

### **3.07. Presumption of Regularity**

**(1) In general, the presumption of regularity presumes that no official or person acting under an oath of office will do anything contrary to their official duty, or omit anything which their official duty requires to be done.**

**(2) In accord with the presumption of regularity,**

**(a) the acts of a public officer, which presuppose the existence of other acts or conditions to make them legally operative, are presumptive proofs of the performance of the applicable acts or conditions; and**

**(b) a public official is presumed to act honestly and in good faith.**

**(3) A presumption of regularity attaches to judicial proceedings.**

**(4) Substantial evidence is required to overcome a presumption of regularity.**

#### **Note**

The presumption of regularity is well established in the common law of New York. For examples of statutory law derived from the common-law presumption of regularity, see: CPLR 4520 (a certificate or affidavit of a public officer deposited in a public office is prima facie evidence of its contents); CPLR 4521 (a statement of a government official that a public record has not been found is prima facie evidence that there is no such record); Guide to New York Evidence rule 3.21 (Lack of Record).

**Subdivision (1)** defines the presumption of regularity as set forth in the seminal case of *Matter of Marcellus* (165 NY 70, 77 [1900] [“The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done”]; accord e.g. *Matter of Whitman*, 225 NY 1, 9 [1918] [“The affiant did not aver that the inspectors of elections made an error or omitted any duty. The court was bound . . . to presume that everything was rightfully done by them”]; *People ex rel. Henderson v Meloni*, 162 AD2d 999, 1000 [4th Dept 1990]

["In finding that relator violated several general release conditions (of parole), the Hearing Officer . . . was entitled to presume that the Division of Parole had complied with its own regulations"]; *Matter of Steinberg*, 137 AD2d 110, 114 [1st Dept 1988] ["the Board of Law Examiners must be presumed to have acted . . . in accordance with law and to have done nothing contrary to official duty in processing respondent's application".])

**Subdivision (2) (a)** is derived from *Hamilton v Erie R.R. Co.* (219 NY 343, [1916]). In *Hamilton*, the plaintiff sued the defendant railroad company in negligence for the death in New York of plaintiff's intestate. A preliminary issue was whether the deceased was a citizen of the United States or of Russia because the main issue in the case was whether "there had been a valid settlement and release of the cause of action by the beneficiaries of it, through and by the acts of the Imperial Russian consul-general at New York." (*Id.* at 347.) On the preliminary question, the Court found that "the acts of the Russian consul-general under [a] treaty created the presumption that the intestate was a citizen . . . of Russia, because . . . [t]he acts of a public officer which presuppose the existence of other acts or conditions to make them legally operative are presumptive proofs of the latter. 'The general presumption is that no official or person acting under an oath of office will do anything contrary to his official duty, or omit anything which his official duty requires to be done.' (*Matter of Marcellus*, 165 N. Y. 70). We conclude from the proofs that the intestate was, at the time of his death, a citizen of Russia." (*Hamilton* at 349-350 [citations omitted]; accord *Hood v Guaranty Trust Co.*, 270 NY 17, 28 [1936] [where the validity of an assessment depended upon a Commissioner of Banks' compliance with the requirements of statutes, the Court held that the "presumption lies that the Commissioner of Banks, being a public official, acted in compliance with law," citing *Hamilton*]; *People v Beerman*, 12 NYS2d 888, 889-890 [Sup Ct, Kings County 1939] [in answer to a claim that the Deputy Commissioner of Jurors was not authorized to administer an oath to a witness in the grand jury, the Court held that when the Deputy Commissioner "administered the oath" he was a "public officer acting in an official capacity and it will be presumed that any conditions or circumstances prerequisite to his right to act were present"]; cf. *Swarthout v Ranier*, 143 NY 499, 504 [1894] ["even acts done by a corporation which presuppose the existence of other acts to make them legally operative, are presumptive proofs of the latter"].)

The United States Supreme Court, before and after *Hamilton*, also noted that "it is a rule of very general application that, where an act is done which can be done legally only after the performance of some prior act, proof of the latter carries with it a presumption of the due performance of the prior act" (*Knox County v Ninth Nat. Bank*, 147 US 91, 97 [1893]; see *R.H. Stearns Co. v United States*, 291 US 54, 63 [1934]; *American Railway Express Co. v Lindenburg*, 260 US 584, 589 [1923]).

**Subdivision (2) (b)**, which states that "a public official is presumed to act honestly and in good faith," is derived from cases that include: *Anheuser-Busch, Inc. v Abrams*, 71 NY2d 327, 332 [1988] ["the Attorney-General enjoys a

presumption that he is acting in good faith”]; *Matter of Magnotta v Gerlach* (301 NY 143, 149 [1950] [“The general presumption is that public officials, as well as boards, act honestly and in accordance with law”]); *Steinberg* (137 AD2d at 114 [“the Board of Law Examiners must be presumed to have acted honestly”]).

**Subdivision (3)** sets forth the statement of *People v Velasquez* (1 NY3d 44, 48 [2003]) that “[a] presumption of regularity attaches to judicial proceedings.”

In *Velasquez*, the defendant claimed that he was not present in the robing room for the questioning of prospective jurors, and the minutes of the proceeding did not record his presence. The Court, however, declined “to speculate that the court reporter’s failure to note defendant’s presence at the challenged robing room conference, coupled with occasional references to his presence in other portions of the transcript, demonstrates that he must have been absent from the ancillary proceeding at issue. Without more, failure to record a defendant’s presence is insufficient to meet the defendant’s burden of rebutting the presumption of regularity.” (*Id.* at 48.)

Other examples of the presumption of regularity attaching to judicial proceedings include: *People v Dominique* (90 NY2d 880, 881 [1997] [in the absence of specific proof that in issuing a search warrant the court took oral testimony and failed to record the testimony as required by statute, “the law presumes that the statutory requirements were satisfied”]); *People v Glass* (43 NY2d 283, 287 [1977] [where stenographic notes of the summations and the Judge’s charge could not be found and there was no showing “that there were inadequate means” to determine whether “appealable and reviewable issues were present,” the defendant had “not met his burden of overcoming the presumption of regularity that attaches to his trial”]); *People v Ramos* (189 AD3d 586, 586 [1st Dept 2020] [“Under the presumption of regularity, absent specific proof to the contrary, the law presumes that the requirements for a valid waiver of indictment (CPL 195.20) were satisfied”]).

**Subdivision (4)**, requiring “substantial evidence” to overcome the presumption of regularity, has long been the law. (*Velasquez*, 1 NY3d at 48 [a presumption of regularity “may be overcome only by substantial evidence” (citing *People v Richetti*, 302 NY 290, 298 [1951] [“A presumption of regularity exists only until contrary substantial evidence appears”]); *People v Harris*, 61 NY2d 9, 16 [1983] [“the presumptions of the validity and regularity of the previous felony convictions . . . were not overcome by substantial evidence to the contrary”]; *Steinberg*, 137 AD2d at 114 [“In the absence of substantial evidence to the contrary, the presumption carries”].)

*Richetti* added that the presumption “forces the opposing party (defendant here) to go forward with proof but, once he does go forward, the presumption is out of the case.” (*Richetti* at 298; *but see* Guide to NY Evid rule 3.01, Presumptions in Civil Proceedings.)

On what constitutes “substantial evidence” to rebut a presumption, the Court of Appeals in *Matter of FMC Corp. (Peroxygen Chems. Div.) v Unmack* (92 NY2d 179, 187-188 [1998]) explained that

“generally speaking:

“a determination is regarded as being supported by substantial evidence when the proof is so substantial that from it an inference of the existence of the fact found may be drawn reasonably. . . . [I]t means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact . . . . Essential attributes are relevance and a probative character . . . . In final analysis, substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably—probatively and logically.

“The substantial evidence standard is a minimal standard. It requires less than ‘clear and convincing evidence,’ and less than proof by ‘a preponderance of the evidence’ ” (citations and some internal quotation marks omitted).