*, CE 404(b)(2); 609(c)(1) & (2); 806; 902(b); 1003(b); 1006. Prior inconsistent and consistent statements, CE 803(a)(1) & (2), are excepted from the notice requirement because the proponent of such statements will almost

never know that they will be offered until the declarant has testified. Moreover, in criminal cases prior written statements of a witness must be disclosed at the outset of trial. *See* CPL 240.45. Notice requirements concerning prior statements of identification, CE 803(a)(3), are contained in CPL 710.30. Admissions are excepted because notice and disclosure of them is dealt with by other statutory provisions reflecting matters of policy, which the Code is not designed to disturb. *See, e.g.*, CPLR 3101(e); CPL 240.20, 240.30; 3A Weinstein-Kom-Miller, NY Civ. Prac. 3101.56-3101.57,

## ARTICLE 9—AUTHENTICATION AND IDENTIFICATION

### Section

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### Comment

**This Article is composed of rules which relate to the authentication or identification of an offer of evidence. For the most part, these**



rules codify

present New York law. *But see* 901(b)(3), (b)(8), 902(a)(1), (a)(2). They are designed to minimize the time and expense of proving authenticity or identification without departing in any substantial degree from traditional safeguards of genuineness. They are also designed to afford greater predictability with respect to questions of authenticity or identification.

Authentication or identification refers to the requirement that before probative value can be attached to an offer of evidence, it must be established that the evidence, be it a writing, a tangible object, a test result, or a conversation, is what the proponent claims it to be. *See* Prince, Richardson on Evidence §§ 128, 635 (10th ed.); Fisch, Evidence § 132 (2d ed.). It is a special application of the general requirement that evidence be relevant in order to be admissible. CE 401, 402. To illustrate, a purported letter of a party is not relevant unless it is properly shown that the party actually wrote the letter, nor is a telephone conversation offered to show knowledge on the part of a speaker relevant unless the person speaking is sufficiently identified. In both cases, relevance is conditioned upon the fulfillment of a condition of fact, in the former establishing the party as the author of the letter, in the latter the identification of the speaker. In some instances, the authentication rules impose stricter requirements than would be necessary if relevance were the only question. For example, the chain of custody requirement in a criminal case ensures not only that the evidence is probative, but also that it meets a minimum standard of reliability.

When questions of authentication or identification are raised, the provisions of CE 104(a) become applicable. Thus, once the court finds that the offered evidence is what it purports to be, either by evidence sufficient to sustain a finding of genuineness, CE 901, or by other means sanctioned by law, CE 902, the evidence shall be admitted for consideration by the trier of fact. The fact that the court permits the evidence to be admitted does not necessarily establish the genuineness of the evidence and does not preclude an opposing party from introducing contradictory evidence. All that the court has determined is that there has been a sufficient showing of the genuineness of the evidence to permit the trier of fact to find that it is genuine. The trier of fact independently determines the question of genuineness, and, if the trier of fact does not believe the evidence of genuineness, it may find that the evidence is not genuine, despite the fact that the court has determined that it was "authenticated" or "identified."

**PROPOSED CODE OF EVIDENCE**

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**Authentication or identification is part of the process called "laying a foundation." Compliance with the requirements of this Article does not, however, guarantee that the evidence is admissible. The offered evidence may still be excluded because of some other bar to admission, such as the hearsay rule, CE 802, lack of relevancy, CE 401, 402, undue prejudice, CE 403, privilege, CE 504-514, or best evidence, CE 1002.**

## § 901. Authentication and identification

(a) General provision. A requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of evidence satisfying a requirement of authentication or identification:

(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that the offered evidence is what it is claimed to be.

(2) Nonexpert opinion on handwriting. Nonexpert opinion as to handwriting based upon familiarity not acquired for purposes of litigation.

(3) Comparison by court or expert witness. Comparison by the court or by an expert witness of the offered evidence with a specimen which the court has determined to be authentic.

(4) Circumstantial evidence. Distinctive facts and circumstances, such as appearance, contents, substance, internal patterns, or other identifying characteristics.

(5) Nonexpert opinion of 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, provided that such familiarity was not acquired for purposes of litigation.

(6) 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 the 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.

(7) Public records. Evidence that a record, report, or other writing or data compilation authorized by statute to be recorded or filed and actually recorded or filed in a public office is from that public office.

(8) Ancient writings, recordings and photographs. Evidence that a writing, recording, or photograph, as those terms are defined in section 1001 of this chapter: (A)

is in such condition as to create no suspicion concerning its authenticity; (B) was in a place where it, if authentic, would likely be; and (C) has been in existence twenty years or more at the time it is offered into evidence.

(9) Process, system and scientific test or experiment. Subject to the requirements of subdivision (b) of section 702 of this chapter, evidence that a process, system, or scientific test or experiment is reliable and accurate, and was properly employed or applied on the particular occasion.

(10) Methods provided by statute. Any method of authentication or identification provided by this chapter or other statute.

#### Comment

##### (a) General provisions.

Subdivision (a) establishes the general proposition that a requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims. It applies to all situations, other than those covered by CE 902, in which the relevance of evidence depends on its being associated with a person, time, place or other known condition. There is no stated limitation on the kind of evidence by which authentication or identification may be proved. Subdivision (b), however, sets out 10 examples of authentication or identification conforming to the requirements of subdivision (a). These examples are not intended to be exclusive or exhaustive. They are illustrative only, thereby leaving room for growth and development in this area of the law. *See* CE 102.

##### (b) Illustrations.

###### (b) (1) Testimony of a witness with knowledge.

This paragraph codifies existing law. *See* Prince, Richardson on Evidence §§ 137, 364, 637 (10th ed.); Fisch, Evidence § 132 (2d ed.). It describes the most obvious method of authentication or identification: testimony of a witness with knowledge that the offer of evidence is what it is represented to be. A broad range of witnesses is contemplated. Thus, the witness might be the author of the writing in question, or one who observed the signing of a document, or one who can verify that a photograph accurately represents the subject matter depicted, or one who is in a position

to identify a certain object, *e.g.*, the murder weapon found by the witness at the scene of the crime. Additionally, it should be noted that this paragraph will generally govern "chain of custody" cases, that is, cases where it is necessary to account for 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. *See People v. McGee*, 49 N.Y.2d 48, 424 N.Y.S.2d 157 (1979); *People v. Julian*, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977). Thus, when evidence is fungible and "not patently identifiable or is capable of being replaced or altered" authentication is done through a chain of custody. *People v. Connelly*, 35 N.Y.2d 171, 174, 359 N.Y.S.2d 266, 269 (1974); *People v. Julian*, 41 N.Y.2d at 342-43, 392 N.Y.S.2d at 612-13, *supra*. This paragraph is designed to continue present law's treatment of the chain of custody with respect to fungible items such as drugs.

Personal knowledge acquired from any of the five senses may form the basis of the testimony of the witness. Moreover, knowledge can be acquired through the witness's position or experience. For example, a person who has not personally made a business entry can testify concerning the entry if the witness has been responsible for supervising such entries. *Jezowski v. Beach*, 59 Misc.2d 224, 298 N.Y.S.2d 360 (Sup. Ct. Oneida Co. 1968); McCormick, Evidence § 219 (3d ed.). The witness's knowledge need not be absolutely certain or precise. *See People v. Randolph*, 40 A.D.2d 806, 338 N.Y.S.2d 229 (1st Dep't 1972); *People v. Levia*, 3 A.D.2d 42, 158 N.Y.S.2d 448 (3d Dep't 1956).

(b) (2) Nonexpert opinion on handwriting.

This paragraph codifies the well-established principle that a lay witness may identify handwriting with which the witness is familiar. *See People v. Molineux*, 168 N.Y. 264, 320-21, 61 N.E. 286, 304-05 (1901); *Collins v. Wyman*, 38 A.D.2d 600, 601, 328 N.Y.S.2d 725, 727 (1971); Prince, Richardson on Evidence § 364 (10th ed.). Familiarity may be obtained by various means, such as seeing the party write, *e.g.*, *Hammond v. Varian*, 54 N.Y. 398, 400 (1873); writings acknowledged by the party to be written by him, *e.g.*, *Rosenberger v. Johnson*, 210 A.D. 319, 206 N.Y.S. 286 (4th Dep't 1924); or receiving correspondence from the party in response to his own communications addressed to him, *e.g.*, *Gross v. Sormani*, 50 A.D. 531, 189 N.Y.S.2d 522 (2d Dep't 1900). Of course, the court has discretion to exclude the witness's testimony if he does not appear to have sufficient familiarity. CE 104(a); *see also People v. Corey*, 148 N.Y. 476, 482-83, 42 N.E. 1066, 1068 (1896).

Lay witness testimony based on familiarity acquired for

purposes of litigation is unreliable and therefore inadmissible. *Hynes v. McDermott*, 82 N.Y. 41, 52-54 (1880). For that reason, this paragraph bars testimony based on familiarity acquired for purposes of any litigation, not just the litigation at which the evidence is offered. In this respect, this example is more restrictive than its federal counterpart, FRE 901(b)(2). However, the example is not intended to change the principle that a witness with familiarity may have his recollection

"refreshed" *post litem motam*. *Remington Paper Co. v. O'Dougherty*, 81 N.Y. 474, 486-87, 16 Hun. 594 (1880).

(b) (3) Comparison by court or expert witness.

Traditionally, the trier of fact has been permitted to determine the identity of a contested item of evidence on the basis of a comparison between the item and a genuine specimen. The comparison may be made by the trier either from its own observation or with the assistance of an expert witness. Thus, the trier may compare the handwriting on a disputed document with that on a document known to have been written by the purported author; or an expert can compare blood, clothing fibers, fingerprints, hair, shoe prints, etc. This process of identification is premised on the view that when markings or other identifying characteristics of a particular item of evidence are rare, either alone or in combination, it is likely that other items with the same markings had the same source.

Where the similarity of compared items would be obvious to a lay person, the trier of fact can conduct the comparison. For example, a jury is competent to compare a handwriting with a handwriting specimen, the authenticity of which has been sufficiently established. However, when the comparison involves an analysis in which specialized knowledge can help the jury, an expert may make the comparison and state his conclusions to the trier of fact. *See, e.g., People v. Allweiss*, 48 N.Y.2d 40, 49-50, 369 N.E.2d 735 (1979). Thus, an expert witness would be helpful when the comparison involves ballistics identification or the identification of speakers through "voiceprints" or similar techniques, shown to be reliable under CE 901(b)(9) and admissible under CE 702. *See People v. Soper*, 243 N.Y. 320, 153 N.E. 433 (1926). Who may testify as an expert and what subjects are proper for expert testimony are covered in CE 702. It must be recognized that the comparison cannot be made by lay witnesses. *See Collins v. Wyman*, 38 A.D.2d 600, 328 N.Y.S.2d 725 (2d Dep't 1971).

This paragraph prescribes the admissibility requirements for the identification procedure described above. First, the court must

determine the specimen to be authentic. This is a determination governed by CE 104(b), and the question of the specimen's genuineness is not submitted to the jury for any further determination.

The paragraph is basically in accord with current law. *See People v. Soper, supra; People v. Roach*, 215 N.Y. 592, 109 N.E. 618 (1915); *People v. Mayo*, 64 A.D.2d 783, 407 N.Y.S.2d 918 (3d Dep't 1978); *People v. MacDonald*, 61 A.D.2d 1081, 403 N.Y.S.2d 337 (3d Dep't 1978); Prince, Richardson on Evidence § 378 (10th ed.). One difference is to be noted. Presently, comparison of handwriting with a specimen of handwriting is governed by CPLR 4536. Under this section, as interpreted by the courts, 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, and the genuineness of both the specimen and the offered handwriting are questions for the trier of fact. *See 5 Weinstein-Kom-Miller*, N.Y. Civ. Prac. 1 4536.03-04. The standard of authentication imposed and the requirement that the genuineness of the specimen be submitted to the jury are inconsistent with this paragraph. Since no similar preference for such treatment is discernible in other comparison situations, and no reason presently exists to justify its retention, it should not be retained for handwriting cases. Accordingly, the provisions of CPLR 4536 are not restated in this paragraph.

(b) (4) Circumstantial evidence.

This paragraph codifies present law. *See Prince, Richardson on Evidence* § 637 (10th ed.). It recognizes that circumstantial evidence may serve to authenticate or identify the offered evidence. Such circumstantial evidence need not fall in any set pattern. Thus, a letter may be authenticated by its own content and other circumstances suggesting that it was a reply to an authenticated letter, *e.g., McCormick*, Evidence § 225 (3d ed.); statements made over the telephone may be shown to have been made by a particular person because they disclosed knowledge of facts known peculiarly to that person, *e.g., People v. Lynes*, 49 N.Y.2d 286, 425 N.Y.S.2d 295 (1980); *People v. Dunbar Contracting Co.*, 215 N.Y. 416, 106 N.E. 554 (1915); *Dave Levine & Co., Inc. v. Wolf's Package Depot, Inc.*, 29 Misc.2d 1085, 138 N.Y.S.2d 427 (Sup. Ct. N.Y. Co. 1955), *aff'd*, 1 A.D.2d 874, 150 N.Y.S.2d 543 (1st Dep't 1956); or that a cashier's check was purchased by a certain party may be shown by evidence that the purchaser had characteristics similar to those of that party, *e.g., United States v. Gutierrez*, 576 F.2d 269 (10th Cir. 1978). Similarly, unique items such as tape recordings or other real evidence containing distinctive markings would be authenticated under this

paragraph. *See, e.g., People v. McGee*, 49 N.Y.2d 48, 59-60, 424 N.Y.S.2d 157, 163 (1979), *cert. denied*, 446 U.S. 942, 100 S.Ct. 2166 (1980); *People v. Flanagan*, 174 N.Y. 356, 66 N.E. 988 (1903).

(b) (5) Nonexpert opinion of voice identification.

This paragraph provides that a person's voice can be identified by a witness having some familiarity with the voice. It codifies present law. *See People v. Dunbar Contracting Co.*, 215 N.Y. 416, 106 N.E. 554 (1915); Prince, Richardson on Evidence § 364(f) (10th ed.). It is important to note that the familiarity with the voice can be acquired either before or after hearing the voice to be identified, provided that familiarity was not obtained solely for litigation purposes. *People v. Dunbar Contracting Co.*, *supra*; *see* Comment to 902(b)(2), *supra*. When the witness became acquainted with the speaker goes to the weight but not the admissibility of the identification. *People v. Stollo*, 191 N.Y. 42, 83 N.E. 573 (1908). Furthermore, even though the witness has never personally met the speaker, the witness may testify as to identification where circumstances exist connecting the voice with the speaker. The mere



statement of identity by the speaker is not a sufficient showing of identity under this paragraph. *Murphy v. Jack*, 142 N.Y. 215, 27 N.Y.S. 802 (1894); 7 Wigmore, Evidence § 2155 (Chadbourn rev.).

(b) (6) Identification of telephone call recipient.

This paragraph provides another way, in addition to CE 901(bX4) and (b)(5), to identify the recipient of a telephone call; however, it does not apply when seeking to identify the caller. Under its provisions, the identification of the recipient of a telephone call can be established by a showing by testimony or other evidence, such as telephone company records, that a call was made as alleged to an assigned number, plus some further indication of the identity of the one spoken to. With respect to the further indication of identity requirement, if the number called is that of a person, it will suffice that the person answering the phone identified himself as that person, or that the identification can be established by other circumstances. If the number called is that of a business, it will suffice if the ensuing conversation "related to that business." The conversation must relate to the recipient's business and not just any business.

The theory of the provisions with respect to calls to persons is that the accuracy and reliability of the telephone system, the probable absence of motive to falsify, and the lack of opportunity for premeditated fraud all tend to support the conclusion that the self-identification of the speaker is reliable. *See McCormick*, Evidence § 226 (3d ed.); 7 Wigmore, Evidence § 2155 (Chadbourn rev.). As to businesses, the theory is that it would be unfair that a business advertising or listing its telephone number should be able to exclude evidence regarding a call placed to that number on the ground that there is no showing the person answering had authority to respond or take action with respect to the call.

The paragraph codifies present law. *See People v. Lynes*, 49 N.Y.2d 286, 425 N.Y.S.2d 295 (1980); *cf. Russell v. New York State Elec. & Gas Corp.*, 276 A.D. 44, 93 N.Y.S.2d 3 (3rd Dep't 1949), *aff'd*, 301 N.Y. 593, 93 N.E. 493 (1950); *Ratomskt v. Quittner*, 214 A.D. 186, 212 N.Y.S. 53 (1st Dep't 1925); *Orlando v. Great Eastern Casualty Co.*, 91 Misc. 539, 155 N.Y.S. 20 (Sup. Ct. App. Term 1915).

(b) (7) Public records.

The paragraph codifies the well-established principle that public records identified by their custodian as coming from official custody are authentic. *See Prince*, Richardson on Evidence § 644 (10th ed.). The theory is that public employees can reasonably be relied upon to perform their task of accepting, recording or filing,

and maintaining only genuine records. McCormick, Evidence § 224 (3d ed.). The public offices encompassed by this provision include the courts, legislature, departments, agencies, boards, or other governmental offices where records, reports, or other writings are ordinarily

filed, of this state, the United States, other states, and foreign countries, or of a political subdivision thereof.

Illustrative examples of the kinds of public records that come within this paragraph are court orders, deeds, mortgages, certificates of incorporation, birth certificates, rate schedules of regulated industries, motor vehicle accident reports, and UCC filings. The term "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. Not covered by this paragraph are those records and reports which are not filed or recorded in a public office, even if they have been prepared by the public office itself. This exclusion is consistent with the paragraph's theory of authentication premised on filing and custody. Of course, such documents can be authenticated by other means, *e.g.*, CE 902(a)(1),(2),(3),(4) & (5).

Proof of production from proper custody can be established in several ways, such as testimony of the official whose duty it is to keep such records; testimony of a witness who has knowledge that the record is from the public office; or by certification from the authorized custodian, admissible as an exception to the hearsay rule under CE 803(c)(7)(A); or by judicial notice.

It should be noted that this paragraph comes into play when the offer of evidence involves the original public records, reports, or writings. Since considerations of public inconvenience and possible loss militate against removal of records or reports from public office, legislation has been enacted which places limitations upon the availability or use of the original. *See, e.g.*, CPLR 2302(b); CPLR 8021(e); *see* Prince, Richardson on Evidence § 645 (10th ed.); Fisch, Evidence § 108 (2d ed.). These sections are not affected by the Code of Evidence. Consequently, in most instances when proof of the contents of a public record is necessary, copies of them will be utilized. In this regard, CE 902(a)(4) provides that certified copies of public records, reports or other writings are admissible as authentic without extrinsic proof, and CE 1005 provides that the certified copy is admissible to prove the contents of the original.

(b) (S) Ancient writings.

This paragraph provides that the authenticity of a writing, recording or photograph, as those terms are defined in CE 1001, can be established by showing that it is at least 20 years old, was found in a place where such items are normally kept, and is in such condition so as not to create suspicion as to its authenticity. Upon establishing these requirements, no further evidence of authentication is required. The paragraph is premised upon recognition that items which have been in existence for a number of years will frequently be difficult to authenticate by direct evidence (*see* Prince, Richardson on Evidence

§ 76 [10th ed.]; Fisch, Evidence § 105 [2d ed.]), and that if the requisite conditions are shown, the likelihood that the item is not genuine is minimal.

The paragraph is not limited to writings. This is not inconsistent with present law. *See, e.g., Dodge v. Gallatin*, 130 N.Y. 117, 29 N.E. 107 (1891); *Matter of Barney*, 185 A.D. 782, 174 N.Y.S.2d 242 (1st Dep't 1919); *Coleman v. Bruch*, 132 A.D. 716, 117 N.Y.S. 582 (1st Dep't 1909); *Crisafulli v. State*, 198 Misc. 941, 100 N.Y.S.2d 773 (Ct. of Claims 1950). Although there is no case applying the rule to photographs or records, such an application is a logical outgrowth of the reasoning of *Dodge*, and certainly not unwarranted. Furthermore, as "writings" includes data compilations, contemporary methods of data processing, retention, and storage are also within the scope of this paragraph.

Present law is changed in two respects. First, the pertinent period is reduced from 30 to 20 years. This is predicated upon the unlikelihood of a fraud planned and executed over so long a period. It is consistent with modern evidentiary views. *See* 7 Wigmore, Evidence § 2143 (Chadbourn rev.). Second, the paragraph dispenses with the need to show authenticating circumstances other than those specified by its provisions. Present law, by contrast, requires that in applying the rule to documents dealing with interests in real property, proof of possession of the land is required in addition to proof of age, appearance, and custody of the document. *See Clark v. Owens*, 18 N.Y. 434 (1858); *Porter v. State*, 5 Misc.2d 28, 159 N.Y.S.2d 549 (Ct. of Claims, 1957). Possession consistent with the terms of the instrument is simply another form of evidence tending to show genuineness; it strengthens the inference of genuineness but is not essential to the inference.

(b) (9) Process, system and scientific test or experiment.

This paragraph governs situations where the source of the offered evidence is derived from the use or application of a process, system or scientific test or experiment. Provided the requirements of section 702(b) are also satisfied under the paragraph, evidence showing the reliability and accuracy of the process, system, or scientific test or experiment, coupled with evidence that the process, system, or scientific test or experiment was properly employed or applied on the particular occasion, constitute sufficient evidence that the offered evidence is what it purports to be. The paragraph, read together with CE 403 and 702(b), codifies present law. Comment to 702(b), *supra*.

(b) (10) Methods provided by statute.

This paragraph is intended to make clear that methods of authentication or identification provided by the Code itself or other statutes are not superseded. Notably, provisions of Article 8 provide for authentication of certain records by certification. *See, e.g.*, CE 803(a)(5)(B)-(E) & 803(a)(7)(B). Existing statutes, *e.g.*, CPLR 3123; GBL § 277; Navigation Law § 123, providing for

**authentication or identification of certain evidence remain in effect. The paragraph is to the same effect as CPLR 4543.**

**Additionally, it should be noted that federal law establishes procedures for authenticating acts of the legislature, and the records and judicial proceedings of any court, as well as nonjudicial records or books kept in any public office, or copies thereof, of any state, territory, or possession of the United States. 28 U.S.C. § 1739; 28 U.S.C. § 1740. This legislation is, of course, under the supremacy clause of the United States Constitution, applicable in state courts.**

**Parties, however, are not bound to utilize these procedures to authenticate such records; they may avail themselves of other procedures, e.g., CE 901, 902;**

**Prince, Richardson on Evidence §§ 653-654,662 (10th ed.). Indeed, since these other procedures are less restrictive than the procedures provided for in 28 U.S.C. §§ 1739, 1740, resort to them is common.**

#### § 902. Self-authentication

(a) General provision. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

(1) Public documents bearing official seals. A public document bearing a seal purporting to be the official seal of: (A) this state, or a political subdivision, department, agency, bureau, officer, or employee thereof; (B) the United States, or a department, agency, bureau, officer, or employee thereof; or (C) any state, territory, or jurisdiction of the United States, or a political subdivision, department, agency, bureau, officer, or employee thereof.

(2) Public documents bearing official signatures. A public document bearing a signature purporting to be the signature in the official capacity of an officer or employee of: (A) this state, or a political subdivision, department, agency, or bureau thereof; (B) the United States, or a department, agency, or bureau thereof; or (C) any state, territory, or jurisdiction of the United States, or a political subdivision, department, agency, or bureau thereof.

(3) Foreign public documents. A foreign public document purporting to be executed or attested in a person's official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position of the executing or attesting person, or of any foreign official whose certificate of genuineness of signature

and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. 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 a foreign public document, the court may, for good cause shown, order that they be admitted as authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.

(4) Certified copies of public records. A copy of a record, report, or other writing or data compilation produced by a public office or authorized by statute to be recorded or filed and actually recorded or filed in a public office, certified as correct by the custodian or other person authorized to make the certification, by certificate complying either with paragraph one, two or three of this subdivision, or with any other statute.

(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.

(6) Newspapers and periodicals. Printed material 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.

(7) Trade inscriptions and the like. Inscriptions, signs, marks, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.

(8) Acknowledged documents. Documents, except wills, accompanied by a certificate of acknowledgment or of proof executed in the manner provided by statute by a notary public or other person authorized by law to take an acknowledgment or proof.

(9) Tariff or classification subject to public service commission, commissioner of transportation, or interstate commerce commission. A printed copy of a tariff or classification which shows a public service commission or commissioner of transportation number of this state and an effective date, or a printed copy of a tariff or classification which shows an interstate commerce commission number and an effective date.

(10) Self-authentication by statute. Any signature, document, or other matter declared by statute presumptively or prima facie genuine or authentic.



(b) Notice. The proponent of evidence under this section shall make known to all parties the proponent's intention to offer the evidence and its particulars sufficiently in advance of offering the evidence to provide them with a fair opportunity to meet it. To cure the prejudice from the failure to give such notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

#### Comment

This section expresses the rule that extrinsic evidence of authenticity is not required with respect to certain enumerated "self-authenticating" documents. It reflects the sensible view that in the normal course of events these documents are unlikely to be forgeries and are, therefore, for reasons of policy and convenience, deemed to be self-authenticating. *See* 7 Wigmore, Evidence § 2161 (Chadbourn rev.). The fulfillment of the authentication requirement does not, of course, preclude an opposing party from contesting the genuineness of the evidence. The opposing party is only precluded from disputing admissibility on the ground of authentication.

#### (a) (1) Public documents bearing official seals.

This paragraph provides that public documents bearing an official seal are self-authenticating. It will be most commonly encountered in connection with acknowledgments or certificates attesting to the correctness of copies of public records, reports, or writings, although its scope is not so limited.

The paragraph is intended to eliminate, as a condition to admissibility, the need for formal proof of the genuineness of many public documents by presuming the authenticity of a broad range of domestic and foreign official seals. Such seals have traditionally been considered extremely reliable indications of authenticity because they are distinctive, difficult to forge, generally protected from misuse, and relatively easy to compare with a specimen. *See* 7 Wigmore, Evidence § 2161 (Chadbourn rev.). The paragraph differs from its federal counterpart, FRE 902(1), which requires in addition to the seal a signature "purporting to be an attestation or execution." While in practice a signature will in most instances accompany the use of a seal, the omission of a signature should not preclude a party from availing itself of the provisions of this paragraph to authenticate a public document in light of the considerations underlying the use of a seal.

With respect to documents bearing the public seals of this state and the United States and its various entities, officers and employees, the paragraph codifies present law. *See* Prince, Richardson on Evidence §§ 31, 644 (10th ed.); 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 5 4540.07; *cf.* CPLR 4540(b). It is also consistent with present law concerning a document bearing the public seal of another state. *See* Prince, Richardson on Evidence §§ 31, 644 (10th ed.). The paragraph does, however, change the law concerning a document bearing the public seal of a subdivision or officer of another state. *See* 7 Wigmore, Evidence § 2166 (Chadbourn rev.). No persuasive reason exists as to why such a document should be treated differently in light of the general recognition accorded seals. *Cf.* 5 Weinstein-Kom-Miller, N.Y. Civ. Prac. 5 4540.07.

(a) (2) Public documents.

Under this paragraph, a public document will be deemed to be self-authenticating if it bears a signature purporting to be that of a public officer or employee of one of the listed entities. As with CE 902(a)(1), it will be most commonly encountered in connection with acknowledgments or certificates attesting to the correctness of copies of public records, reports, or writings, although its scope is not so limited.

There is no requirement imposed with respect to authentication of the signature. An assumption of genuineness is accorded to these signatures. Penal sanctions for forged writings are deemed to be sufficient guarantees of genuineness. *Cf.* 7 Wigmore, Evidence § 2168 (Chadbourn rev.). In this regard, the paragraph differs from its federal counterpart, FRE 902(2), which requires authentication of the signature by an officer who has a seal. In the Commission's opinion, this requirement is unduly restrictive.

This paragraph extends to the signatures of officers and employees of other states the assumption of genuineness that is accorded to the signatures of the officials of this state and the United States under present law. Prince, Richardson on Evidence §§ 31, 644 (10th ed.). This extension is justified on the ground that the danger of forgery is outweighed by the time and expense that may otherwise be incurred in establishing authenticity.

(a) (3) Foreign public documents.

This paragraph restates without substantive change the

present method of self-authentication of foreign public records and reports provided by CPLR 4542.

It should be noted that resort to this paragraph may not be necessary in many instances because of ratification by the United States Senate on November 29, 1979 of the Convention Abolishing the Requirement of Legalization for Foreign Public Documents. Under the supremacy clause the Convention is applicable in state courts. *See generally, Lambert, Surrogate Explains New Procedure for Authenticating Foreign Papers, N.Y.L.J., 12/22/81, p. 1, col. 1.*

(a) (4) Certified copies of public records.

This section is concerned with authentication of copies of two categories of public documents. The first consists of records, reports, or other writings prepared by employees of a public office in the course of the performance of the duties of their positions. The second consists of records, reports, or other writings authorized to be recorded or filed and in fact recorded or filed in a public office. Examples of this latter category are court orders, deeds, mortgages, certificates of incorporation, birth certificates, rate schedules of regulated industries, motor vehicle accident reports, and UCC filings. Public offices covered by this section include the courts, legislatures, departments, agencies, boards, or other governmental offices where records and reports are ordinarily filed, of this state, the United States, other states, and foreign countries, or of a political subdivision thereof.

In order to keep these documents in secure custody and available for public use, common law and statutes have long permitted the introduction of duly authenticated copies of the originals. *See* CPLR 4540; CPLR 4542; Prince, Richardson on Evidence § 645 (10th ed.). This paragraph continues the practice.

Under this paragraph a copy of a public document is self-authenticating when it bears or is accompanied by a certificate, made by the custodian or other authorized person, which indicates his status in relation to the original document and the accuracy of the copy. No additional certification as to the fact of custody or the certifying person's authority, or of the authenticity of the seal or signature is required, when the certificate complies with the provisions of CE 902(a)(1), (a)(2), (a)(3) or a similar statute. The certificate itself qualifies as a public document receivable as self-authenticating under those subdivisions. The certificate is admissible as an exception to the hearsay rule under CE 803(c)(7)(A), and the certified copy is admissible to prove the contents of the original under CE 1005.

This paragraph relaxes somewhat the requirements of CPLR 4540 and 4542: (1) it permits attestation and certification by an officer possessing no seal (*compare* CPLR 4540[b]); and (2) it makes the attestation of an authorized custodian sufficient without further certification of the attesting officer's authority and incumbency and of the genuineness of the signature (*compare* CPLR 4540[c]).

(a)(5) Official publications.

This paragraph restates present statutory law. *See* CPLR

4511(d), 4540(a), 4542(a). It will be most commonly encountered in connection with statutes, court reports, rules, and regulations, although it is to be noted that its scope is not so limited.

(a) (6) Newspaper and periodicals.

This paragraph continues present law (CPLR 4532) by making it unnecessary to establish by extrinsic evidence that a newspaper or periodical offered into evidence is genuine. The rule of self-authentication provided by the paragraph applies to periodicals of general circulation. An example of its utilization will be in actions for libel when the newspaper or periodical is offered against its purported publisher. The section recognizes both the right of a party to challenge authenticity before admission and the right of the party to raise authenticity as a question of fact to be decided by the jury.

(a) (7) Trade inscriptions and the like.

This paragraph provides that any trade inscriptions and the like on items indicating ownership, control, or origin are self-authenticating. It restates present law. *See Weiner v. Mager & Throne*, 167 Misc. 338, 3 N.Y.S.2d 918 (Mun. Ct. of N. Y. 1938). An example of when its provisions may be encountered is in a products liability action where a plaintiff is attempting to link a defendant to a defective product which bears defendant's mark.

(a) (8) Acknowledged documents.

This paragraph restates without substantive change the present statutory method of self-authentication of acknowledged documents. *See* CPLR 4538; *Matter of Pirie*, 198 N.Y. 209, 91 N.E. 587 (1910); *Dart Associates v. Rosal Meat Market, Inc.*, 39 A.D.2d 564, 331 N.Y.S.2d 853 (2d Dep't 1972); Prince, Richardson on Evidence §§ 665-671 (10th ed.). The certificate itself may be self-authenticating if in conformity with CE 902(a)(1), (a)(2), or (a)(3), or another statute, *e.g.* Executive Law § 137, and is admissible as an exception to the hearsay rule under CE 803(c)(7), or another statute which provides an exception to the hearsay rule, *e.g.*, Executive Law § 137.

(a) (9) Tariff on classification  
subject to various  
commissions.

This paragraph restates without substantive change the present method of self-authentication of specific kinds of tariffs or classifications. *See* CPLR 4540(d).

## (a) (10) Self-authentication by statute.

This paragraph is intended to make clear that methods of self-authentication provided by other statutes are not superseded. The paragraph is to the same effect as CPLR 4543. Statutes that remain in effect include: Ag. & Mkt. Law § 96 (certificates of registry and transfer of domestic animals under seal of appropriate organization); Bank. Law §§ 1006, 9012 (corporate seal *prima facie* evidence of execution and authority); BCL § 107 (corporate seal

*prima facie* evidence of execution and authority); N. Y. City Uninc. Bus. Income Tax Act § 124(a),(b) (signature on tax return *prima fade* evidence of execution and authority); CPLR 2105 (certification by attorney); Executive Law § 137 (certificate of notary admissible as presumptive evidence of the facts contained.);

Gen'l City Law § 25-a, Model Local Law § 33(a) (signature on return or other document is *prima fade* evidence document signed by purported signer); Mental Hygiene Law § 23.21(d) (certified statement by bank, etc., covering assets of drug-dependent person admissible in any action or proceeding); N.Y. City Civ.

Ct. Act § 1102(b) (signature to instrument pleaded shall be deemed genuine unless opponent denies specifically and demands proof); Uniform City Ct. Act § 1102(b) (same); Uniform Dist. Ct. Act § 1102(b) (same); Uniform Justice Ct.

Act § 1102(b) (same); Not-for-Profit Corp. Law § 107 (corporate seal *prima fade* evidence document executed by authority of corporation); Tax Law §§

287, 367, 429, 505, 653 (signature on return *prima fade* evidence it was actually signed by persons named); Uniform Commercial Code § 3-307(1)

(signatures on negotiable instruments).

## (b) Notice.

In order to provide a meaningful opportunity to challenge writings offered without extrinsic evidence of their authenticity, subdivision (b) requires that timely notice be given of a party's intent to offer the writing. *See Meyer,*

*Should Notice Be a Prerequisite to Use of Prima Fade Evidence?*, 19 N.Y.L.F.

785 (1974). This notice requirement is present in other sections of the Code. *See, e.g.,* CE 404(b)(3); 609(b); 810; 1003(b). A similar provision is not contained in CE 901 because the means of authentication specified in CE 901(b) generally involve the testimony of witnesses who are subject to cross-examination.

## § 903. Subscribing witness's testimony unnecessary

Unless a writing requires a subscribing witness for its validity, the testimony of a subscribing witness is not necessary to authenticate it.

**Comment**

**This section recodifies without substantive change CPLR 4537. Pursuant to its provisions, it is not necessary to call a subscribing witness to establish the genuineness of a writing except in the case of a writing invalid unless so witnessed. Fisch, Evidence § 106 (2d ed.). Thus, even though a writing has been attested, unless its validity depends upon a subscribing witness, its genuineness may be established in the same way as that of an unattested writing.**

Some of the situations where subscribing witnesses are required are wills, *e.g.*, EPTL § 3-2.1, written contracts of marriage, *e.g.*, DRL § 11(4), and unacknowledged grants of fee or freehold, *e.g.*, RPL § 243. With respect to wills, if a subscribing witness is unavailable and the witness's absence is satisfactorily explained, or the witness denies or does not recollect the execution of the will, other methods of establishing the will's authenticity may be employed. SCPA §§ 1404, 1405, 1406; Prince, Richardson on Evidence § 39 (10th ed.).



**ARTICLE 10—CONTENTS OF WRITINGS, RECORDINGS  
AND PHOTOGRAPHS**

Section

- 1001. Definitions
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- 1007. Testimony or written admission of party
- 1008. Functions of court and jury

**Comment**

**This article codifies with several modifications the common law "best evidence" rule. The function of the best evidence rule is preserved while many unnecessary restrictions are eliminated.**

**As originally understood at the common law, the rule required a party to produce the best evidence available. That**

meant, for example, that if a party

had an expert, it had to produce him in preference to a lay witness. *See* 4 Wigmore, Evidence § 1177 (Chadbourn rev. ed.). That meaning of the best evidence rule has long since been discarded. As understood and applied in present-day practice, the best evidence rule requires that when a party seeks to prove the contents of a writing, the party must produce the original writing or explain its absence before secondary evidence of its contents may be admitted.

*See* Fisch, Evidence § 81 (2d ed.); Prince, Richardson on Evidence § 568 (10th ed.). In actuality then, the rule is really more accurately called the 'original writings rule.' *See* McCormick, Evidence § 229 (3d ed.).

Several reasons exist for requiring that the original be offered. First, as a slight difference in words can make a great difference in meaning, and thus in rights, it is of substantial importance to have the exact words of the original before the trier of fact. McCormick, Evidence § 231 (3d ed.). Second, the probability of accuracy is substantially increased by production of the original, as opposed to a copy or proof by oral testimony, because the danger of human and mechanical error is eliminated. Prince, Richardson on Evidence § 569 (10th ed.). Lastly, fraud is discouraged because the parties have an opportunity to examine the writing for alterations, and its presence in court prevents the coloring of testimony. Fisch, Evidence § 81 (2d ed.).

While present-day expansion of discovery and related procedures may have reduced the need for the rule, discovery, where available, is not always a sufficient assurance against inaccuracies and fraud. *See* Cleary and Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825 (1966). Accordingly, the best evidence rule is retained, but in recognition of present technological processes it has been modernized.

## § 1001. Definitions

For purposes of this article the following definitions are applicable:

(a) Writings and recordings. "Writings" and "recordings" consist of letters, words, sounds, or numbers, or their equivalents, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other form of data compilation.

(b) Photographs. "Photographs" include still photographs, X-ray films, videotapes, and motion pictures.

(c) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data is stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the

data accurately, is an "original." A duplicate of a writing, recording, or photograph, made in the regular course of business or activity and preserved as part of the records of any business, institution, or member of a profession or calling, is an "original."

(d) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent technique which accurately reproduces the original.

#### Comment

This section sets forth definitions of terms that are used throughout Article 10.

##### (a) Writings and recordings.

Traditionally, the best evidence rule applied only to written or printed words. 4 Wigmore, Evidence § 1174 (Chadbourn rev. ed.). As a result of technological advances in presenting and storing information, New York courts have recognized that in this day and age it is no longer enough to refer to "writings" in the sense of words on sheets of paper. Consequently, the rule has been expanded to include modern methods of storing or recording data. *See, e.g., Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 637 (1974) (rule applied to computer printouts); *People v. Graham*, 57 A.D.2d 478, 394 N.Y.S.2d 982 (4th Dep't 1977), *aff'd*, 44 N.Y.2d 768, 406 N.Y.S.2d 36 (1978) (rule applied to tape recordings). This subdivision codifies present law. Any form of documentary evidence, whether perceived visually or aurally, if it consists of letters, words, sounds, numbers or their equivalents, is within this subdivision and therefore subject to CE 1002.

##### (b) Photographs.

Recognizing that pictorial evidence can have independent probative value, New York cases have consistently held that such evidence is within the best evidence rule when introduced as proof of its contents. *See, e.g., People v. Byrnes*, 33 N.Y.2d 343, 352 N.Y.S.2d 913 (1974) (photographs); *Cellamare v. Third Ave. Transit Corp.*, 273 A.D. 260, 77 N.Y.S.2d 91 (1st Dep't 1948) (X-rays); *see also Anno.*, 76 A.L.R.2d 1356. This subdivision codifies present law.

##### (c) Originals.

In most instances, what is an original will be self-evident. In some situations, however, the nature of an original will not be entirely clear. This

subdivision provides some particularized definitions, which, it will be noted, are based on the practicalities of the situation.

Contracts and other writings are frequently executed by the parties in multiple copies, with each party retaining one. This subdivision provides that the term original includes "any counterpart intended to have the same effect" as the writing or recording itself. Thus, a carbon copy or photostatic copy of a contract executed in duplicate is treated as an original, as well as a carbon copy of a sales ticket or slip provided by a seller to a customer. This provision is consistent with present law. *See, e.g., Sarasohn v. Kamaiky*, 193 N.Y. 203, 86 N.E. 20 (1908); Prince, Richardson on Evidence § 576 (10th ed.). In this regard, any one such copy may be admitted at the trial as an original without producing or explaining the absence of the other. *Id.* This provision does not, however, change the well-established rule that when multiple copies of a will have been executed, one of them cannot be probated until all the others have been accounted for, the theory being that a testator can destroy his will by destroying the one in his possession without repossessing and destroying its duplicate. *See Crossman v. Crossman*, 95 N.Y. 145 (1884); *Matter of Robinson*, 257 A.D. 405, 13 N.Y.S.2d 324 (4th Dep't 1939).

Common usage, based upon practicality, treats the negative and any print from the negative of a photograph as an original. Similarly, common usage and practicality treat a computer printout as an original. This subdivision codifies this treatment. *See Berger & Weinstein*, 5 Weinstein's Evidence ^ 1001(3) (03-04). Present law is not to the contrary. *Cf. Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367 (1974).

The last sentence of this subdivision restates the present practice of treating duplicates, as defined in CE 1001(d), of business records, *e.g.*, microfilms, photocopies, if made in the regular course of business, as originals (CPLR 4539). This provision is based not only on modern business practice, but also on the recognition that such reproductions are sufficiently trustworthy to be treated as originals. Prince, Richardson on Evidence § 577 (10th ed.).

(d) Duplicates.

Subdivision (d) creates a class of items generally admissible under CE 1003. Under that section duplicates, even if not intended to possess the legal effect of the original, are admissible to the same extent as originals unless there are questions of authenticity or other circumstances making admission unfair.

"Duplicates" are reproductions made by processes which largely eliminate the possibilities of fraud or error. The applicable test is one of practicality. Although it is possible to alter reproductions made by processes such as carbon copy, photocopy, offset printing, and magnetic tape re-recording, such reproductions are customarily accurate and, therefore, possess sufficient reliability to be admitted as originals, unless an issue of authenticity is raised.



This subdivision includes reproductions made subsequent to the creation or execution of the original and reproductions such as enlargements or reductions in size from the original, so long as the process ensures accuracy of reproduction. A copy made by hand would not, however, be a "duplicate." It must be recognized that this subdivision does not encompass reproductions made in the course of business, or copies intended to have the same effect of an original, which are defined as "originals" by subdivision (c) and are, therefore, not controlled by CE 1003.

### § 1002. Requirement of original

To prove the contents of a writing, recording, or photograph, the original writing, recording, or photograph is required except as otherwise provided by this chapter or other statute.

#### Comment

This section codifies the familiar best evidence rule that requires the production of an original when a party seeks to prove the contents of a writing, recording, or photograph, as defined in CE 1001. See *Trombley v. Seligman*, 191 N.Y. 400, 84 N.E. 280 (1908); *Butler v. Mail & Express Publ. Co.*, 171 N.Y. 208, 63 N.E. 981 (1902); Prince, Richardson on Evidence § 568 (10th ed.).

It must be recognized that under this section the original must be produced only when a party is attempting to prove the contents of a writing, recording, or photograph. Thus, the section does not apply when a party seeks to prove a fact which has an existence independent of any writing, even though a writing exists evidencing that fact. For example, payment may be proved without producing the written receipt which was given, *e.g.*, *Steele v. Lord*, 70 N.Y. 280 (1877); oral testimony may be proved without reference to the stenographer's minutes, *e.g.*, *McRorie v. Monroe*, 203 N.Y. 426, 96 N.E. 724 (1911); *People v. Colon*, 281 A.D. 354, 119 N.Y.S.2d 503 (1st Dep't 1953); birth, marriage, age and death may be proved orally although certificates evidencing these facts are in existence, *e.g.*, Prince, Richardson on Evidence § 572 (10th ed.); and earnings may be proved without producing books of account in which they are entered, *e.g.*, McCormick, Evidence § 233 (3d ed.). In these and similar situations the proof is directed to the occurrence of the event or transaction and not to the contents of the writing. When, however, the fact itself takes the form of a writing, as in the case of written contracts, wills or deeds, proof of the fact necessarily involves the contents of the writing, and this section is applicable, unless an exception is present. Similarly, when a party, in

attempting to prove a fact, elects to show the contents of a writing, recording, or photograph, provisions of this section come into play.  
*See McCormick,*

Evidence § 233 (3d ed.). For example, a writing may contain a recital of fact which is admissible under an exception to the hearsay rule, CE 802. This fact might be established without the writing, but if the contents are relied upon to prove the fact, the original writing must be produced. Thus, the oral testimony as to contents will be inadmissible unless an exception is present.

It is important to note that a photograph may or may not be offered to prove its contents. Two situations need to be distinguished. When a witness identifies a photograph as a true and fair representation of an event which he observed or of a scene with which he is familiar, and uses it to illustrate his testimony, he is not attempting to prove the contents of the picture and CE 1002 is not applicable. When, on the other hand, a party is attempting to prove the contents of the photograph, CE 1002 is applicable.

CE 1002 provides that the requirement of an original may be dispensed with if other sections of the Code or other statutes so provide. The sections in the Code are CE 1004, 1005, 1006, 1007, and 1101(a)(2). Additionally, CE 1002 is limited by CE 703, which allows an expert to give an opinion based on matters not in evidence (*see* McLaughlin, *New York Trial Practice*, N.Y.L.J., November 14, 1980, p. 1, col. 1), and in some instances by CE 803(c)(5), which, for example, would allow interpretive X-ray reports contained in hospital records to come in as records of a regularly conducted activity. Illustrative of other statutes which excuse production of the original are: Banking Law § 256; County Law § 208(5); Education Law §§ 106, 312; General Business Law § 394-a; General Municipal Law § 51-a; Indian Law § 71; Public Lands Law § 5; Public Officers Law §§ 65-a, 65-b; Public Service Law § 17; Real Property Law § 399; and Transportation Law §§ 69, 88.

Additionally, it should be noted that copies of records and judicial proceedings of any court, as well as nonjudicial records or books kept in any public office of any state, territory, or possession of the United States are admissible as proof of their contents when the procedures set forth in 28 U.S.C.

§ 1739 and 28 U.S.C. § 1740 are complied with. This legislation is, of course, under the supremacy clause of the United States Constitution applicable in state courts. Parties are not bound, however, to utilize these procedures to prove the contents of such records; they may avail themselves of other procedures, *e.g.*, CE 901, 902. *See* Prince, *Richardson on Evidence* §§ 653-654, 662 (10th ed.). Indeed, because these other procedures are less restrictive than the procedures provided for in 28 U.S.C. §§ 1739, 1740, they are commonly resorted to.

**§ 1003. Admissibility of duplicates**

(a) General provision. Except as otherwise provided by section 1005 of this article, a duplicate is admissible to the same extent as an original unless: (1) a genuine question is raised as to the authenticity of the original; or (2) under the circumstances it would be unfair to admit the duplicate in lieu of the original.

(b) Notice. The proponent of a duplicate shall make known to all parties the proponent's intention to offer the duplicate and its particulars sufficiently in advance of offering the evidence to provide them with a fair opportunity to meet it. Upon request of the other party, the proponent shall make the original available for inspection if it exists and is in the proponent's possession. If the original no longer exists or is not in the possession of the proponent, the proponent shall so notify the requesting party and advise that party of the location of the original, if known. To remedy the prejudice from the failure to give such notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require.

#### Comment

**This section governs the admissibility of all duplicates other than duplicates of public records which are governed by CE 1005.**

**Apart from those instances which are presently governed by CPLR 4539, this section will result in a change in the current law which permits an adverse party to insist upon production of an original, even though there was no question as to accuracy of the copy nor any other purpose to be served by the original's production. *See Foot v. Bentley*, 44 N.Y. 166 (1870); *Dipace v. Hertz Carp.*, 30 A.D.2d 515, 290 N.Y.S.2d 124 (1st Dep't 1986). As observed in the Comment to CE 1001(d), with the development of accurate and convenient reproducing systems, much of the concern about the admission of duplicates is eliminated. This section is designed to save the time and expense which would be incurred in producing an original when an equally reliable counterpart is at hand. If there is no genuine issue of authenticity or admission of the duplicate would not be unfair, an accurate duplicate will serve just as well as the original to get the contents before the trier of fact. *See Comment, Authentication and the Best Evidence Rule Under the Federal Rules of Evidence*, 16 Wayne L. Rev. 195 (1969). In large measure, this section gives "duplicates" the status of "originals."**

**Consequently, the proper inquiry under CE 1003 is whether a duplicate should be ruled inadmissible because there is a question as to the authenticity of the original or admission of the duplicate would be unfair. An example of a question regarding authenticity would be where a party argues that the original is a forgery. Unfairness may be present when the duplicate is a poor quality reproduction, is grossly reduced, or has a misleading appearance. *See Berger & Weinstein*, 5 Weinstein's Evidence 1 1003[03]. It should be noted that a "duplicate," although denied the status of an original, may nonetheless be admissible as secondary evidence when production of the original is not required because of**

the operation of CE 1004.

In recognition of the fear of possible fraud or unfairness, and consequently to provide a meaningful opportunity to challenge duplicates, the

section requires that a timely notice be given of a proponent's intent to offer a duplicate. *See Meyer, Should Notice Be a Prerequisite to Use of Prima Facie Evidence*, 19 N. Y.L.F. 785 (1974). This notice provision is consistent with ones used elsewhere in the Code. *See, e.g.*, CE 404(b)(2); 609(b); 810; 902(b); 1006. In addition to the notice requirement, the section requires the offering party to make the original available for inspection, if it still exists and is in the possession of the offering party. If the original no longer exists or is not in the possession of the offering party, that party must advise the other party of those facts and the location of the original if known. To remedy the failure to give notice or to make the original available, a court is directed to CE 107 for the appropriate remedy.

§ 1004. Admissibility of other evidence of contents

The original is not required, and, except as otherwise provided by section 1005 of this article, other evidence of the contents of a writing, recording, or photograph is admissible if:

(a) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;

(b) Original not reasonably obtainable. An original cannot be obtained by any available judicial process or procedure, or the utility of producing the original is substantially outweighed by considerations of difficulty, expense, or the like;

(c) Original in control of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof, and that party does not produce the original; or

(d) Collateral matters. The writing, recording, or photograph is not closely related to a controlling issue.

**Comment**

This section states the circumstances in which nonproduction of the preferred original is excused, and correspondingly, when other evidence, referred to as secondary evidence, is admissible to prove the contents of a writing, recording, or photograph. It is consistent with present practice (*see Prince, Richardson on Evidence* §§ 571, 573, 582, 600 [10th ed.]), with two exceptions, discussed *infra* in (b) and (c).

With one exception regarding proof of the contents of a public document (*see* Comment to CE 1005), no degrees of secondary evidence are recognized under this section. Consequently, once the failure to produce an original is excused, any available evidence otherwise admissible can be used to prove the contents of the original. Thus, oral testimony as to contents can be introduced even though a copy of the original was at sometime made and nonproduction of that copy was not accounted for. The complexities and possible unfairness involved in administering a hierarchy of preferences outweigh the theoretical benefits of requiring the most reliable secondary evidence. The adversary system provides sufficient motivation to produce the most reliable evidence available. *See* Cleary and Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 Iowa L. Rev. 825, 846-47 (1966).

(a) Originals lost or destroyed.

This subdivision codifies the well-established excuse of good faith loss or destruction. *See* Prince, Richardson on Evidence §§ 583-588 (10th ed.). The rationale is that the need for relevant evidence takes precedence over the dangers of inaccuracy and fraud, issues left to the trier of fact in determining probative weight.

The burden of showing loss or destruction is upon the proponent of the evidence. It may be met by either direct or circumstantial evidence. Thus, it can be established by testimony of a witness with personal knowledge of the destruction or loss, or by testimony as to an unsuccessful but diligent search. *Kearney v. Mayor*, 92 N.Y. 617 (1883). Whether a search was diligent will depend, of course, on the circumstances of each case. *Cole v. Canno*, 168 A.D. 178, 153 N. Y.S. 957 (3rd Dep't 1915). Destruction of the original in bad faith will preclude introduction of secondary evidence. *West v. New York Central & Hudson River R. R. Co.*, 55 App. Div. 464, 67 N.Y.S. 104 (4th Dep't 1900); *cf. People v. Betts*, 272 App. Div. 737, 74 N.Y.S.2d 791 (1st Dep't 1947), *aff'd*, 297 N.Y. 1000, 80 N.E.2d 456 (1948). Intentional destruction in the ordinary course of business or because there was no reason for its preservation is not, however, deemed to be in bad faith. *See Steele v. Lord*, 70 N.Y. 280 (1877); *Dearing v. Pearson*, 8 Misc. 269, 28 N.Y.S. 715 (N.Y. Co. Common Pleas 1894).

It is important to note that this subdivision becomes operative only when all originals are lost or have been destroyed. Thus, when multiple originals have been executed, all such originals must be shown to be lost or destroyed before secondary evidence of their contents is admissible.

(b) Original not reasonably obtainable.



Even if the original has not been lost or destroyed, secondary evidence of its contents is admissible under this subdivision when the proponent of the evidence adduces proof that the original cannot be obtained by any judicial process, or the utility of producing the original is substantially outweighed by considerations of difficulty, expense or the like. The rationale underlying this rule is similar to that of subdivision (a), namely, if the original cannot be obtained, or the utility of obtaining it is outweighed by other factors, it is as inaccessible as if it had been lost or destroyed.

Thus, when an original is in the control of a third party, it must be shown that the third party cannot be subpoenaed to produce the original and that no other judicial procedure is available to compel production. No further efforts are required; it is not necessary to show that other efforts have been made, or if attempted would be futile, a requirement currently imposed by some New York cases. *See Kearney v. Mayor*, 92 N. Y. 617 (1883); *cf. People v. Burgess*, 244 N.Y. 472, 155 N.E. 745 (1927). Such further requirements are unnecessary because it is unlikely that they will be particularly effective in securing an original and they may impose disproportionate costs in time and expense.

Furthermore, this subdivision grants a court some discretion to excuse production of the original, even if obtainable by subpoena, if such production is "substantially outweighed by considerations of difficulty, expense or the like." Such variables as the need for establishing the exact terms, and the difficulty and expense of bringing the original into court will enter into the court's determination of whether production of the original should be excused. As one court has observed: "If a sign were painted on a house, it would hardly be contended that the house would have to be produced, nor can it be said that the law converts the courtroom into a receptacle for wagons, boxes, tombstones, and the like, on which one's name may be written." *Kansas Pacific By. Co. v. Miller*, 2 Colo. 442, 462 (1874). This provision codifies present law. *See Prince*, *Richardson on Evidence* § 571 (10th ed.); *Fisch*, *Evidence* § 85 (2d ed.).

(c) Original in control of opponent.

This subdivision recognizes that a party in control of the original does not need the protection of CE 1002 if put on notice that the contents of the original will be the subject of proof. In essence, the notice precludes an argument that the opponent has not taken all reasonable means to procure the original. Notice is required in both civil and criminal actions. As to criminal actions,

this marks a change from present law. In *People v. Gibson*, 218 N.Y. 70, 112 N.E. 730 (1916), the Court of Appeals held that secondary evidence was admissible in a criminal action without any request of the defendant to produce the original. The Court observed: "To allow a demand ... is to require [the defendant] to produce it or deny his possession thereof, or by reason of his silence to warrant injurious inferences against him." *Id.* at 75. This decision is not followed as it misconstrues the notice requirement as involving compulsion and self-incrimination. In reality, the notice does not compel

production of the original, but merely lays the foundation for secondary evidence if the notice is disregarded.

That the original is in the control of the opponent can be established by circumstantial evidence, *e.g.*, *People v. Dolan*, 186 N.Y. 4, 78 N.E. 569 (1906); by testimony, *e.g.*, *Oscar Chandler & Co. v. S & E Novelty Co.*, 118 N.Y.S.2d 797 (App. Term 1st Dep't 1952); or by proof that the original was mailed to the opponent, *e.g.*, *Gardam & Son v. Batterson*, 198 N.Y. 175, 91 N.E. 371 (1910). If the proof of possession is insufficient, failure to produce upon notice will, of course, make the secondary evidence inadmissible. *See Herman v. Heller*, 172 N.Y.S. 474 (App. Term 1st Dep't 1918).

As to the form of the notice, the section specifies "pleadings or otherwise." While the preferable practice will be to give written notice, the broad language of this phrase is intended to incorporate a wide variety of notice techniques. Thus, informal notice will suffice, and in certain situations the very nature of the proceedings can give rise to an implied notice. *See McCormick*, Evidence § 239 (3d ed.). As to the time of giving notice, it is sufficient if it allows the opposing party a reasonable opportunity under the existing circumstances to produce the original. *Id.* In criminal actions a request that a defendant produce an original should not be made in the presence of the jury. *See Anno.*, 110 A.L.R. 101 (collecting cases).

(d) Collateral matters.

This subdivision codifies the common law rule that an original need not be produced if its contents are of such minor importance to the claims or defenses in dispute that no useful purpose would be served in requiring its production. *E.g.*, *Daniels v. Smith*, 130 N.Y. 696, 29 N.E. 1098 (1892); *Grover v. Morris*, 73 N.Y. 473 (1878); *Wolper v. New York Water Service Corp.*, 276 A.D. 1106, 96 N.Y.S.2d 647 (2d Dep't 1950). The provision is eminently sensible in that by precluding hypertechnical insistence on the best evidence rule it can promote the expedition of trials. *See McCormick*, Evidence § 234 (3d ed.).

Whether a writing, recording, or photograph is to be regarded as collateral will depend upon the facts and circumstances of each case. The decision in each case will turn upon a consideration of three factors. They are: (1) whether the writing, recording, or photograph is germane to a principal issue in the case; (2) the complexity of its relevant features; and (3) the existence of a genuine dispute as to its contents. *See Fisch*, Evidence § 83 (2d ed.); *McCormick*, Evidence § 234 (3d ed.).

**§ 1005. Public records**

The contents of a record, report, or other writing or data compilation produced by a public office or authorized by statute to be recorded or filed and actually recorded or filed in a public office may be proved by a copy that is certified as correct in accordance with the provisions of paragraph four of subdivision (a) of section 902 of this chapter, or testified to be correct by a witness who has compared it with the original, or authenticated in any manner prescribed by statute. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, other evidence of the contents may be admitted.

**Comment**

This section is concerned with proving the contents of two categories of public documents. The first consists of those records and reports prepared by employees of a public office in the course of the performance of the duties of their positions. The second consists of records, reports, or other writings authorized to be recorded or filed and in fact recorded or filed in a public office. Illustrative examples of this category are court orders, deeds, mortgages, certificates of incorporation, birth certificates, rate schedules of regulated industries, motor vehicle accident reports, and UCC filings. Public offices covered by this section include the courts, legislature, departments, agencies, boards, or other governmental offices where records and reports are ordinarily filed of this state, the United States, other states, and foreign countries, or of a political subdivision thereof.

In order to keep these public records, reports, and writings in secure custody and available for public use, this section sensibly recognizes, as does 'CE 902(a)(4), that the originals of these documents need not always be produced. Accordingly, the section states that the contents of public records, reports, and writings may be proved by certified copy, or a copy authenticated by witness testimony, or a copy that complies with some other statute, *e.g.*, Banking Law § 11(3); Education Law §§ 106, 312; General Municipal Law § 51-a(2). An exception to CE 1002 is thus provided for public records, reports, and writings.

This section creates a clear preference for certified or compared copies, or copies specifically authorized by other statutes, thus departing from the general pattern of rejecting the concept of degrees of secondary evidence. *See* Comment to CE 1004. The rationale for this preference is that without it, all kinds of secondary evidence of public records and reports would be offered,

some of which would be of questionable accuracy. The establishment of a preference is an appropriate *quid pro quo* for not demanding the production of the original. Furthermore, the preference is not burdensome since a certified copy can almost always be easily obtained and produced. Other evidence of the

contents of a public record or report may be introduced only if "reasonable diligence" cannot obtain one of the specified kinds of copies. "Reasonable diligence" will vary with the circumstances, much like the search requirement for a lost original under CE 1004.

The section is consistent with present law. *See* CPLR 4524; CPLR 4540(a) (b) (c); Prince, Richardson on Evidence §§ 645,652-656,660-663 (10th ed.); Fisch, Evidence § 90 (2d ed.). In this respect, it is important to note that the section does not change the current practice of proving the contents of deeds and mortgages. Such writings are frequently recorded or filed with a copy in the public office and the original returned to the owner of the property. *See* Real Property Law §§ 290(5), 291. The contents of the deed or mortgage may be proved by either the original or, under CE 1005, by the authenticated and certified copy of the copy in the public office. *See* *Sudlow v. Warshing*, 108 N.Y. 520, 15 N.E. 532 (1887); *Jackson v. Rice*, 3 Wend. 180 (1829).

### § 1006. Summaries

The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The proponent of such evidence shall make known to all parties the proponent's intention to offer the evidence and its particulars sufficiently in advance of offering it to provide them with a fair opportunity to meet it. To remedy the failure of the proponent to give notice, the court, pursuant to section 107 of this chapter, shall make any order the interests of justice require. The originals or duplicates shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

#### Comment

The best evidence rule has traditionally been modified to permit a litigant to prove the contents of voluminous writings not amenable to examination in court by presentation of summaries of their contents derived from an inspection of the documents. *See* 4 Wigmore, Evidence § 1230 (Chadbourn rev.). This exception was developed not only for the sake of convenience but also because summaries are often the only practical means of proving the contents of voluminous writings. *Id.* CE 1006 codifies this exception, and, consistent with the identity of treatment given in Article 10 to writings, recordings and photographs, extends it to voluminous recordings or photographs. This is in accord with present law. *See* *Ed Guth Realty, Inc. v. Gingold*, 34 N.Y.2d 440, 358 N.Y.S.2d 367 (1974); Prince, Richardson on Evidence § 574 (10th

**ed.); Fisch, Evidence § 93 (2d ed.).**

Before a summary of voluminous writings, recordings, or photographs can be admitted into evidence under this section, a proper foundation must be laid. First, a timely notice of a party's intent to offer the summary must be given to all parties. This notice requirement is present in other sections, *e.g.*, CE 404(b)(2); 609(b); 810; 902(b); 1003(b); 1101(b). Second, the originals or duplicates of the writings, recordings, or photographs summarized must be made available to the other parties for examination or copying, or both, at a reasonable time and place. Third, the original or duplicate materials on which the summary is based must be authenticated. *See* Berger & Weinstein, 5 Weinstein's Evidence | 1006[03]. Lastly, the summary itself must be authenticated. *Id.*

The summary is admissible only if the material on which it is based is admissible. *See United States v. Johnson*, 594 F.2d 1253 (9th Cir. 1979);

*United States v. Conlin*, 551 F.2d 534 (2d Cir. 1977), *cert. denied*, 434 U.S. 831, 98 S.Ct. 115 (1977). Thus, if the originals are inadmissible because of the hearsay rule, CE 802, or because of some other rule of evidence, the summary based on that original is inadmissible, except to the extent that it has been reasonably relied upon by an expert pursuant to CE 703.

It is important to note that the writings, recordings, or photographs summarized need not be offered into evidence. Under the section the summary itself, and not the underlying documents, is the evidence which the trier of fact considers. Berger & Weinstein, 5 Weinstein's Evidence 11006[02]; Dombroff, *Summaries Can Help Combat "Paper Avalanche,"* Legal Times of Washington, October 12, 1981, p. 13.

The section also requires that the proponent give notice of the intent to use a summary and its particulars at a time that provides other parties with a fair opportunity to prepare and respond. The remedy for a failure to give such notice is governed by CE 107.

### § 1007. Testimony or written admission of party

Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by the party's written admission, without accounting for the nonproduction of the original.

#### Comment



**Pursuant to this section, the original writing, recording, or photograph need not be produced if the contents of the writing, recording, or photograph can be established by the testimony, deposition, or written admission of the party against whom offered. This section is, of course, an exception to CE**

**1002, the theory that in the enumerated situations the policy rationale for requiring the original is satisfied. It codifies present law. See Prince, Richardson on Evidence § 579 (10th ed.); Fisch, Evidence § 94 (2d ed.).**

**"Testimony" includes testimony given in the case wherein it is offered as well as testimony before grand juries, legislative hearings, and other judicial or administrative proceedings because such testimony is generally under oath and available in transcript form. Berger & Weinstein, 5 Weinstein's Evidence 1 1007[01]. It does not include an oral out-of-court admission by an adversary because the risk of inaccuracy is substantial. See McCormick, Evidence § 242 (3d ed.).**

**It is important to note that evidence of an oral admission will qualify under CE 1004 or 1005 as admissible secondary evidence to prove contents when nonproduction of the original has been excused. See *Mandeville v. Reynolds*, 68 N.Y. 528 (1877); *Cociancich v. Vazzoler*, 48 App. Div. 462, 62 N.Y.S. 893 (2d Dep't 1900). The difference between CE 1004 and 1005 and this section is that the former sections require an accounting for the original, while the latter does not.**

### **§ 1008. Functions of court and jury**

Whenever the admissibility of other evidence of contents of writings, recordings, or photographs depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of subdivision (b) of section 104 of this chapter. However, when an issue is raised whether (a) the asserted writing ever existed, or (b) another writing, recording, or photograph produced at the trial, proceeding, or hearing is the original, or (c) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine in accordance with the provisions of subdivision (a) of section 104 of this chapter.

#### **Comment**

**This section is an application of the division of functions between the court and jury adopted in CE 104. Factual determinations concerning the administration of the rules set forth in this Article preferring the original as evidence of contents are to be decided solely by the court while those concerning the merits of the controversy are to be made by the jury.**

**Thus, the court should decide pursuant to CE 104(b) and CE**

**1008 such issues as: (1) whether a given writing, recording or photograph is an "original;" (2) whether a given writing, recording or photograph is a "duplicate;" (3) whether a genuine question is raised as to the authenticity of the original for purposes of CE 1003; (4) whether it would be unfair to admit a duplicate as**

provided for in CE 1003; (5) whether an original is lost or destroyed; (6) whether the proponent lost or destroyed an original in bad faith; (7) whether an original can be reasonably obtained; (8) whether proper notice was given to a party in control of an original; (9) whether the writing, recording or photograph goes to a collateral matter or to a controlling issue; and (10) whether a certified copy of a public record is obtainable by the exercise of reasonable diligence. *See* Saltzburg and Redden, *Federal Rules of Evidence Manual* 700 (2d ed.). These questions involving the administration of the policy espoused in this Article of preferring the original are solely for the court.

When, however, relevancy depends upon satisfaction of a condition of fact, the issue relating to the condition of fact is ultimately for the jury. Under CE 104(a), the court determines only whether there is sufficient evidence to support a finding of the fulfillment of the condition of fact. Thus, if an issue is raised whether the asserted writing ever existed or whether another writing, recording, or photograph produced at the trial is the original, or whether other evidence of contents correctly reflects the contents, the issue is for the jury to decide.

An example of how CE 1008 operates is provided by the following hypothetical situation. The plaintiff offers secondary evidence of the contents of an alleged contract, having introduced evidence to show the loss of the original. The defendant introduces evidence that no such contract was ever executed. If the court were empowered to rule that the alleged contract never existed, the case would come to an abrupt end without the jury having passed upon the key issue. Consequently, under CE 1008, the court alone determines whether plaintiff has established loss of the original, thus permitting the introduction of secondary evidence, and whether evidence has been introduced sufficient to support a finding that the secondary evidence accurately reflects the original. The jury determines whether a contract was in fact entered into, and if so, whether the secondary evidence correctly reflects the contents of the original.

## ARTICLE 11 — MISCELLANEOUS PROVISIONS

Section

1101. Contracts in small print.

### **§ 1101. Contracts in small print**

The portion of any printed contract or agreement involving a consumer transaction or a lease for space to be occupied for residential purposes where the print is not clear and legible or is less than eight points in depth or five and one-half points in depth for upper case type may not be received in evidence on behalf of the party who printed or prepared such contract or agreement or who caused said agreement or contract to be printed or prepared. As used in the immediately preceding sentence, the term "consumer transaction" means a transaction wherein the money, property, or service which is the subject of the transaction is primarily for personal, family, or household purposes. No provision of any contract or agreement waiving the provisions of this section shall be effective. The provisions of this section shall not apply to agreements or contracts entered into prior to July first, nineteen hundred seventy-six.

#### **Comment**

**This section restates without change CPLR 4544. It provides that if the provisions of contract or agreement covered by the section are printed in either unclear print or in less than the required type-size, they are inadmissible in evidence. Additionally, any provisions in any contract or agreement waiving the provisions of the section are deemed null and void.**

## ARTICLE 12—ADVISORY COMMITTEE ON THE CODE OF EVIDENCE

### Section

1201. Organization of the committee

1202. Powers and duties of the committee § 1201. Organization of the committee

(a) An advisory committee on the code of evidence is hereby created. The committee shall consist of thirteen members, four of whom shall be appointed by the governor, two by the temporary president of the senate, one by the minority leader of the senate, two by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. The governor shall designate the chairperson.

(b) The persons first appointed by the governor shall have respectively one, two, three, and four year terms as the governor shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three and four year terms as the chief judge shall designate. The persons first appointed by the temporary president of the senate shall have respectively three and four year terms. The person first appointed by the minority leader of the senate shall have a three year term. The persons first appointed by the speaker of the assembly shall have respectively three and four year terms. The person first appointed by the minority leader of the assembly shall have a three year term. Thereafter, each member of the committee shall be appointed for a term of four years.

(c) Membership on the committee by a judge shall not constitute the holding of a public office and no judge shall be required to take and file an oath of office before serving on the committee. No public officer shall be deemed to have vacated or forfeited his or her office by reason of membership on the committee. A vacancy shall be filled by the appointing officer for the remainder of the term.

(d) The members of the committee shall receive no compensation for their services, but shall be allowed actual and necessary expenses incurred in the performance of their duties. Research and administrative support shall be provided to the committee by the staff of the law revision commission.

## § 1202. Powers and duties of the committee

(a) The committee may propose amendments adding to, modifying, or repealing provisions of the code of evidence.

(b) The committee may study, and make recommendations with respect to, any bill introduced in the legislature which adds to, modifies, or repeals provisions of the code of evidence.

**DISTRIBUTION TABLE: ARTICLE 45  
OF THE CIVIL PRACTICE LAW & RULES**

The left column of this table lists each section of article 45 of the Civil Practice and Rules (CPLR); the right column shows the disposition of each such section. The numbers in the right column refer to the appropriate section of the Code of Evidence which specifically or generally cover the same or approximately the same subject matter. The word "Omitted"<sup>1</sup> indicates that the CPLR section has not been included in the Code of Evidence because it has no further utility.

<b>CPLR Section</b>	<b>Disposition</b>
4501 .....	Omitted. See 501
4502 (a) .....	602 (d)
4502 (b) .....	505
4503 .....	504
4504 .....	507, CPLR 4010-a
4505 .....	506
4506 .....	422
4507 .....	508
4508 .....	509
4509 .....	510
4511 .....	202
4512 .....	601
4513 .....	601. See 609
4514 .....	Omitted. See 607, 613 (b)
4515 .....	705
4516 .....	414
4517 .....	804 (a), (b) (1) (c)
4518 .....	803 (c) (5)
4519 .....	602 (e)
4520 .....	803 (c) (7)
4521 .....	803 (c) (9), 902
4522 .....	803 (c) (8), (c) (12)
.....	(c) (13)
4523 .....	803 (c) (5)
4524 .....	803 (c) (12)
4525 .....	803 (c) (7)
4526 .....	803 (c) (8), (c) (11)
4527 .....	803 (c) (7)
4528 .....	803 (c) (7)
4529 .....	803 (c) (7)
4530 (a) .....	803 (c) (22)
4520 (b) .....	803 (c) (22)
4531 .....	804 (b) (5)



CPLR Section	Disposition
4532 .....	902 (a) (6)
4532- a .....	803(c) (5) (E)
4533 .....	803 (c) (15)
4533- a .....	803(c) (5) (D)
4533-b .....	423
4534 .....	803 (c) (21)
4536 .....	901(b) (3)
4537 .....	903
4538 .....	803(c) (12), (c) (13),
.....	902(a) (8)
4540 .....	902(a) (4) , (a) (9)
4541 .....	803(c) (7), 902(a) (4)
4542 .....	902(a) (3)
4543 .....	901(b) (10), 902(a) (10)
4544 .....	1101
4545 .....	CPLR §4501
4546 .....	.. CPLR §4502

**DISTRIBUTION TABLE: ARTICLES 60 AND 670  
OF THE CRIMINAL PROCEDURE LAW**

The left column of this table lists each section of article 60 and 670 of the Criminal Procedure Law (CPL); the right column shows the disposition of each such section. The numbers in the right column refer to the appropriate section of the Code of Evidence which specifically or generally covers the same or approximately the same subject matter. The word "Omitted" indicates that the CPL section has not been included in the Code of Evidence because it has no further utility.

<b>CPL Section</b>	<b>Disposition</b>
60.10.....	101
60.15.....	Omitted. See 501, 611
60.20 .....	602, 603 (b)
60.22 .....	421
60.25 .....	805
60.30 .....	805
60.35 .....	613 (c)
60.40 (1) .....	609 (a)
60.40 (2) .....	405 (c) (2)
60.40 (3) .....	418
60.42 .....	412
60.43 .....	413
60.44 .....	414
60.45 .....	416
60.50 .....	417
60.55 .....	702 (c)
60.60 .....	803 (c) (7) (B)
60.70 .....	419
60.75 .....	420
670.10 .....	804 (b) (1)
670.20 .....	804 (b) (1)





