GUDE TO NEW YORK EVIDENCE

ARTICLE 8: HEARSAY

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ARTICLE 8. HEARSAY

8.00 Definition of Hearsay'

(1) Hearsay is an out of court statement of a declarant offered in evidence to prove the truth of the matter asserted in the statement.

(2) The declarant of the statement is a person who is not a witness at the proceeding, or if the declarant is a witness, the witness uttered the statement when the witness was not testifying in the proceeding.

(3) A statement of the declarant may be written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion.

Note

This section sets forth the definition of hearsay which is generally applied by the courts. *(See People v Nieves,* 67 NY2d 125, 131 [1986] [the statements in issue "constituted hearsay evidence, as they were made out of court and were sought to be introduced for the truth of what she asserted. Accordingly, they were admissible only if the People demonstrated that they fell within one of the exceptions to the hearsay rule" (citations omitted)]; *see also People v Caviness,* 38 NY2d 227, 230 [1975]; *Felska v New York Cent. & Hudson Riv. R.R. Co.,* 152 NY 339, 342 [1897].)

Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. *(See Matter of Findlay,* 253 NY 1, 11 [1930]; *Ford v Snook,* 205 App Div 194, 198 [4th Dept 1923], *affd* 240 NY 624 [1925].) However, the Appellate Division may in the interest of justice reverse or modify a judgment for error in admitting hearsay even though no objection was made at trial. *(See Alexander v State of New York,* 36 AD2d 777, 778 [3d Dept 1971] ["It is well established that in the interest of justice we have the right to reverse a judgment and grant a new trial where there is fundamental trial error, even though no objection was taken at the trial"]; *People v Clegg,* 18 AD2d 694 [2d Dept 1962]; CPL 470.15 [3] [c]; [6] [a].) The Court of Appeals review power is much more limited as it is precluded from reviewing a claim of error when no proper objection was made at trial except where the claim falls within "the narrow class of mode of proceedings errors for which preservation is not required." *(People v Mack,* 27 NY3d 534, 536 [2016].) The Court of Appeals has never held that a claim of error in the admission of hearsay to which no objection was made, much

less a general claim of error in the admission of evidence generally, is a "mode of proceedings" error.

Subdivision (1). No statement made by a declarant is inherently hearsay. Whether the statement is hearsay turns on the purpose for which it is offered. Thus, where the statement is offered for its truth, or has no relevant purpose other than a truth purpose, the statement is deemed hearsay. *(See People v Steiner,* 30 NY2d 762, 763 [1972].)

However, a statement which is not offered to prove the truth of the matter asserted therein is not hearsay. *(See People v Salko,* 47 NY2d 230, 239 [1979] **["If,** therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply" (internal quotation marks omitted)]; *People v Becoats,* 17 NY3d 643, 655 [2011] [there was no need for defendant to rely upon a hearsay exception because he was not offering the out-of-court statements for their truth].)

If the statement is not offered for its truth, and is offered merely to show that the words were uttered or the conduct was engaged in, the issue of admissibility then becomes whether it is relevant and whether its probative value is substantially outweighed by the potential of unfair prejudice to the party against whom the statement is admissible. *(See* Guide to NY Evid rule 4.06.) There are many non-truth purposes for statements offered into evidence which the Court of Appeals has recognized. For example:

- A statement of a declarant which provides evidence of the declarant's state of mind, or a statement of a declarant which is heard by another and provides evidence of the hearer's state of mind (Guide to NY Evid rule 8.41, State of Mind).

- A statement of a testifying witness which may be inconsistent with the witness's testimony and thereby tend to impeach the witness's credibility (Guide to NY Evid rule 6.15, Impeachment by Prior Inconsistent Statement).

- A timely complaint of a sexual assault by the victim, known as "prompt outcry" (Guide to NY Evid rule 8.37, Prompt Outcry).

- A statement of the victim of a crime describing the purported perpetrator of the crime (Guide to NY Evid rule 8.31 [4], Prior Consistent Statement).

- A statement which provides an explanation of the conduct of a police investigation or simply completes the narrative of events leading to the defendant's arrest (Guide to NY Evid rule 8.31 [5], Prior Consistent Statement).

- A statement which constitutes a "verbal act" (Guide to NY Evid rule 8.45, Verbal Act).

- A "flow diagram" offered as an aid to the jury to understand a doctor's testimony that he had followed a set of guidelines. *(See Hinlicky v Dreyfuss,* 6 NY3d 636 [2006].)

Subdivision (2). While no Court of Appeals decision has set forth a definition of "declarant," the term, in accord with its normal meaning, has been commonly used by the Court to mean a person who makes an extrajudicial statement. *(See People v James,* 93 NY2d 620, 630-631 [1999]; *People v Settles,* 46 NY2d 154, 166-167 [1978].)

In connection with this definition, the courts have recognized that while the usual situation will involve the offered testimony of a witness who will testify about what he or she heard someone else say at a time prior to the trial or hearing, a declarant for purposes of the hearsay rule may also be a witness who seeks to testify about his or her own pretrial statement.

Keep in mind, while a statement as set forth in this rule may constitute hearsay, rule 8.01 of the Guide to New York Evidence (Admissibility of Hearsay) and the ensuing rules set forth whether the statement is nonetheless admissible.

It should also be noted that since the declarant is defined to be a "person," any statement generated from mechanical sources, other than data inputted by humans and subsequently retrieved, will not constitute hearsay. *(See People v Towsley,* 85 AD3d 1549 [4th Dept 2011] [canine tracking evidence not barred by hearsay rule]; *People v Stultz,* 284 AD2d 350 [2d Dept 2001] [testimony regarding the telephone caller ID number displayed on victim's telephone not barred by hearsay rule since the number as displayed was not made by a person].)

Subdivision (3). As recognized by the courts, a statement within the hearsay definition can be verbal, written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion, e.g., an expressive communication. *(See e.g. People v Salko,* 47 NY2d 230, 238-241 [1979] [the hearsay rule has, "as a general rule, no application to an act which is not intended to serve as an expressive communication"]; *see also People v Spicola,* 16 NY3d 441, 452 n 2 [2011] [infant's flushed skin and elevated heart rate, as testified to, not "statements"]; *People v Madas,* 201 NY 349, 354 [1911] [identifying perpetrator by pointing to him a communicative gesture and therefore hearsay but admissible as a dying declaration]; *Roche v Brooklyn City & Newtown R.R. Co.,* 105 NY 294 [1887] [involuntary expressions and exclamations of pain not hearsay].)

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[1] In May 2023, the bulleted items in the Note's subdivision (1) were amended to add cross-references to other Guide to New York Evidence rules.

8.01. Admissibility of Hearsay

(1) (a) Hearsay is not admissible unless it falls within an exception to the hearsay rule as provided by decisional law or statute and is permissible under the Federal Constitution and New York Constitution as provided in rule 8.02, or as provided in subdivision (1)(b) below.

(b) The Federal and New York State Constitutions require the admission of hearsay not encompassed within a hearsay exception when the court finds that the declarant is unavailable to testify and the hearsay is material, exculpatory and has sufficient indicia of reliability.

(c) New York law does not currently recognize the "residual exception" to the hearsay rule set forth in Federal Rules of Evidence rule 807.

(2) The burden of establishing the applicability of an exception rests upon the proponent of the statement.

(3) A statement which is not offered for its truth is not barred by the hearsay rule.

Note

Subdivision (1) (a). This subdivision is derived from *Nucci v Proper* (95 NY2d 597, 602 [2001] [Hearsay statements "'may be received in evidence only if they fall within one of the recognized exceptions to the hearsay rule"). It also reflects the Court of Appeals holdings that defendant has the constitutional right to introduce hearsay but under strict conditions set forth in subdivision (1) (b). *(See e.g. People v Robinson,* 89 NY2d 648, 650 [1997].)

New York evidence law provides for numerous hearsay exceptions, each with specific requirements which must be fulfilled before the statement is admissible. *(See People v James,* 93 NY2d 620, 634-635 [1999].) The source of these exceptions is both statutory and decision law. Statutory exceptions can be found in CPLR article 45 and CPL article 60, and throughout the consolidated

laws. The judicially created exceptions are part of New York's common law of evidence. *(See Fleury v Edwards,* 14 NY2d 334, 340 [1964 Fuld, **J.,** concurring] ["The common law of evidence is constantly being refashioned by the courts of this . . . jurisdiction( ) to meet the demands of modern litigation. Exceptions to the hearsay rule are being broadened and created where necessary."]; *see also People v Lynes,* 64 AD2d 543 [1978], affd 49 NY2d 286 [1980] [the determination of preliminary questions of fact on the admissibility of evidence "is not restricted by the ordinary exclusionary rules of evidence"].)

Subdivision (1) (b). The applicability of a hearsay exception may be dictated by the Constitution of New York or the United States, which both recognize that "a [criminal] defendant has a constitutional right to present a defense." *(People v Hayes,* 17 NY3d 46, 53 ([2011]; *Chambers v Mississippi,* 410 US 284, 294 [1973]), and a "[criminal] defendant's right to due process requires admission of hearsay evidence when [the] declarant has become unavailable to testify and `the hearsay testimony is material, exculpatory and has sufficient indicia of reliability' *(People v Burns,* 6 NY3d 793, 795 [2006]), quoting *People v Robinson,* 89 NY2d at 650, *supra* [emphasis omitted]).

Subdivision (1) (c). This subdivision makes it clear that New York has not approved of a "residual exception" similar to Federal Rules of Evidence rule 807. *(See People v Nieves,* 67 NY2d 125, 131 [1986] ["we are not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous `reliability' test, particularly in criminal cases where to do so could raise confrontation clause problems"].)

Subdivision (2). This subdivision restates New York's well established rule, as stated in *Tyrrell v Wal-Mart Stores* (97 NY2d 650, 652 [2001]), that "[t]he proponent of hearsay evidence must establish the applicability of a hearsay-rule exception."

Subdivision (3). This subdivision states expressly that which is implicit from the definition of hearsay set forth in Guide to New York Evidence rule 8.00 (1). *(See People v Ricco,* 56 NY2d 320, 328 [1982] ["a relevant extrajudicial statement introduced for the fact that it was made rather than for its contents . . . is not interdicted by the hearsay rule"].)

8.02 Admissibility Limited by Confrontation Clause (*Crawford*)[1]

(1) Confrontation rule in a criminal prosecution. A "testimonial statement" of a person who does not testify at trial is not admissible against a defendant for the truth of the statement, unless the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination, or the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the unavailability of the witness.

(2) Testimonial statement, in general.

A hearsay statement is testimonial when it consists of:

(a) prior testimony at a preliminary hearing, before a grand jury, or at a former trial;

(b) an out-of-court statement in which

(i) state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial; or

(ii) absent a formal interrogation, the circumstances demonstrate that the "primary purpose" of an exchange was to procure an out-of-court statement to prove criminal conduct or past events potentially relevant to a later criminal prosecution, or otherwise substitute for trial testimony.

(3) Statement to police.

A statement made to the police is not testimonial when made in the course of a police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. The

statement to the police is testimonial when the circumstances objectively indicate that there is no ongoing emergency and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to a later criminal prosecution. A statement obtained by the police in a formal station house interrogation for that stated purpose is thus testimonial.

(4) Statement to a court.

A defendant's guilty plea allocution that implicates a codefendant is a testimonial statement and may not therefore be admitted at the trial of the codefendant in the absence of an opportunity for the codefendant to cross-examine the defendant.

(5) Statement made for the safety or treatment of a person.

> **(a) A statement of a student made in response to an inquiry of an educator is not testimonial when the primary purpose of the inquiry was to provide for the safety of the child.**
>
> **(b) A statement of a patient made in response to an inquiry by a physician is not testimonial when the primary purpose of the inquiry was to diagnose the patient's condition and administer medical treatment.**

(6) Forensic Report.

> **(a) A statement in a forensic report is testimonial if it identifies an item connected to the defendant as an illegal drug, or delineates the blood-alcohol content of a defendant's blood, or identifies the defendant through a fingerprint analysis or through a DNA analysis of incriminating evidence.**

(b) A testimonial forensic report entitles a defendant to be confronted, as defined in subdivision one, with either the person who performed the analysis underlying the forensic report or with a person who is a trained analyst who supervised, witnessed or observed the analysis or who conducted an independent analysis of the primary data.

(c) Autopsy Report.

> **(i) Autopsy reports are testimonial evidence and the admission of autopsy reports through an expert witness who did not perform the autopsies, as well as that witness's testimony, violates a defendant's right to confrontation where the defendant had not been given a prior opportunity to cross-examine the performing medical examiner.**
>
> **(ii) An expert medical examiner may, however, offer conclusions as to the cause and manner of death, and surrounding circumstances, where that testifying expert performed, supervised, or observed the autopsy or used their independent analysis on the primary data. Autopsy photographs and video recordings of a conducted autopsy may properly be relied upon by a testifying witness reaching their own independent conclusions, as well as standard anatomical measurements devoid of the subjective skill and judgment of the performing examiner.**

(d) Nontestimonial reports include documents pertaining to the routine inspection,

maintenance, and calibration of a breathalyzer machine.

(7) DNA Evidence. See Guide to NY Evidence rule 7.21 (DNA Evidence).

(8) "Opening the door evidence."

Unconfronted testimonial hearsay is not admissible in response to evidence introduced by a defendant in a criminal case that is misleading even though the misleading evidence would be subject to correction by the unconfronted testimonial hearsay.

Note

Subdivision (1). The Confrontation Clause of the US Constitution Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." That Clause applies to the states through the Fourteenth Amendment of the US Constitution (*Pointer v Texas*, 380 US 400, 406 [1965]), and therefore limits the admissibility of "testimonial" hearsay statements that may otherwise be admissible under state law.

The parameters of "confrontation" are defined in subdivision (1) in accord with *Crawford v Washington* (541 US 36, 42 [2004]) and *Giles v California* (554 US 353, 367 [2008]).

In *Crawford*, the Supreme Court held that

> "[w]here nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law . . . . Where testimonial evidence is at issue, however, the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination" (*Crawford v Washington*, 541 US at 68).

*Crawfor*d, however, does not extend to a testimonial statement admitted "for purposes other than establishing the truth of the matter asserted" (*Crawford v Washington*, 541 US at 59 n 9; *Williams v Illinois*, 567 US 50, 57-58 [2012] [plurality op], and at 125-126 [dissenting op]; *People v Garcia*, 25 NY3d 77, 86 [2015]; *People v Reynoso*, 2 NY3d 820, 821 [2004]).

Nor does *Crawford* apply to the admission of testimonial statements at a sentencing proceeding (*People v Leon*, 10 NY3d 122, 125-126 [2008]), or in a grand jury proceeding where there is no right of confrontation.

Last, a defendant may forfeit the right of confrontation where the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the witness's unavailability (*Giles*; *see* Guide to NY Evid rule 8.19, Forfeiture by Wrongdoing; Fed Rules Evid rule 804 [b] [6]; *see also People v Geraci*, 85 NY2d 359, 366 [1995] ["out-of-court statements, including Grand Jury testimony, may be admitted as direct evidence where the witness is unavailable to testify at trial and the proof establishes that the witness's unavailability was procured by misconduct on the part of the defendant"]).

Subdivision (2) (a) is derived from *Crawford*'s declaration that "[w]hatever else the term [testimonial evidence] covers, it applies at a minimum to prior testimony at a preliminary hearing, before a grand jury, or at a former trial" (*Crawford*, 541 US at 68).

Subdivision (2) (b) (i) is derived from *Crawford* (541 US at 68), which itself directly held inadmissible a witness's statement obtained by formal station house interrogation (541 US at 68); and *Michigan v Bryant* (562 US 344, 358 [2011]), which declared that "the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial." (*See People v Goldstein*, 6 NY3d 119, 129 [2005] ["(T)he statements made to (the expert) by her interviewees were testimonial. . . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making 'a casual remark to an acquaintance'; all of them should reasonably have expected their statements 'to be used prosecutorially' or to 'be available for use at a later trial.'. . . Responses to questions asked in interviews that were part of the prosecution's trial preparation are 'formal' in much the same sense as 'depositions' and other materials that the Supreme Court identified as testimonial"].)

Subdivision (2) (b) (ii). The rule that, absent a formal investigation, a statement is testimonial when the "primary purpose" of questioning was to prove criminal conduct or past events relevant to a criminal prosecution is derived from *Davis v Washington* (547 US 813, 822 [2006] [statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"]; *see Michigan v Bryant*, 562 US 344, 358, 366, 370 [2011] ["although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an

emergency or the lack of testimonial intent" (citation and internal quotation marks omitted)]).

That a statement is testimonial when its primary purpose is to create a substitute for trial testimony is derived from *Bryant* (562 US at 358 ["When . . . the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute"]; *accord Ohio v Clark*, 576 US 237, 238 [2015]; *People v John*, 27 NY3d 294, 307 [2016] [a "statement will be treated as testimonial only if it was procured with a primary purpose of creating an out-of-court substitute for trial testimony (*People v Pealer*, 20 NY3d 447, 453 [2013], quoting *Michigan v Bryant* . . .)" (internal quotation marks omitted)]; *see People v Pacer*, 6 NY3d 504, 512 [2006]; *Pealer* at 453 [an affidavit of an employee of the Department of Motor Vehicles attesting to the revocation of an accused's license in a prosecution was testimonial because it "had an accusatory purpose in that it provided proof of an element of the crime and resembled testimonial hearsay"]).

Subdivision (3) is derived from *Davis v Washington* (547 US at 822) which decided two cases. In the first case, a 911 caller's statements relating to an ongoing assault, including the identification of her assailant, were not testimonial, given that the "primary purpose" of the statements was to obtain help (*People v Nieves-Andino*, 9 NY3d 12, 17 [2007]; *People v Bradley*, 8 NY3d 124, 127 [2006]). In the second case, the police, responding to a "domestic disturbance" call, found no ongoing emergency, and thus statements in response to their questions as to what happened were testimonial. (*See Michigan v Bryant*, 562 US at 349 [where the police found a mortally wounded person lying on the ground in a parking lot of a gas station, the victim's statement identifying his assailant, in response to police questions, was admissible because the " 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency' "].)

Subdivision (4) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]).

Subdivision (5) (a) is derived from *Ohio v Clark* (576 US at 249-250 ["(M)andatory reporting (obligations) . . . cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution"]).

Subdivision (5) (b) is derived from *People v Duhs* (16 NY3d 405, 408-409 [2011] [a child's responses to a medical doctor questioning the child for purposes of treatment were not testimonial]).

Subdivision (6) (a) is derived from *Melendez-Diaz v Massachusetts* (557 US 305 [2009] [drug analysis]); *Bullcoming v New Mexico* (564 US 647 [2011] [blood-alcohol content]); *People v Rawlins* (10 NY3d 136, 157 [2008] [fingerprint report]); *People v John* (27 NY3d at 307-308 [DNA report that linked the defendant to possession of the weapon he was charged with possessing]); and *People v Austin* (30 NY3d 98, 104 [2017] [buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the burglaries "with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding—that defendant . . . committed the crime for which he was charged"]).

Subdivision (6) (b) is derived from *Bullcoming* (564 US at 651 [holding that a surrogate analyst who was familiar with the laboratory's testing procedures, but "had neither participated in nor observed the test," did not satisfy the Confrontation Clause requirement]); and *People v Hao Lin* (28 NY3d 701, 705 [2017]) from which the language of subdivision (6) (b) is taken. In *Hao Lin*, a retired officer performed the "breath test" and the officer who testified observed him "perform all of the steps on the checklist and saw the breathalyzer machine print out the results. Based upon his personal observations, Mercado—as a trained and certified operator who was present for the entire testing protocol—was a suitable witness to testify about the testing procedure and results in defendant's test. Inasmuch as Mercado testified as to his own observations, not as a surrogate for Harriman, there was no Confrontation Clause violation." (*Id*. at 707; *see People v John*, 27 NY3d at 314 ["(T)he claim of a need for a horde of analysts is overstated and a single analyst, particularly the one who performed, witnessed or supervised the generation of the critical numerical DNA profile, would satisfy the dictates of *Crawford* and *Bullcoming*"]; *People v Jordan*, 40 NY3d 396, 402 [2023] ["the testifying analyst must have either participated in or directly supervised this 'final' step that generates the DNA profile, or [conducted] an 'independent analysis' of the data used to do so in a manner that enables replication of the determinations made at that stage in order to verify the profile"].)

Subdivision (6) (c) summarizes the holdings of *People v Ortega* (40 NY3d 463 [2023]) to the effect that an autopsy report is testimonial evidence.

Subdivision (6) (d) is derived from *People v Pealer* (20 NY3d at 455-456 [with respect to a breathalyzer machine, the Court noted that "*Melendez-Diaz* recognized the possibility that records 'prepared in the regular course of equipment maintenance'—precursors to an actual breathalyzer test of a suspect—'may well qualify as nontestimonial records' (557 US at 311 n 1)"]; *cf. People v Jordan*, 40 NY3d at 400-401 [holding that the dictates of *Crawford* did not apply to the "preliminary" steps prior to the analysis of the raw electrophoresis data which involved " 'essentially ministerial tasks' " in which the analyst "simply prepare(s) the DNA samples for testing"]).

Subdivision (7) notes that the rules pertaining to what constitutes testimonial DNA evidence are contained in Guide to New York Evidence rule 7.21 (DNA Evidence).

Subdivision (8) is derived from *Hemphill v New York* (595 US 140 [2022]). Contrary to the principle set forth in *People v Reid* (19 NY3d 382 [2012]) that was applied in *People v Hemphill* (173 AD3d 471 [1st Dept 2019], *affd* 35 NY3d 1035 [2020]), the Supreme Court held that the "opening the door to evidence" principle must not permit the introduction of evidence in violation of the Sixth Amendment's Confrontation Clause. In *Hemphill*, the defense to a murder indictment rested upon a claimed third party's culpability; in accord with New York's then "opening the door to evidence" principle, the trial court allowed the introduction of the third party's guilty plea when the third party was unavailable to testify. The parties did not dispute that the third party's guilty plea was "testimonial" hearsay, and the Supreme Court then held its admission to be in violation of the Confrontation Clause. Thus, even if it may be argued that "unconfronted, testimonial hearsay" would respond to a party's misleading impression on an issue, it is not admissible: "[The Confrontation Clause] admits no exception for cases in which the trial judge believes unconfronted testimonial hearsay might be reasonably necessary to correct a misleading impression. Courts may not overlook its command, no matter how noble the motive" (595 US at 154).

The Supreme Court, however, made a point of stating that "the Court does not decide today the validity of the common-law rule of completeness as applied to testimonial hearsay. Under that rule, a party against whom a part of an utterance has been put in, may in his turn complement it by putting in the remainder. The parties agree that the rule of completeness does not apply to the facts of this case, as Morris' plea allocution was not part of any statement that Hemphill introduced. Whether and under what circumstances that rule might allow the admission of testimonial hearsay against a criminal defendant presents different issues that are not before this Court" (595 US at 155-156 [internal quotation marks and citations omitted]; *see* Guide to NY Evid rule 4.03).

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[1] In June 2022, this rule was amended to add subdivision (7) with a corresponding Note to incorporate the rule of *Hemphill v New York* (595 US 140 [2022]).

In December 2023, the subdivision (6) rule as it related to an autopsy report was revised to accord with the Court of Appeals decision cited in the Note under subdivision (6) (c).

In May 2024, subdivision (6) (d) (ii) relating to DNA evidence was deleted and subdivision (7) was added to include a cross-reference to the Guide to New York Evidence DNA rule. The Note to subdivision (6) (d) was also updated primarily to account for the holding and import of *People v Jordan* (40 NY3d 396, 401 [2023]).

8.03 Admission by Party'

(1) A statement of a party which is inconsistent with the party's position in the proceeding is admissible against that party, if the statement is one of the following:

(a) made by a party in an individual or representative capacity and offered against the party in that capacity, irrespective of the party's lack of personal knowledge of the facts asserted by the party.

(b) made by a person in a relationship of privity with the party and the statement concerns the party's and the person's joint interest.

(2) A statement offered against an opposing party shall not be excluded from evidence as hearsay if made by [a] a person whom the opposing party authorized to make a statement on the subject or [b] by the opposing party's agent or employee on a matter within the scope of that relationship and during the existence of that relationship.

The required authorization may be expressly given by the party or implied from the scope of the agent's or employee's duties or employment. The statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship, unless it is admissible under another exception.

Note

Subdivision (1) (a) is derived from *Reed v McCord* (160 NY 330, 341 [1899]) which held that "admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed* further held that the absence of personal knowledge on the part of the

party making the statement does not preclude the statement's admissibility under the admission's exception. *(See Reed v McCord,* 160 NY at 341.)

Unlike Federal Rules of Evidence rule 801 (d) (2) (A), which permits a party's statement to be admitted against the party in either the party's individual or representative capacity, present New York law authorizes the use of a statement made by the party in a representative capacity to be admitted against the party only in that capacity. *(See Commercial Trading Co. v Tucker,* 80 AD2d 779 [1st Dept 1981].)

Subdivision (1) (b) is derived from a series of Court of Appeals decisions which adopted this privity-based admissions exception. *(See e.g. Murdock v Waterman,* 145 NY 55 [1895] [joint obligor]; *Chadwick v Fonner,* 69 NY 404 [1877] [grantor]; *Hatch v Elkins,* 65 NY 489 [1875] [principal-surety].)

Subdivision (2) contains three sentences. The first sentence restates verbatim CPLR 4549 (enacted by L 2021, ch 833), except for the insertion of paragraph letters, and sets forth two closely related hearsay exceptions for statements made by an agent or employee offered against the principal or agent. When the agent's or employee's statement is admitted under either of the exceptions, the statement is treated as a party's admission *(see* Michael J. Hutter, *New CPLR 4549: Admissibility of Agent/Employee Statements Against the Principal/Agent,* NYLJ, Feb. 16, 2022 at 3, col 1).

Paragraph (a) of the first sentence codifies New York's well established common law "speaking agent" exception, permitting the admission of a statement of a party's agent or employee against the principal or employer when the party has authorized the statement to be made; paragraph (b) creates a new exception permitting the admission of a statement of a party's agent or employee against the party principal or employer when the statement concerns a matter within the scope of the agency or employment irrespective of whether the statement was authorized or not. Before the enactment of CPLR 4549, New York's common law did not recognize a hearsay exception for an agent's or employee's statement concerning the relationship when the agent or employee had no speaking authority.

The operative element of the "speaking agent" exception is that the agent or employee has been given authority to make the statement in issue *(see e.g. Tyrrell v Wal-Mart Stores,* 97 NY2d 650, 652 [2001] ["The Appellate Division correctly concluded that plaintiff failed to establish that the unidentified employee was authorized to make the alleged statement; thus, the statement did not constitute an admission binding on the employer"]; *Loschiavo v Port Auth. of N.Y. & Ni,* 58 NY2d 1040, 1041 [1983] ["(T)he hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule . . . if the making of the statement is an activity within the scope of his authority"]; *Merchants' Natl. Bank, of Gardner, Kennebec County, Me. v Clark,* 139 NY 314, 319 [1893] ["Hearsay evidence of this character is only permissible when it relates

to statements by the agent, which he was authorized by his principal to make"]). Proof that the person was authorized or otherwise directed to act in the matter to which his statement relates is insufficient (Barker & Alexander, Evidence in New York State and Federal Courts § 8:21 [2d ed]).

The other exception set forth in paragraph (b) creates an exception for statements of a party's agent or employee made by the agent or employee in the scope of such relationship. The exception has two operative elements: (1) the statement relates to or concerns a matter within the scope of the agency or employment relationship; and (2) the statement was made during the existence of that relationship. As to the first element, the relational phrase—"within the scope of that relationship"—is identical to that phrase in Federal Rules of Evidence rule 801 (d) (2) (D). Commentators have noted that relationship phrase "is broad in its scope" (Mueller & Kirkpatrick, Federal Evidence § 8:55 [4th ed]). Consistent with that observation, the federal courts have given the phrase a liberal construction, requiring only that the statement have some connection to the agent's or employee's specific job duties *(id.).* With respect to the second element, the temporal requirement—"during the existence of that relationship"—is likewise derived from Federal Rules of Evidence rule 801 (d) (2) (D). Federal courts uniformly hold the statement must be made while the agent or employee was employed, not before the person was hired, or after the person quit or was fired.

The subdivision's second sentence, reciting present law, provides that authority may be expressly given by the agent's or employee's principal or employer or implied from the scope of the agent's or employee's duties or employment *(see e.g. Spett v President Monroe Bldg. & Mfg. Corp.,* 19 NY2d 203, 206 [1967] [although defendant's general foreman was not given any authority to speak on behalf of his employer, his statement was admissible against employer since he "was apparently the person who ran (his employer's business), in whom complete managerial responsibility for the enterprise was vested"]). As *Spett* recognizes, where the employee has been given extensive managerial responsibility over the employer's business, speaking authority may be implied. Thus, implied authority to speak has been found to exist where the employee was placed "in full charge" of the business *(Stecher Lithographic Co. v Inman,* 175 NY 124, 127 [1903]); the employee was the "general manager" of the business *(Vaughn Mach. Co. v Quintard,* 165 NY 649 [1903], *affg* 37 App Div 368, 372 [1st Dept 1899]); and the employee was the superintendent of the job site or facility *(see Brusca v El Al Israel Airlines,* 75 AD2d 798, 800 [2d Dept 1980]). There are cases concluding that an employer's general manager of one of the employer's stores did not have implied authority from that position, cases that apparently turn on the extent of the responsibilities given to the general manager. *(E.g. Alvarez v First Natl. Supermarkets, Inc., 11* AD3d 572 [2d Dept 2004]; *Scherer v Golub Corp.,* 101 AD3d 1286 [3d Dept 2012]; *compare Navedo v 250 Willis Ave. Supermarket,* 290 AD2d 246, 247 [1st Dept 2002] [implied authority present]; *Bransfield v Grand Union Co.,* 24 AD2d 586 [2d Dept 1965], *affd* 17 NY2d 474 [1965] [implied authority present].)

The subdivision's third sentence addresses foundational requirements, specifying that the agent's or employee's statement cannot be used as proof of the agency or employment relationship, or the claimed authority to make the statement, or the scope of the agency or employment relationship unless it is admissible under another exception. Proof of those foundation elements must be made by independently admissible evidence, i.e., evidence other than the statement being offered into evidence. This requirement is derived from present law governing the "speaking agent" exception (Martin, Capra & Rossi, NY Evidence Handbook § 8.3.2 [2d ed]). No principled reason suggests that it should not also apply to the newly created exception. Of note, Federal Rules of Evidence rule 801 (d) (2) provides that the agent's or employee's statement may be considered along with other evidence to establish the agency relationship.

An agent's or employee's lack of personal knowledge of the facts underlying an otherwise admissible statement does not under existing New York law preclude the statement's admissibility (Martin, Capra & Rossi, *supra* at 715; *see also Reed,* 160 NY at 341).

This rule does not bar the admission of an employee's statement that is admissible on other grounds. See, for example, the rules on declaration against interest *(Kelleher v F.M.E. Auto Leasing Corp.,* 192 AD2d 581, 583 [2d Dept 1993]); excited utterance *(Tyrrell,* 97 NY2d at 652 [recognizing potential but finding insufficient foundation for its admissibility]); and verbal act *(Giardino v Beranbaum,* 279 AD2d 282 [1st Dept 2001]).

For the rule on "informal judicial admissions" and "formal judicial admissions" by a party see Guide to New York Evidence rule 8.23.

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[1] In June 2022, this rule and Note were amended for the purpose of incorporating CPLR 4549, enacted in 2021. Subdivision (1) (c) was deleted, and subdivision (2) was added to incorporate portions of former subdivision (1) (c) and CPLR 4549.

8.05 Admission by Adopted Statement[1]

(1) A person who understands and clearly expresses assent in word or conduct to a statement of another that is inconsistent with that person's position in the proceeding adopts that statement as his or her own and the statement is thus admissible in evidence as that person's adopted admission.

(2) Except as provided in subdivision three, an out-of-court statement made by a person that is inconsistent with a party's position in the proceeding is admissible against that party if the party heard and understood the statement and provided an equivocal or evasive response or remained silent when he or she would reasonably have been expected to deny the statement and had an opportunity to do so.

(3) In a criminal proceeding when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as provided in paragraphs (a) and (b).

(a) The silence of a defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible if the defendant was under a duty to inform his or her superiors of his or her activities.

(b) A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at a criminal proceeding with respect to that transaction may be impeached by the defendant's omission of critical details from the

defendant's pretrial statement that would have been natural to include in that statement.

(4) A party's failure to respond to a written statement directed to the party may not be used to establish the party's assent to the statement.

Note

This rule addresses the adoptive admission hearsay exception.

An adoptive admission occurs "when a party acknowledges and assents to something *`already* uttered by another person, which thus becomes effectively the party's own admission' " *(People v Campney,* 94 NY2d 307, 311 [1999], citing 4 John Henry Wigmore, Evidence § 1069 at 100 [James H. Chadbourn rev]). The other person's statement is then admissible against the party as a party admission. In effect, it is as if the party himself or herself made the statement. The manifestations of assent are also admissible to establish the "relevant demonstrative response of the affected party" *(People v Lourido,* 70 NY2d 428, 433 [1987]).

Subdivision (1) sets forth the adoptive admission rule in situations where the alleged manifestation of assent involves words or conduct by the party charged with the adoption. It recognizes that the assent may be by a verbalized response *(see e.g. Campney,* 94 NY2d at 312-313; *see also People v Vining,* 28 NY3d 686 [2017] [express assent may be based upon evasive or equivocal answers]), or by conduct *(e.g. People v Ferrara,* 199 NY 414, 430 [1910] [shrugging of shoulders]). Subdivision (2) and subdivision (3) set forth the rule where the alleged manifestation involves the party's evasive or equivocal responses or silence.

The Court of Appeals has cautioned that an adoptive admission is allowed only when the statement was "fully known and fully understood" by the party against whom it is being offered *(People v Koerner,* 154 NY 355, 374 [1897]; *see also People v Allen,* 300 NY 222, 225-226 [1949]). Thus, the foundation for holding that a statement was adopted includes finding, by direct or circumstantial evidence, that the "defendant had read or been informed of the contents of the statement, understood its implications, and affirmatively adopted the statement as his own" *(Campney,* 94 NY2d at 313).

In *People v Woodward* (50 NY2d 922, 923 [1980]), for example, the police read to the defendant his codefendant's written confession, whereupon the defendant said: "Yes, that is what happened." In addition to holding that the statement was admissible at the joint trial of the defendants, the Court observed: "Even at a separate trial . . . the [codefendant's] statement would have been admissible since the jury could find that he had adopted it as his own" *(id.).*

Whether the foundation elements for the admissibility of the statement have been established is to be decided by the trial court in light of "all the facts and circumstances surrounding the incident" *(Ferrara,* 199 NY at 430).

Subdivision (2). Except as set forth in subdivision (3), subdivision (2) sets forth the rule governing an adoption of a statement in circumstances involving a party's silence or evasive or equivocal response. The Court of Appeals has held that "[a]ssent can be manifested by silence, because `[a] party's silence in the face of an accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission' " *(Vining,* 28 NY3d at 690). For purposes of this rule, the Court has held that silence may also encompass equivocal or evasive answers *(id.* ["an equivocal or evasive response may similarly be used against (a) party . . . as an adoptive admission by silence"]).

As to adoption by silence, the Court of Appeals has cautioned that while "accusatory statements, not denied, may be admitted against the one accused, as admissions," they are admissible "only when the accusation was `fully known and fully understood' by defendant and when defendant was `at full liberty to make answer thereto, and then only under such circumstances as would justify the inference of assent or acquiescence as to the truth of the statement by his remaining silent' " *(People v Allen,* 300 NY at 225 [citations omitted]; *see also Vining,* 28 NY3d at 691 ["To use a defendant's silence or evasive response as evidence against the defendant, the People must demonstrate that the defendant heard and understood the assertion, and reasonably would have been expected to deny it"]; *Koerner,* 154 NY at 374 [the circumstances must be "such as would properly or naturally call for some action or reply from (persons) similarly situated"]). Whether these foundation elements have been established is an issue for the trial court to determine *(Vining,* 28 NY3d at 691).

Of note, the Court of Appeals has stated that in criminal proceedings this rule "is to be applied with careful discrimination" as " [r]eally it is most dangerous evidence' " *(Koerner,* 154 NY at 374) and that this evidence "should always be received with caution, and ought not to be admitted unless the evidence is of direct declarations of a kind which naturally call for contradiction, or some assertion made to a party with respect to [the party's] rights, in which, by silence, [the party] acquiesces" *(id.* at 374-375).

Subdivision (3). Subdivision (3) sets forth the rule governing the admissibility in a criminal proceeding of a defendant's silence during police questioning. Specifically, evidence of a criminal defendant's pre-arrest and post-arrest silence during police questioning may not be used in the People's direct case or for impeachment purposes, a rule derived from the State Constitution *(see e.g. People v De George,* 73 NY2d 614, 618 [1989] [pre-arrest silence]; *People v Von Werne,* 41 NY2d 584, 588 [1977] [post-arrest silence]; *People v Conyers,* 52 NY2d 454, 457 [1981] [post-arrest silence]).

In summing up New York law, the Court of Appeals has stated: "We hold, as a matter of state evidentiary law, that evidence of a defendant's selective silence generally may not be used by the People as part of their case-in-chief, either to allow the jury to infer the defendant's admission of guilt or to impeach the credibility of the defendant's version of events when the defendant has not testified" *(People v Williams,* 25 NY3d 185, 188 [2015]).

Subdivision (3) (a). Subdivision (3) (a) is derived from *People v Rothschild* (35 NY2d 355, 360-361 [1974] ["The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well"]); and *People v De George* (73 NY2d 614, 619 [1989] ["we affirmed the *(Rothschild)* conviction because under the circumstances, the evidence of silence had an unusually high probative value. The officer was under a duty to inform his superiors of his undercover activities and thus his continued silence in the face of direct accusations by his fellow officers was probative of guilt"]).

Subdivision (3) (b). Subdivision (3) (b) is derived from *People v Savage* (50 NY2d 673, 676 [1980] ["a defendant who, having been given the warnings required by *Miranda v Arizona* (384 US 436 [1966]) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial"]); and *People v Chery* (28 NY3d 139, 142, 145 [2016] [it was permissible for "the People to use defendant's selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony," given that the "defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial"]).

Subdivision (4). This subdivision is derived from substantial Court of Appeals precedent *(see e.g. Talcott v Harris,* 93 NY 567, 571 [1883] ["While a party may be called upon in many cases to speak where a charge is made against him, and in failing to do so may be considered as acquiescing in its correctness, his omission to answer a written allegation, whether by affidavits or otherwise, cannot be regarded as an admission of the correctness thereof and that it is true in all respects"]; *Gray v Kaufman Dairy & Ice Cream Co.,* 162 NY 388, 397-398 [1900] [collecting cases]; *Viele v McLean,* 200 NY 260, 262 [1910]).

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[1] In June 2022, the rule was amended to merge the contents of subdivisions (1) and (5) into subdivision (1).

8.07 Ancient Documents'

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

(2) A statement in a document that is not included in subdivision one is admissible if it is proved to be in existence for more than thirty years, and its authenticity is supported by its proper custody or otherwise accounted for, and it is free from any indication of fraud or invalidity.

Note

Subdivision (1) is taken verbatim from CPLR 4522. *(See* Guide to NY Evid rule 3.22.) That CPLR statute creates a hearsay exception for the specified documents.

Subdivision (2) is commonly referred to as the "ancient documents" exception to the hearsay rule and is derived primarily from Court of Appeals decisions dealing with certain recitals in documents affecting interests in real property. *(See e.g. Young v Shulenberg,* 165 NY 385 [1901] [statement in 81-year-old deed]; *McKinnon v Bliss,* 21 NY 206 [1860] [statement in "ancient" deed and will regarding title].)

The Court of Appeals explained the rule by noting that

> "[i]t is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof." *(Greenleaf v Brooklyn, F. & C. I. R. Co.,* 132 NY 408, 414 [1892].)

However, before receiving such documents in evidence, the Court of Appeals advised that "[c]are is first taken to ascertain their genuineness, and this may be shown *prima facie* by proof that the document came from the proper custody, or by otherwise accounting for it. The documents found in a place in which and under the care of persons with whom such papers might naturally and

reasonably be expected to be found, or in possession of persons having an interest in them, are in precisely the custody which gives authenticity to documents found within it." *(Dodge v Gallatin,* 130 NY 117, 133-134 [1891].)

The Appellate Division has more recently reaffirmed the "ancient document rule," explaining that

> "a record or document which is found to be more than 30 years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity `proves itself' *(Fairchild v Union Ferry Co.,* 121 Misc 513, 518 [1923], affd 212 App Div 823, affd 240 NY 666). This rule dispenses with the proof of the execution of a record or document on the proof of its antiquity. It presumes that the entrant of the record or document is dead after the passage of 30 years. *(Matter of Barney,* 185 App Div 782, 798, 799 [1919].) If the genuineness of an ancient document is established, it may be received to prove the truth of the facts that it recites." *(Tillman v Lincoln Warehouse Corp.,* 72 AD2d 40, 44-45 [1st Dept 1979].)

In the *Fairchild* case, cited by *Tillman,* an action in which rights to docks and piers in New York harbor were in issue, the Supreme Court held that old writings and book entries were properly admitted under the ancient document rule, observing:

> "This rule is that a record or document which is found to be more than thirty years of age and which is proven to have come from proper custody and is itself free from any indication of fraud or invalidity proves itself" *(Fairchild,* 121 Misc at 518.)

While the Court of Appeals has not held that this exception applies to non-real-property documents, the Appellate Division has so held. *(See e.g. Estate of Essig v 5670 58 St. Holding Corp.,* 50 AD3d 948, 949 [2d Dept 2008] ["The stock certificates are more than 30 years old, are free from any indication of fraud or invalidity, and were discovered by the plaintiff . . . amongst the personal records of (the deceased) after her death. Under such circumstances, the stock certificates are self-authenticating pursuant to the ancient document rule"]; *Tillman,* 72 AD2d at 44-45 [inventory list; quoting the rule as set forth by the Supreme Court in *Fairchild]; Matter of Barney,* 185 App Div 782, 798 [1st Dept 1919] [psychiatric hospital records]; *Layton v Kraft,* 111 App Div 842, 847 [1st Dept 1906] [church records].)

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[1] In December 2022, this rule was revised for the purpose of dividing it into two subdivisions, numbering the then existing rule as subdivision (2) and adding subdivision (1).

8.08 Business Records (CPLR 4518)

(a) Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

> **[In addition, the writing or record must have been made upon the recorder's own personal knowledge or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately.**
>
> **For a hospital or medical office record the entry must be germane to the patient's treatment or diagnosis.**
>
> **The admission of an out-of-court statement that is included within a properly admitted business record is itself admissible for the truth of its contents only if the statement meets the requirements of an exception to the hearsay rule; otherwise the statement is admissible for having been made and not for its truth.]**

An electronic record, as defined in section three hundred two of the state technology law, used or stored as such a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and

accurate representation of such electronic record.

All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

(b) Hospital bills. A hospital bill is admissible in evidence under this rule and is prima facie evidence of the facts contained, provided it bears a certification by the head of the hospital or by a responsible employee in the controller's or accounting office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. This subdivision shall not apply to any proceeding in a surrogate's court nor in any action instituted by or on behalf of a hospital to recover payment for accommodations or supplies furnished or for services rendered by or in such hospital, except that in a proceeding pursuant to section one hundred eighty-nine of the lien law to determine the validity and extent of the lien of a hospital, such certified hospital bills are prima facie evidence of the fact of services and of the reasonableness of any charges which do not exceed the comparable charges made by the hospital in the care of workmen's compensation patients.

(c) Other records. All records, writings and other things referred to in [CPLR] section 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician.

Where a hospital record is in the custody of a warehouse as that term is defined by paragraph

(thirteen) of subsection (a) of section 7-102 of the uniform commercial code, pursuant to a plan approved in writing by the state commissioner of health, admissibility under this subdivision may be established by a certification made by the manager of the warehouse that sets forth (i) the authority by which the record is held, including but not limited to a court order, order of the commissioner, or order or resolution of the governing body or official of the hospital, and (ii) that the record has been in the exclusive custody of such warehouse or warehousemen since its receipt from the hospital or, if another has had access to it, the name and address of such person and the date on which and the circumstances under which such access was had. Any warehouse providing a certification as required by this subdivision shall have no liability for acts or omissions relating thereto, except for intentional misconduct, and the warehouse is authorized to assess and collect a reasonable charge for providing the certification described by this subdivision. Where a hospital record is located in a jurisdiction other than this state, admissibility under this subdivision may be established by either a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state or by an employee delegated for that purpose, or by a qualified physician.

(d) Any records or reports relating to the administration and analysis of a genetic marker or DNA test, including records or reports of the costs of such tests, administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law are admissible in evidence under this rule and are prima facie evidence of the facts contained therein provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee delegated for that purpose,

or by a qualified physician. If such record or report relating to the administration and analysis of a genetic marker test or DNA test or tests administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law indicates at least a ninety-five percent probability of paternity, the admission of such record or report shall create a rebuttable presumption of paternity, and shall, if unrebutted, establish the paternity of and liability for the support of a child pursuant to articles four and five of the family court act.

(e) Notwithstanding any other provision of law, a record or report relating to the administration and analysis of a genetic marker test or DNA test certified in accordance with subdivision (d) of this rule and administered pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law is admissible in evidence under this rule without the need for foundation testimony or further proof of authenticity or accuracy unless objections to the record or report are made in writing no later than twenty days before a hearing at which the record or report may be introduced into evidence or thirty days after receipt of the test results, whichever is earlier.

(I) Notwithstanding any other provision of law, records or reports of support payments and disbursements maintained pursuant to title six-A of article three of the social services law by the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions are admissible in evidence under this rule, provided that they bear a certification by an official of a social services district attesting to the accuracy of the content of the record or report of support payments and that in attesting to the accuracy of the record or report such official has received

confirmation from the office of temporary and disability assistance or the fiscal agent under contract to the office for the provision of centralized collection and disbursement functions pursuant to section one hundred eleven-h of the social services law that the record or report of support payments reflects the processing of all support payments in the possession of the office or the fiscal agent as of a specified date, and that the document is a record or report of support payments maintained pursuant to title six-A of article three of the social services law. If so certified, such record or report shall be admitted into evidence under this rule without the need for additional foundation testimony. Such records shall be the basis for a permissive inference of the facts contained therein unless the trier of fact finds good cause not to draw such inference.

(g) Pregnancy and childbirth costs. Any hospital bills or records relating to the costs of pregnancy or birth of a child for whom proceedings to establish paternity, pursuant to sections four hundred eighteen and five hundred thirty-two of the family court act or section one hundred eleven-k of the social services law have been or are being undertaken, are admissible in evidence under this rule and are prima facie evidence of the facts contained therein, provided they bear a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or the state or by an employee designated for that purpose, or by a qualified physician.

Note

Introduction. This rule restates verbatim CPLR 4518, except for paragraphs two, three, and four of subdivision (a) which incorporate the holdings of decisional law discussed in the "subdivision (a)" section of this note.

The key *statutory* provisions governing the hearsay exception for the admissibility of business records are contained in CPLR 4518 (a), as set forth in paragraphs one and six of subdivision (a). The fifth paragraph of this subdivision

(as set forth in CPLR 4518 [a]) addresses the admissibility of an "electronic record," i.e., "information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities" (State Technology Law § 302 [2]).

Paragraphs two, three and four of subdivision (a), as noted, set forth additional *decisional law* rules governing business records.

The remaining subdivisions of this rule and CPLR 4518 provide separate hearsay exceptions for specified records as well as certification procedures that make it unnecessary to call a witness to lay the foundation for their admissibility.

Subdivision (a) initially sets forth the scope of the business records exception to the general prohibition on the admission of hearsay. *(See* Guide to NY Evid rule 8.01, Admissibility of Hearsay.) The exception encompasses any record of a business "made as a memorandum or record of any act, transaction, occurrence or event" (CPLR 4518 [a] [first sentence]). The term, "business," is broadly defined as a "business, profession, occupation and calling of every kind" (CPLR 4518 [a] [last sentence]).

The Court of Appeals has included within the scope of this exception: government records *(Kelly v Wasserman,* 5 NY2d 425, 429 [1959] [welfare department records]; *Johnson v Lutz,* 253 NY 124 [1930] [police accident report]); hospital records *(Williams v Alexander,* 309 NY 283, 286 [1955]); and criminal enterprise records *(People v Kennedy,* 68 NY2d 569, 577 [1986] [loan shark records]). A record falls outside the scope of the exception if it contains purely personal, nonbusiness related activity *(Kennedy* at 577).

As to the form of the record, the subdivision provides that "[a]ny writing or record, whether in the form of an entry in a book or otherwise" may be admissible. The Appellate Division has interpreted that language broadly, holding that " [a]ny record designed to retain information and otherwise possessed of the characteristics of a business record should be admitted under the rule regardless of the form which the record takes,' " provided the record is intelligible *(Wilson v Bodian,* 130 AD2d 221, 231 [2d Dept 1987] [citation omitted]).

A business record stored in computerized format in a database is admissible under the exception through a computer printout of the stored information, provided it is shown that the printout is a fair and accurate representation of the electronic record (CPLR 4518 [a] [second sentence]). In *People v Kangas* (28 NY3d 984 [2016]), the Court of Appeals held that CPLR 4539 (b)'s requirement that reproductions of an original record must be authenticated by testimony or an affidavit does not apply when the record was created electronically in the first instance, that "CPLR 4539 (b) applies only when a document that originally existed in hard copy form is scanned to store a digital `image' of the hard copy document,

and then a `reproduction' of the digital image is printed in the ordinary course of business" (28 NY3d at 985).

Admissibility of a business record requires proof of four foundation elements. Three of those foundation elements are set forth in CPLR 4518 (a) and in the first paragraph of subdivision (a) of this rule. The fourth element is established in *Johnson v Lutz* (253 NY 124 [1930]) and is set forth in the second paragraph of subdivision (a) of this rule. *Williams v Alexander* (309 NY 283 [1955]) sets forth an additional requirement for hospital and medical records and that requirement is set forth in the third paragraph of subdivision (a) of this rule.

The three statutory elements as recited in *Kennedy* (68 NY2d at 579-580) are

> *"first,* that the record be made in the regular course of business--essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business; *second,* that it be the regular course of such business to make the record (a double requirement of regularity)--essentially, that the record be made pursuant to established procedures for the routine, habitual, systematic making of such a record; and *third,* that the record be made at or about the time of the event being recorded--essentially, that recollection be fairly accurate and the habit or routine of making the entries assured."

Notably, these elements provide the "probability of [the record's] trustworthiness . . . , which justifies admission of the writing or record without the necessity of calling all the persons who may have had a hand in preparing it" *(Williams,* 309 NY at 286-287). Since the entry is routine, the regularity and continuity of making such entries develop habits of precision; the temporal requirement assures that the recollection of the information recorded is fairly accurate; and the existence of the recorder's duty to record the information ensures that it is in the recorder's own interest to accurately record the information *(Kennedy,* 68 NY2d at 579).

In *Johnson v Lutz,* the Court of Appeals imposed the fourth foundation requirement, namely that there must be a showing that the record was made upon the recorder's own personal knowledge, or from information given to the recorder by someone with personal knowledge and a business duty to transmit the information accurately (253 NY at 128 [business records statute "was not intended to permit the receipt in evidence of entries based upon voluntary hearsay statements made by third parties not engaged in the business or under any duty in relation thereto"]; *see People v Patterson,* 28 NY3d 544, 550 [2016] [reaffirming *Lutz's* requirement that " `admission may only be granted where it is demonstrated that the informant has personal knowledge of the act, event or condition and he (or she) is under a business duty to report it to the entrant' "]). This fourth requirement enhances the trustworthiness of the record *(Matter of Leon RR,* 48 NY2d 117, 123

[1979] ["it is essential to emphasize that the mere fact that the recording of third-party statements by the caseworker might be routine, imports no guarantee of the truth, or even reliability, of those statements. To construe these statements as admissible simply because the caseworker is under a business duty to record would be to open the floodgates for the introduction of random, irresponsible material beyond the reach of the usual tests for accuracy--cross-examination and impeachment of the declarant"]).

Thus, if the recorder had no personal knowledge about the information being recorded and the source of the information being recorded had no business duty to transmit the information accurately to the recorder, the record is inadmissible *(Cover v Cohen,* 61 NY2d 261, 274 [1984] [the investigating police officer's accident report of the statement of the driver of a vehicle involved in an accident that "his accelerator stuck on him" was not admissible as the driver was under no duty to report to the police officer]; *Cox* v *State of New York,* 3 NY2d 693, 699 [1958] [hospital record containing an entry that a hospital patient stated she pushed another patient excluded on ground the declarant inmate was under no duty to impart such information]).

In essence, the rule derived from *Johnson v Lutz* and its progeny is an application of New York's double hearsay rule *(see Patterson,* 28 NY3d at 550-551; Barker & Alexander, Evidence in New York State and Federal Courts § 8:94 at 204-205 [2d ed West's NY Prac Series]; Guide to NY Evid rule 8.21, Hearsay or Nonhearsay Within Hearsay). That rule as applied to a business record is set forth in the fourth paragraph of subdivision (a) of this rule. The first level of hearsay is the record containing the statement; the second level of hearsay is the statement itself. The business records exception covers the first level; that is, if the four foundation elements are met, then the record comes in as proof that the statement was made. As to the admissibility of the statement itself (second level), if the maker of the record either had personal knowledge of the information being recorded or prepared the record with information provided by another person who had a duty to transmit the information accurately, then the record also comes in as some proof that the statement is true. The double hearsay is excused by the business records exception. However, if the source had no such duty, the information provided to the recorder must fall within another hearsay exception in order to overcome the double hearsay to be admissible for its truth. Alternatively, the statement itself could be admissible for a relevant non-truth purpose.

Where the record being offered is a hospital or medical office record, the Court of Appeals has imposed a special requirement in addition to the four foundation elements discussed thus far. As originally imposed in *Williams* (309 NY at 286-287) and reaffirmed in *People v Ortega (Benston)* (15 NY3d 610, 617-618 [2010]), the medical record entry must be germane to the patient's treatment or diagnosis, that is, being germane to treatment or diagnosis is what makes the record a business record in the first instance. If the entry is not germane to treatment or diagnosis, it is not admissible under the exception.

In *Ortega (Benston),* a consolidation of two appeals, an entry in a hospital record was in issue in each case. In the *Ortega* case, which involved a charge of drug possession, the entry stated the patient-complainant "was forced to smoke [a] white substance from [a] pipe"; that entry was found to be germane because "complainant would not have been in control over either the amount or the nature of the substance he ingested[,]" and "treatment of a patient who is the victim of coercion may differ from a patient who has intentionally taken drugs" (15 NY3d at 616, 620). In the *Benston* case, which involved a charge of assault of the defendant's former girlfriend, the entry contained references to domestic violence committed against the patient-complainant and the existence of a safety plan for her; that entry was found to be germane because a victim of domestic violence will have a "host of . . . issues" that need to be treated in addition to the treatment of physical injuries (15 NY3d at 619).

As expressed in the note to Guide to NY Evidence rule 8.43 (Statement Made for Medical Diagnosis or Treatment), care must be exercised in determining whether an entry is germane because some details recorded in a medical record may not relate to treatment or diagnosis. For example, in *Williams,* the Court of Appeals held that information that the patient was struck by a motor vehicle was germane to his treatment but not the statement that the car that struck the patient was propelled into him when it was struck by another car *(Williams,* 309 NY at 288). As stated by the Court: "[W]hether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment." *(Id.)* Medical testimony about whether the information is germane to treatment or diagnosis will be helpful in making the determination. *(See People v Pham,* 118 AD3d 1159, 1162 [3d Dept 2014]; *Wright v New York City Hous. Auth.,* 273 AD2d 378, 379 [2d Dept 2000]; *Sanchez v Manhattan & Bronx Surface Tr. Operating Auth.,* 170 AD2d 402, 404 [1st Dept 1991].)

It bears repeating that entries in a medical record will not be admissible merely because they are determined to be germane to the patient's diagnosis and treatment; like all other business records, the entry must be made upon the recorder's personal knowledge or from information given by one with personal knowledge and a duty to transmit accurately the information to the recorder, or the information must fall within its own independent hearsay exception *(see Ortega,* 15 NY3d at 620-621 [Smith, J., concurring]).

The subject matter of any business record may be "any act, transaction, occurrence or event." While opinions are not specifically enumerated as proper subject matter, the Court of Appeals held in *People v Kohlmeyer,* interpreting CPLR 4518 (a)'s predecessor, Civil Practice Act § 374-a, that a hospital entry recording an opinion of a physician is admissible under the business records exception (284 NY 366, 369 [1940]). Consistent with *Kohlmeyer,* the courts routinely admit records containing opinions provided a showing is made that the

opinion was rendered by a person qualified to give the opinion and was based on proper data *(see* Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, CPLR C4518:4).

Reports or records received from another business and filed as part of the receiving business's business records are ordinarily not admissible as business records of the recipient business *(see People v Cratsley,* 86 NY2d 81, 90 [1995]). They may be qualified as business records of the recipient, however, upon a showing that the maker of the report prepared the report on behalf of the recipient and in accordance with its requirements, and the recipient relied on the report in conducting its business *(Cratsley,* 86 NY2d at 89-91; *see also People v DiSalvo,* 284 AD2d 547, 548-549 [2d Dept 2001]).

Records or reports prepared solely for litigation that are offered by the party responsible for making the record are not admissible under the exception *(People v Foster,* 27 NY2d 47, 52 [1970] ["Of course, records prepared solely for the purpose of litigation should be excluded"]; *Flaherty v American Turners N.Y,* 291 AD2d 256, 257-258 [1st Dept 2002] [physician's report prepared for specific litigation purpose]; *Cornier v Spagna,* 101 AD2d 141, 148 [1st Dept 1984] [same]). The reason is that such records or reports are "not the systematic, routine, day-to-day type of record envisioned by the business records exception" *(Wilson vBodian,* 130 AD2d 221, 229-230 [2d Dept 1987]).

The four foundation elements necessary for the admissibility of a record under the business record exception must be proven to the court's satisfaction by the offering party *(Kennedy,* 68 NY2d at 580). Traditionally, a witness is called for this purpose. While the person or persons involved in the preparation of the record is not required to be called, the witness must have personal knowledge of the record keeping practices of the business *(see Bank ofN.Y. Mellon v Gordon,* 171 AD3 d 197, 208-210 [2d Dept 2019]). Alternatively, resort may be had to the certification procedure provided for certain records in the remaining subdivisions.

Where the record or report is offered against the defendant in a criminal action, the defendant's US Constitution Sixth Amendment right of confrontation may be implicated and the record or report may be inadmissible as a violation of that right *(see* Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause *[Crawford]).*

CPLR 3122-a allows for the certification of business records produced pursuant to a subpoena duces tecum for the discovery and production of documents pursuant to CPLR 3120. The certification's contents must include an attestation of the statutory foundation for the admission of business records. Once all the content requirements of the certification are fulfilled, the certification "is admissible as to the matters set forth therein and as to such matters shall be presumed true" (CPLR 3122a [b]). Thus, the certification eliminates the need for foundation testimony for the record. The underlying certification procedure is discussed in detail in Patrick M.

Connors, Practice Commentaries to CPLR 3122-a (McKinney's Cons Laws of NY).

As mentioned earlier, a statement inadmissible for its truth as a business record may yet be admissible for a relevant non-truth purpose or pursuant to some other exception to the hearsay rule *(see Patterson,* 28 NY3d at 550-551; *Kelly v Wasserman,* 5 NY2d at 429-430). In *Patterson,* for example, the Court held that subscriber information in prepaid cell phone records provided by the person purchasing the phone was not admissible to prove the truth of the name of the subscriber because the subscriber was not under a duty to provide accurate information to the phone provider; but the record of the subscriber's name was admissible for the non-truth purpose of permitting other evidence to prove that the name listed as the subscriber in the record was, in fact, that of the defendant (28 NY3d at 552-553). In *Kelly,* the Court held a welfare investigator's report was admissible even though it contained a statement to the investigator by a welfare recipient's landlord, who had no duty to report, because the statement fell within the hearsay exception for the admission of a party *(see* Guide to NY Evid rule 8.03, Admission by Party).

Subdivision (b) creates a hearsay exception for hospital bills and also provides a certification procedure for their admission, thereby making it unnecessary to call a foundation witness. The certification must be made by the head of the hospital or by a responsible employee in the controller's office that the bill is correct, that each of the items was necessarily supplied and that the amount charged is reasonable. If properly certified, the hospital bill is "prima facie" evidence of the facts contained therein. As to the evidentiary effect of a hospital bill admitted as "prima facie" evidence, the Court of Appeals has interpreted "prima facie" in CPLR 4518 (c) as creating only a permissive inference *(Matter of Commissioner of Social Servs. v Philip De G.,* 59 NY2d 137, 140 [1983] ["In the absence of contradictory evidence, these hospital entries were sufficient to permit but not require the trier of fact to find in accordance with the record"]; *see also People v Mertz,* 68 NY2d 136, 148 [1986] [prima facie evidence is "not a presumption which must be rebutted but rather an inference"]).

Bills for medical services provided by physicians outside of a hospital may be admissible without a witness to lay a foundation pursuant to CPLR 4533-a *(see Matter of Haroche v Haroche,* 38 AD2d 957, 957 [2d Dept 1972] ["We note in passing that the evidentiary problem encountered as to the necessity for and reasonable value of most of the medical and dental expenses for which claim was made might have been avoided by the use of CPLR 4533-a"]).

A hospital bill may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception will need to be established by foundation testimony.

By the statute's terms, subdivision (b) does not apply in a Surrogate's Court proceeding or an action commenced by the hospital to recover payments for its

services. A certified hospital bill may be sued upon, however, by a hospital in a proceeding pursuant to Lien Law § 189.

Subdivision **(c)** creates a hearsay exception and a certification procedure for three types of business records described in CPLR 2306 and 2307, i.e., medical records of a hospital or government entity concerning the condition or treatment of a patient; records of a library; and records of a department or bureau of a municipal corporation or of the state. A 2017 amendment provides that out-of-state hospital records are admissible pursuant to the certification procedure (L 2017, ch 229, amending CPLR 4518 [c]).

The certification or authentication required must be made by the head of the hospital, laboratory, department, or bureau of a municipal corporation or of the state, or by an employee delegated for the purpose, or by a qualified physician. As to the certificate's contents, the Court of Appeals held in *Mertz* that the "admissibility [under CPLR 4518 (c)] is governed by the same standards as the general business record exception in subdivision (a)" (68 NY2d at 147). Of note, the certificate does not have to be dated near the time of the event reported in the record so long as the record itself was created at or near that time *(People v Kinne,* 71 NY2d 879 [1988]).

Records admitted pursuant to the certification procedure constitute "prima facie evidence" of the facts contained in the record. As noted, supra, the certification creates a permissive inference of the truth of the facts contained in the record *(see also Rodriguez v Triborough Bridge & Tunnel Auth.,* 276 AD2d 769, 770 [2d Dept 2000] [blood alcohol test results]; *LaDuke v State Farm Ins. Co.,* 158 AD2d 137, 138 [4th Dept 1990] [blood alcohol test result]).

Where the hospital record has been retrieved from a warehouse, as defined in UCC 7-102 (a) (13), a separate certification procedure allowing admission of the retrieved records without foundation evidence is set forth in subdivision (c).

Records encompassed by subdivision (c) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (d) creates a hearsay exception and provides a certification procedure for the admission of records or reports on genetic marker tests or DNA tests administered pursuant to Family Court Act §§ 418 and 532 or Social Services Law §111-k, thereby making it unnecessary to call a foundation witness. The certification or authentication must be made by the head of the hospital, laboratory, or department or bureau of a municipal corporation or the state, or an employee designated for that purpose, or a qualified physician must make the certification or authorization. If properly certified, the records or reports are "prima facie" evidence of the facts contained therein; and if at least a 95 % probability of paternity is shown, the records or reports create a rebuttable presentation of paternity, and if unrebutted,

they "shall" establish paternity and liability for child support *(see Matter of Orleans County Dept. of Social Servs. v Aaron S.,* 281 AD2d 931, 931 [4th Dept 2001]). Records encompassed by subdivision (d) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (e) provides that, "notwithstanding any other provision of law," a record or report on genetic marker or DNA tests administered pursuant to Family Court Act §§ 418 and 532 or Social Services Law § 111-k, and certified in accordance with subdivision (d) is admissible into evidence without the need of a foundation witness or further proof of authenticity or accuracy unless a timely written objection is made. Specifically, any objection must be made no later than 20 days before the hearing at which the report may be introduced into evidence or 30 days after receipt of the test results, whichever is earlier.

Subdivision (f) creates a hearsay exception and provides a certification procedure for the admissibility of records of reports of specified support payments and disbursements maintained by the State Department of Social Services or the fiscal agent under contract to the Department for the provision of centralized collection and disbursement functions, thereby making it unnecessary to call a foundation witness. The certification must be made by an official of a social services district who must attest to the accuracy of the contents of the record or report, that the official has received a specified confirmation from the Office of Temporary and Disability Assistance or the fiscal agent under contract to the Office, and that confirmation is of a record or report maintained pursuant to title 6-A of article 3 of the Social Services Law. If properly certified, and admitted into evidence, a permissive inference of the facts contained therein may be drawn unless the trier of fact finds good cause not to do so. Records encompassed by subdivision (f) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

Subdivision (g) creates a hearsay exception and provides a certification procedure for the admission of any hospital bill or record relating to the costs of pregnancy or birth of a child as to whom a paternity proceeding has been commenced, thereby making it unnecessary to call a foundation witness. The certification or authentication must be made by the head of the hospital, laboratory, or department or bureau of a municipal corporation or the state, or, by an employee designated for that purpose, or by a "qualified physician." If properly certified, the bills or record are "prima facie" evidence of the facts contained therein. Bills and records encompassed by subdivision (g) may also be admitted under the hearsay exception provided in subdivision (a). But admissibility under that exception needs to be established by foundation testimony.

8.09. Coconspirator Statement

(1) A statement by a defendant's coconspirator made in furtherance of the conspiracy during the course of the defendant's involvement in the conspiracy, or prior to the defendant joining the conspiracy, or after the defendant's active involvement has ceased but the conspiracy continues, is admissible to prove the conspiracy and the crime that was the object of the conspiracy, irrespective of the availability of the coconspirator; provided that:

(a) there is a prima facie showing of the existence of the conspiracy, including an overt act and the party's participation in the conspiracy, without recourse to the statement sought to be introduced; and

(b) if the statement was made after the defendant's active involvement had ceased, the defendant had not unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators.

(2) A statement accepting another's solicitation to commit a crime is a verbal act, not hearsay, when offered to prove a conspiracy to commit the underlying crime and is thus admissible without prima facie proof of the conspiracy.

(3) A charge of conspiracy in the accusatory instrument is not required when a statement of a coconspirator is otherwise admissible pursuant to subdivision one or two.

Note

Subdivision (1) is derived from *People v Caban* (5 NY3d 143, 149 [2005]) and *People v Flanagan* (28 NY3d 644 [2017]).

In *Caban,* the Court held:

> " `A declaration by a coconspirator during the course and in furtherance of the conspiracy is admissible against another coconspirator as an exception to the hearsay rule.' The theory underlying the coconspirator's exception is that all participants in a conspiracy are deemed responsible for each of the acts and declarations of the others. The exception `is not limited to permitting introduction of a conspirator's declaration to prove that a coconspirator committed the crime of conspiracy, but, rather, may be invoked to support introduction of such declaration to prove a coconspirator's commission of a substantive crime for which the conspiracy was formed.' However, as defendant points out, such declarations may be admitted only when a prima facie case of conspiracy has been established. While the prima facie case of conspiracy `must be made without recourse to the declarations sought to be introduced,' the testimony of other witnesses or participants may establish a prima facie case' " *(Caban,* 5 NY3d at 148 [citations omitted]; *see also People v Wolf* 98 NY2d 105, 118 [2002]; *People v Berkowitz,* 50 NY2d 333, 341 [1980]; *People v Salko,* 47 NY2d 230, 237-238 [1979]; *cf. People v Bac Tran,* 80 NY2d 170, 179-180 [1992] [prima facie case not established]).

In *Flanagan* (28 NY3d 644 [2017]), the Court of Appeals held: (1) "when a conspirator subsequently joins an ongoing conspiracy, any previous statements made by his or her coconspirators in furtherance of the conspiracy are admissible against the conspirator pursuant to the coconspirator exception to the hearsay rule"; and (2) "statements made after a conspirator's alleged active involvement in the conspiracy has ceased, but the conspiracy continues, are admissible unless this conspirator has unequivocally communicated his or her withdrawal from the conspiracy to the coconspirators *(see United States v Brown,* 332 F3d 363, 373-374 [6th Cir 2003] [`The defendant carries the burden of proving withdrawal, and must show that he took affirmative action to defeat or disavow the purpose of the conspiracy'])."

It appears that the Court of Appeals has approved requiring that the prima facie case include proof of an overt act. (See *People v Bongarzone,* 69 NY2d 892, 896 [1987] ["We agree with the courts below that there was sufficient circumstantial evidence upon which to infer the performance of an overt act by the defendant and, in turn, establish a prima facie case of conspiracy. . . . This evidence being sufficient to establish a prima facie case that a conspiracy existed, the evidence concerning the mother's and sister's statements which established an overt act was properly received"].) The Appellate Division, Third Department has consistently held that the proof of an overt act, as well as the conspiracy, is required for the admission of the coconspirator's statement. *(See e.g. People v Portis* 129 AD3d 1300, 1301 [3d Dept 2015].)

In *People v Caban* (5 NY3d at 151), the Court of Appeals approved of admitting hearsay statements of coconspirators "subject to connection"—meaning,

> "subject to later proof of a prima facie case of conspiracy. Although any statements admitted pursuant to the coconspirator's exception must have been made after the formation of the conspiracy—that is, in the course and in furtherance of it—testimony establishing the prima facie case need not precede testimony about the hearsay statements. Inasmuch as the order of proof at trial is committed to the sound discretion of the trial court *(see e.g. People v Olsen,* 34 NY2d 349, 353 [1974]), a coconspirator's statements are admissible as long as the People independently establish a conspiracy by the close of their case *(see e.g. People v McKane,* 143 NY 455, 473 [1894] [even if the coconspirator's statements were objectionable at the time they were introduced, they were subsequently made competent by proof of the defendant's admissions that the coconspirator was acting under his orders]; *People v Becker,* 215 NY 126, 148-149 [1915])."

In *Crawford v Washington* (541 US 36, 56 [2004]), the United States Supreme Court recognized that at the time the Confrontation Clause was enacted, statements made in furtherance of a conspiracy were an established nontestimonial hearsay exception.

Consistent with *Crawford,* the Appellate Division has rejected challenges from defendants asserting that coconspirator statements introduced against them violated their right to confrontation under the United States Constitution. *(See e.g. People v Inoa,* 109 AD3d 765 [1st Dept 2013], *affd* 25 NY3d 466 [2015]; *People v Adames,* 53 AD3d 503 [2d Dept 2008].)

In a *pre-Crawford* decision, the Court of Appeals held that the admission of hearsay statements by an unavailable declarant pursuant to the coconspirator exception did not violate the Federal or State Constitutions' Confrontation Clause. *(People v Sanders,* 56 NY2d 51 [1982].) The *Sanders* Court also held that no reason had been advanced "which would cause us to recognize a State constitutional right of confrontation broader than the Sixth Amendment guarantee as interpreted by the Supreme Court." *(Id.* at 64-65.) The *Sanders* Court then applied the applicable federal standard for admission of a coconspirator statement when the declarant was unavailable; namely, that there must be some indicia of reliability of the proffered statement.

After *Sanders* and before *Crawford,* the United States Supreme Court declined to require a showing of the declarant's unavailability *(see United States v Inadi,* 475 US 387 [1986]), or "independent indicia of reliability" *(see Bourjaily v United States,* 483 US 171, 182 [1987]) as prerequisites to the admission of a coconspirator statement.

Thereafter, the Appellate Division, First Department expressed concern about the reliability of coconspirator statements in light of the "combined effect of *Inadi* and *Bourjaily." (People v Persico,* 157 AD2d 339, 345 [1st Dept 1990].) As a result, the First Department adopted the *Sanders* test as a matter of state constitutional law. In the words of the *Persico* court: "If the declarant is available,

he or she will testify and the hearsay will be admitted. If the declarant is unavailable, the hearsay will be admitted anyway, provided it is reliable." *(Id.* at 349.)

The Court of Appeals has never expressly considered whether the Confrontation Clause of the New York Constitution requires that the coconspirator statement must be shown to be reliable if the declarant is unavailable; however, in *People v James* (93 NY2d 620 [1999]), decided after *Persico,* the Court cited with approval the United States Supreme Court's holding in *Bourjaily,* that " `a court need not independently inquire into . . . reliability' " of a coconspirator statement before admitting it into evidence. *(James,* 93 NY2d at 634.)

Subdivision (2) is derived from *People v Caban* (5 NY3d at 149 [2005] ["with respect to the conspiracy charge, Garcia's acceptance of defendant's solicitation to murder Ortiz was relevant not for its truth, but rather as evidence of an agreement to commit the underlying crime—itself an essential element of the crime of conspiracy. In other words, whether or not Garcia in fact killed Ortiz, his acceptance of defendant's invitation to do so was a verbal act which rendered defendant and his coconspirators culpable for the inchoate crime of conspiracy, even if the planned substantive crime never came to fruition"]).

Subdivision (3) is derived from *People v Fiore* (12 NY2d 188, 200 [1962] [" `When a conspiracy is shown, or evidence on the subject given sufficient for the jury, then the acts and declarations of the conspirators, in furtherance of its purpose and object, are competent, and in a case like this it is not necessary, in order to make such proof competent, that the conspiracy should be charged in the indictment' " (citations omitted)]).

8.11. Statement Against Penal or Pecuniary Interest

(1) A statement made by a declarant based upon personal knowledge which at the time of its making the declarant knew was contrary to the declarant's pecuniary or proprietary interest, or tended to subject the declarant to criminal liability, is admissible, provided the declarant is unavailable as a witness.

(2) Notwithstanding subdivision (1), in a criminal proceeding:

(a) where the statement is testimonial, such as a plea allocution, it is not admissible against a defendant;

(b) where the statement is not testimonial and tends to expose the declarant to criminal liability and is offered against the defendant, the statement is admissible only as to that part which is disserving to the declarant and when evidence independent of the statement establishes that the statement was made under circumstances which render it highly probable that it is truthful; and

(c) where a statement tends to expose the declarant to criminal liability and is offered to exculpate the defendant, the statement is admissible only when evidence independent of the statement establishes a reasonable possibility that the statement might be true.

Note

Subdivision (1). Subdivision (1) is derived from Court of Appeals decisions which have created a hearsay exception, "declarations against interest," for certain statements that are disserving to the declarant at the time they were made. *(See People v Brown,* 26 NY2d 88, 91 [1970]; *Kittredge v Grannis,* 244 NY 168, 175 [1926].) The particular interests specified are ones identified by the Court. *(See Kittredge v Grannis,* 244 NY at 175 [pecuniary]; *Lyon v Ricker,* 141 NY 225, 231 [1894] [proprietary]; *People v Brown,* 26 NY2d 88 [1970], *supra* [penal].) As to

the knowledge element, the Court of Appeals has insisted that to invoke the exception there must be a showing that the declarant had to have been aware at the time the statement was made that it was against interest. *(See e.g. People v Maerling,* 46 NY2d 289, 298 [1978] ["the declarant must actually be conscious of the adversity" and "the knowledge of the facts on which its adversity hangs and the awareness of the adversity must act on one another and therefore must be contemporaneous"].) The declarant's awareness that the statement was against his or her interest may be proved directly or inferred from the "nature of the adverse matter declared and its relationship to the declarant." *(Maerling,* 46 NY2d at 298.)

In *People v Brown* (26 NY2d at 93), the Court of Appeals held that unavailability of the declarant must be established before a declaration against interest can be admitted and that unavailability may be established by the declarant's death, absence beyond the jurisdiction, or privileged refusal to testify. However, the decision does not preclude the recognition of other grounds of unavailability for the exception.

Subdivision (2) (a). Subdivision (2) (a) is derived from *People v Hardy* (4 NY3d 192 [2005]) and *People v Douglas* (4 NY3d 777 [2005]) where the Court held that, in light of *Crawford v Washington* (541 US 36 [2004]), it was error to admit against the defendant on trial a declaration against penal interest set forth in the declarant's plea allocution.

Subdivision (2) (b). Subdivision (2) (b) is derived from *People v Brensic* (70 NY2d 9 [1987]) wherein the Court stated "the trial court must determine, by evaluating competent evidence independent of the declaration itself, whether the declaration was spoken under circumstances which render it highly probable that it is truthful" *(id.* at 14-15); and "[i]f the court decides to allow such evidence, it should admit only the portion of that statement which is opposed to the declarant's interest since the guarantee of reliability contained in declarations against penal interest exists only to the extent the statement is disserving to the declarant" *(id.* at 16).

Subdivision (2) (c). Subdivision (2) (c) is derived from *People v Settles* (46 NY2d 154, 168, 169-170 [1978]), wherein the Court of Appeals stated that "there must be some evidence, independent of the declaration itself . . . [which] establishes a reasonable possibility that the statement might be true." See also *People v Soto* (26 NY3d 455, 457 [2015]) reaffirming *Settles* ("The central issue in this case is whether an unavailable witness's statement to a defense investigator—that she, not defendant, was the driver at the time of the accident and that she fled the scene—should have been admitted as a declaration against interest. Because the witness was aware at the time she made the statement that it was against her interest, the four prongs of the test described in *People v Settles* [46 NY2d 154 (1978)] were met and the statement should have been admitted as a declaration against interest").

8.13. Declaration of Future Intent

(1) Where an out-of-court statement of a declarant describes the declarant's then-existing intent and is offered to prove subsequent conduct, it is admissible as follows:

(a) A declarant's out-of-court statement of an intention to engage in particular conduct is admissible to prove that the declarant engaged in that conduct, provided there is independent evidence of the statement's reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and independent evidence that the declarant was at least likely to have engaged in that conduct.

(b) Where the statement also indicates an intention to engage in particular conduct with another person, such statement is admissible to prove that such other person engaged, in fact, in the conduct:

(i) if the declarant is unavailable;

(ii) if the statement of the declarant's intent unambiguously contemplated some future action by the declarant, either jointly with the non-declarant or which required the non-declarant' s cooperation for its accomplishment;

(iii) to the extent that the declaration expressly or impliedly refers to a prior understanding or arrangement with the non-declarant, it must be inferable under the circumstances that the understanding or arrangement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and

(iv) if there is independent evidence of reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and evidence that the intended future acts were at least likely to have actually taken place.

Note

This rule addresses specifically the situation where a statement of the declarant's then-existing intent, which is admissible under the exception set forth in Guide to New York Evidence rule 8.39, is offered as proof of subsequent conduct. It encompasses the doctrine as set forth in *Mutual Life Ins. Co. v Hillmon* (145 US 285 [1892]). The United States Supreme Court noted in *Hillmon* that a declarant's statements of current intent were admissible to show that the intended act occurred.

Subdivision (1) (a) is derived from several Court of Appeals decisions which followed *Hillmon.* In these decisions, the Court held that where the statement of current intent by the declarant is offered as proof that the declarant performed the intended act, the statement is admissible for that purpose. *(See e.g. Crawford v Nilan,* 289 NY 444, 448-449 [1943]; *People v Conklin,* 175 NY 333, 342 [1903].) The foundation for admissibility is derived from *People v James* (93 NY2d 620, 634-635 [1999]).

Subdivision (1) (b) is taken verbatim from *People v James* (93 NY2d at 634-635). Following dictum in *Hillmon,* the Court of Appeals held a declarant's statement of intent to participate in conduct with another person is admissible to prove that the other person engaged in the intended conduct, provided the four conditions in the rule were satisfied.

8.15 Dying Declaration'

In a prosecution for homicide, a statement of the deceased is admissible when it is based upon personal knowledge made by a declarant in extremis, while under a sense of impending death with no hope of recovery, concerning the cause or circumstances of the deceased's impending death.

Note

This rule is derived from *People v Nieves* (67 NY2d 125, 131-134 [1986]); *People v Allen* (300 NY 222, 227 [1949]); *People v Ludkowitz* (266 NY 233, 238-239 [1935]); and *People v Becker* (215 NY 126, 145-146 [1915]).

As noted in these decisions, the key elements for its invocation are that the declarant be "in extremis" *and* is conscious of "impending death without hope of recovery." These elements are to be strictly construed. *(See People v Nieves,* 67 NY2d at 133; *People v Liccione,* 63 AD2d 305, 316 [4th Dept 1978, Simons, J.], *affd* 50 NY2d 850 [1980] [exception applied with "great care"]; *People v Kraft,* 148 NY 631, 634 [1896] [dying declaration is not regarded "as of the same value and weight as the evidence of a witness given in a court of justice"].) Additionally, the exception encompasses only those statements that relate to the cause or circumstances of the declarant's death. *(See People v Smith,* 172 NY 210, 242-243 [1902] ["dying declarations are admissible . . . only (as to) the circumstances of the death . . . , and . . . they may not properly include narratives of past occurrences"].)

Where the statement is nothing more than the declarant's speculation concerning the cause of the declarant's impending death, it is not admissible. *(See People v Gumbs,* 143 AD3d 403, 404 [1st Dept 2016] [The trial "court erred in admitting, as dying declarations, the victim's statements implicating defendants, since they were his `mere expression of belief and suspici(ons)' that defendants were involved in his shooting rather than `statements of facts to which a living witness would have been permitted to testify, if placed upon the stand' *(People v Shaw,* 63 NY 36, 40 [1875])"]; *see also People v Liccione,* 63 AD2d at 319-320, citing to *Shepard v United States,* 290 US 96, 101 [1933, Cardozo, J.].)

Historically, the exception has been limited to a prosecution for a homicide. *(See People v Becker,* 215 NY at 145 [noting that the Court had held "that dying declarations were admissible in cases of homicide only, where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations"].) *Becker* added that such restriction was "so clearly established," that any expansion of the exception would require legislative action. *(Id.)* In other jurisdictions, the exception has been

expanded to encompass civil actions and to non-homicide prosecutions. *(See e.g.* Fed Rules Evid rule 804 [b] [2] [homicide and civil cases]; Cal Evid Code § 1242 [all cases]; Colo Rev Stat § 13-25-119 [all cases]; Fla Evid Code § 90.804 [2] [b] [all cases]; Ind Rules Evid rule 804 [b] [2] [all cases]; NJ Rules Evid rule 804 [b] [2] [all criminal cases].)

In *Crawford v Washington* (541 US 36, 56 n 6 [2004]), the United States Supreme Court left open the issue of the effect, if any, of its Confrontation Clause holding upon the dying declaration exception. The Appellate Division, Second Department has held that the United States Supreme Court would likely determine that the Confrontation Clause incorporates an exception for testimonial dying declarations and so held. *(People v Clay,* 88 AD3d 14 [2d Dept 2011].) The vast majority of courts in other jurisdictions have reached the same conclusion. *(See Bishop v State,* 40 NE3d 935 [Ind Ct App 2015] [collecting cases].)

In any event, the Criminal Jury Instructions recognize that a dying declaration "is not always true," and instruct a jury that a dying declaration "be carefully evaluated, and further that such testimony not be accorded the same value and weight as the testimony of a witness, given under oath, in open court, and subject to cross-examination." (CJI2d[NY] General Applicability, Evidence: Dying Declaration.)

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[1] In June 2022, the Note was amended to add the last paragraph.

8.17. Excited Utterance [1]

A statement about a startling or exciting event made by a participant in, or a person who personally observed, the event is admissible, irrespective of whether the declarant is available as a witness, provided the statement was made under the stress of nervous excitement resulting from the event and was not the product of studied reflection and possible fabrication.

Note

This rule is derived from the formulations of the exception as stated by the Court of Appeals. *(See e.g. People v Johnson,* 1 NY3d 302, 306 [2003] ["An out-of-court statement is properly admissible under the excited utterance exception when made under the stress of excitement caused by an external event, and not the product of studied reflection and possible fabrication"]; *People v Brown, 70* NY2d 513, 518 [1987] ["An excited utterance is one made "under the immediate and uncontrolled domination of the senses and during the brief period when consideration of self-interest could not have been brought fully to bear by reasoned reflection"]; *People v Nieves,* 67 NY2d 125, 135 [1986] ["Statements within this exception are generally made contemporaneously or immediately after a startling event which affected or was observed by the declarant, and relate to the event. The essential element of the exception is that the declarant spoke while under the stress or influence of the excitement caused by the event, so that his reflective capacity was stilled. An utterance made `as a direct result of sensory perception during that brief period when considerations of self-interest cannot be immediately brought to bear' is deemed sufficiently trustworthy to be admitted into evidence as an expression of the true belief of the declarant with respect to the facts observed" (citations omitted)]; *People v Edwards,* 47 NY2d 493, 496-497 [1979] [referring to exception as "excited utterance" and observing that underlying it "is the assumption that a person under the influence of the excitement precipitated by an external startling event will lack the reflective capacity essential for fabrication"; encompasses statement "which asserts the circumstances of (the) occasion as observed by the declarant"]; *People v Caviness,* 38 NY2d 227, 230-231 [1975] ["spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation, are admissible as true exceptions to the hearsay rule"; Court also rejected decisions that excluded declarations by bystanders].)

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[1] In May 2018, this rule was revised to substitute the words "a person who personally observed" the event for the words "a bystander to" the event to better reflect the need for the "bystander" to have personally observed the incident, as explained in the Note, and as emphasized by the Court of Appeals in *People v Cummings,* 31 N.Y.3d 204 (May 8, 2018).

The Court of Appeals has cautioned that "it must be inferable that the declarant had an opportunity to observe personally the event described in the declaration . . . ." *(People vFratello,* 92 NY2d 565, 571 [1998].) Overall, the Court has instructed that

> "[t]he admissibility of an excited utterance is entrusted in the first instance to the trial court. In making that determination, the court must ascertain whether, at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of studied reflection." *(People v Edwards,* 47 NY2d at 497.)

With respect to the difference between the "excited utterance" exception and its "close relative" the "present sense impression" exception, the Court of Appeals has explained:

> " `Excited utterances' are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative. `Present sense impression' declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant' s excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability Thus, while the key components of `excited utterances' are their spontaneity and the declarant's excited mental state, the key components of `present sense impressions' are contemporaneity and corroboration." *(People v Vasquez,* 88 NY2d 561, 574-575 [1996] [citations omitted].)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be "testimonial." *(But see People v Nieves-Andino,* 9 NY3d 12 [2007] [as police officer reasonably assumed that there was an ongoing emergency, the victim's responses to the officer's inquiries were nontestimonial and were admissible as excited utterances]; *People v Bradley,* 8 NY3d 124 [2006] [admission into evidence of a statement as an excited utterance was not barred by the Confrontation Clause as it was not testimonial because it was made in response to

a question from a police officer and the officer's evident reason for asking the question was to deal with an emergency].)

8.19. Forfeiture By Wrongdoing

Where a witness in a proceeding is unwilling to testify or testify to the full extent of the witness's knowledge, a party forfeits the right to preclude that witness's prior out of court statement(s) as hearsay or on the ground that the party will be denied the right to confront the witness, if the party offering the statement proves by clear and convincing evidence that: (a) the opposing party, personally or with the aid of others, engaged or acquiesced in misconduct aimed at least in part at preventing the witness from testifying, and (b) such misdeeds were a significant cause of the witness's decision not to testify or testify fully.

Note

This rule is derived from the Court of Appeals recent decisions in *People v Dubarry* (25 NY3d 161, 174-175 [2015]) and *People v Smart* (23 NY3d 213, 219-220 [2014]), which in turn were derived from several prior decisions of the court.

In *People v Geraci* (85 NY2d 359 [1995]), the court held that forfeiture requires a showing that the witness's unavailability was procured by misconduct and noted such a showing had traditionally required that the defendant procured the witness's unavailability through "violence, threats or chicanery." *(Id.* at 365-366.) In *Dubarry* and *Smart,* the court stated the rule as requiring that the defendant engaged in "misconduct" or "misdeeds" aimed at least in part at preventing the witness from testifying and that defendant's misconduct was a significant cause of the witness's decision not to testify. *(People v Dubarry,* 25 NY3d at 176, quoting *People v Smart,* 23 NY3d at 220.) These recent holdings introduced more precise evidentiary standards to the procured by misconduct rule. This language, read literally, also includes misdeeds other than "violence, threats or chicanery." The Court of Appeals, however, has never indicated that misconduct beyond these three kinds of behaviors would qualify for forfeiture. *(See also People v Cotto,* 92 NY2d 68 [1998]; *People v Johnson,* 93 NY2d 254 [1999]; *People v Maher,* 89 NY2d 456, 461-463 [1997].)

The forfeiture of confrontation rights " `constitutes a substantial

deprivation' " *(People v Johnson,* 93 NY2d at 258, quoting *People v Geraci,* 85 NY2d at 367), and the clear and convincing evidence requirement places a "heavy burden" on the statement's proponent *(People v Cotto,* 92 NY2d at 76). Forfeiture is a "narrow departure from the hearsay rule." *(People v Maher,* 89 NY2d at 461.) Where the statement's proponent alleges "specific facts which demonstrate a `distinct possibility' that a criminal defendant has engaged in witness tampering," the court must conduct an evidentiary hearing, known as a *Sirois* hearing *(see Matter of Holtzman v Hellenbrand,* 92 AD2d 405 [2d Dept 1983]), to determine if forfeiture should be invoked. *(People v Johnson,* 93 NY2d at 258, quoting *People v Cotto,* 92 NY2d at 72.) Because of the inherently surreptitious nature of witness tampering, circumstantial evidence may be used to establish, in whole or in part, that a witness's unavailability was procured by the defendant. *(People v Geraci,* 85 NY2d at 369.)

The Court of Appeals has expressly stated that this forfeiture rule is not limited to admitting prior grand jury testimony of an intimidated witness and may encompass other out-of-court statements made by an intimidated witness. *(People v Cotto,* 92 NY2d at 77.) However, the court has cautioned that any statement sought to be admitted pursuant to it "cannot be so devoid of reliability as to offend due process." *(Id.* at 78.)

The Court of Appeals has noted that when an out-of-court statement is admitted pursuant to this rule, the trial court has the discretion to admit additional out-of-court statements of the unavailable witness for impeachment where there is a possibility that, if such impeachment is not allowed, the factfinder will be misled into giving too much weight to the initially offered statement. *(People v Bosier,* 6 NY3d 523, 528 [2006].) However, the court has cautioned that impeachment need not always be allowed. In this connection, the court emphasized that the trial court in exercising that discretion shall consider that the party offering the impeaching statement may benefit from his own wrongful conduct because the party proffering the initial out-of-court statement will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent impeachment evidence. *(Id.* ["Where impeachment is permitted, the defendant, in direct contravention of the most basic legal principles and the policy objectives of *Geraci,* may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered by the defendant"].) In *Bosier,* the court rejected the defendant's impeachment attempt, commenting that since "the inconsistency defendant relied on did not go to the heart of the prosecution's case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence." *(Id.)*

While the forfeiture rule has arisen in criminal cases, there is no indication

in the case law that the rule is not applicable in civil actions when a party seeks to introduce a statement of an intimidated witness over a hearsay objection.

8.21. Hearsay or Nonhearsay Within Hearsay

An out-of-court statement that is included within an otherwise admissible statement is itself admissible: (a) where it is offered to prove the truth of its contents and the included statement meets the requirements of an exception to the hearsay rule; or (b) it includes a statement made by a declarant that is not offered for its truth.

Note

The Court of Appeals has addressed proffers of evidence which involve a declarant's out-of-court statement which contains another out-of-court statement. In that instance, the Court admits evidence consisting of multiple layers of out-of-court statements provided each such layer overcomes a hearsay exception or is not offered for its truth. *(See People v Ortega,15* NY3d 610, 620-621 [2010] [Smith, J., concurring] [discussing the "hearsay within hearsay" rule in relation to the admissibility of a hospital record that was admissible as an exception to the hearsay rule as well as the statements of crime victims contained in the hospital record].) In essence, the Court has recognized that the hearsay rule should not exclude an out-of-court statement which includes another out-of-court statement when each part of the combined statements is separately admissible.

For example, in *People v Patterson* (28 NY3d 544 [2016]), the police obtained the phone number of Patterson' s accomplice and then acquired from the provider of the phone service a record of the phone numbers of calls made to that phone during the period of the crime and the subscriber information associated with those calls. The last name of the subscriber and other information pointed to defendant Patterson as the subscriber. It was accepted that the log of the phone call numbers received by the accomplice was a business record and thus admissible for its truth. The subscriber information was not admissible for its truth "because the subscriber was not under a duty to report his or her `pedigree' information correctly when activating the prepaid cell phone accounts" *(id.* at 550). The Court of Appeals, however, held that the subscriber information was admissible for a nonhearsay purpose, namely, it was admissible not for the truth of who the subscriber and caller was, but that someone (not necessarily the defendant) had supplied certain pedigree information in subscribing to the phone service. The People were then able to couple that pedigree information with other evidence which tended to confirm that the defendant was the subscriber and caller.

By contrast, in *Flynn v Manhattan & Bronx Surface Tr. Operating Auth.* (61 NY2d 769, 770-771 [1984]) a police officer testified as to what a bus driver told him about what he, the bus driver, had heard from a passenger. That testimony "was double hearsay," i.e., passenger to bus driver and bus driver to police officer, and was inadmissible because the statement of the passenger did not fit within any of the exceptions to the hearsay rule *(id.* at 771).

The presence of multiple out-of-court statements frequently occurs in records of regularly conducted activities. In *Patterson,* the Court set forth with approval examples of such cases:

> *"Splawn v Lextaj Corp.,* 197 AD2d 479, 480 [1st Dept 1993], *lv denied* 83 NY2d 753 [1994] [hotel logbook entries reporting burglaries not admissible to prove the crimes occurred but permitted to show hotel had notice of activity]; *People v Blanchard,* 177 AD2d 854, 855 [3d Dept 1991], *lv denied* 79 NY2d 918 [1992] [police blotter entry showing phone call made by someone purporting to be defendant's father properly received not for its truth, but to impeach father, who testified that he did not make the call]; *Donohue v Losito,* 141 AD2d 691, 691-692 [2d Dept 1988], *lv denied* 72 NY2d 810 [1988] [portion of police report indicating trial witness stated that defendant had punched plaintiff in the face not admissible for its truth under CPLR 4518, but admissible to impeach witness]" *(Patterson,* 28 NY3d at 551).

(See also e.g. Ortega, 15 NY3d 610 [hospital record which may contain a patient's statement]; *Cover v Cohen,* 61 NY2d 261, 274 [1984] [police accident report which may contain statements of those involved in an accident]; *Matter of Leon RR,* 48 NY2d 117, 123 [1979] [social service department reports which may contain statements of those involved in the services being provided].)

In sum, a hearsay statement, admissible under an exception, may contain several out-of-court statements. Theoretically, under the rule such a statement is admissible, provided each statement conforms to an exception or is offered for a non-truth purpose, as the rule contains no limit. However, the trial court has the discretion to exclude an otherwise admissible statement with multiple out-of-court statements upon a determination that the statement with so many layers of other statements is unreliable, or gives rise to confusion, or is otherwise more prejudicial than probative.

8.22. Impeachment of Hearsay Declarant

(1) Except as provided in subdivision two, when hearsay evidence has been admitted, the credibility of the declarant may be impeached by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The admission of that impeachment evidence is accordingly not conditioned on affording the declarant an opportunity to deny or explain.

(2) When hearsay evidence is admitted pursuant to rule 8.19, the trial court may in its discretion preclude evidence of impeachment. The court may consider, on the one hand, the possibility that, if impeachment is not allowed, the jury will be misled into giving too much weight to the hearsay evidence and, on the other hand, that the party against whom the hearsay evidence is offered may unfairly benefit from the party's own wrongful conduct because the opposing party will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered as impeaching evidence.

Note

Subdivision (1), first sentence, is derived from Court of Appeals case law, which uniformly recognizes the rule stated therein. *(See People v Fratello,* 92 NY2d 565, 572 [1998], *cent den* 526 US 1068 [1999]; *Matter of Hesdra,* 119 NY 615 [1890].) The second sentence restates recent authority addressing this point. *(See Lawton v Palmer,* 126 AD3d 945 (2d Dept [2015]; *People v Conde,* 16 AD2d 327, 331-332 [3d Dept 1962], *affd* 13 NY2d 939 [1963].)

Subdivision (2) applies when the hearsay statements are admitted because of the defendant's forfeiture of the right to exclude them *(see* Guide to NY Evid rule 8.19) and is derived from *People v Bosier* (6 NY3d 523, 528 [2006] ["(W)e do not hold that such a defendant (who tampered with a witness) should never be able to introduce the unavailable witness's out-of-court statements for impeachment purposes. The trial judge has discretion to permit such impeachment where there is a possibility that, if it is not allowed, the jury will be misled into giving too much weight to the statement offered by the prosecution. But such impeachment need not always be allowed. Where impeachment is permitted, the defendant, in direct

contravention of the most basic legal principles and the policy objectives of *Geraci* (85 NY2d 359 [1995]), may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered (as impeaching evidence). Here, where the inconsistency defendant relied on did not go to the heart of the prosecution's case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence"]).

8.23. Informal and Formal Judicial Admissions

(1) Informal Judicial Admissions.

(a) A statement made in the course of any judicial proceeding (whether in the same or another case) by a party or, in accord with paragraph (b), the party's attorney, that is inconsistent with the position the party now assumes is admissible as an "informal judicial admission" that constitutes evidence (not conclusive evidence) of the fact(s) admitted.

(b) For a statement of a party's attorney to be admitted as an informal judicial admission, the proponent must show that the attorney is the authorized agent of the client, that the client is the source of the statement, and that the client expressly or impliedly waived the attorney-client privilege.

(2) Formal Judicial Admissions.

An act of a party done in the course of a judicial proceeding that dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary is admissible as a "formal judicial admission." A formal judicial admission is conclusive of the fact(s) admitted in the action in which the admission is made.

Note

Introduction

The language of the rule is derived from *People v Brown* (98 NY2d 226 [2002]), although the rule applies in civil cases as well. *(Kimso Apts., LLC v Gandhi,* 24 NY3d 403, 412 [2014]; *Matter of Union Indem. Ins. Co. of N.Y.,* 89 NY2d 94, 99, 103 [1996].)

Brown summarized the differences between an "informal" and "formal" judicial admission as follows:

> "An `informal judicial admission is a declaration made by a party in the course of any judicial proceeding (whether in the same or another case) inconsistent with the position [the party] now assumes' (Fisch, New York Evidence § 803, at 475 [2d ed]). Such an admission is `not conclusive on the defendant in the litigation' *(People v Rivera,* 45 NY2d [989,] 991 [1978]) but `is merely evidence of the fact or facts admitted' (Prince, Richardson on Evidence § 8-219, at 530 [Farrell 11th ed]). By contrast, a formal judicial admission `takes the place of evidence' and is *`conclusive* of the facts admitted in the action in which [it is] made' *(id. §* 8-215, at 523 [emphasis supplied]). `A formal judicial admission is an act of a party done in the course of a judicial proceeding, which dispenses with the production of evidence by conceding, for the purposes of the litigation, the truth of a fact alleged by the adversary' *(id.)." (Brown,* 98 NY2d at 232 n 2.)

While there is a dividing line between an "informal judicial admission" and a "formal judicial admission," as will be seen in the following comments, it is possible that a single admission may constitute both a "formal judicial admission" in one proceeding and an "informal judicial admission" in another or, in other words, an "informal judicial admission" in one proceeding may emanate from a "formal judicial admission" in another proceeding.

Informal Judicial Admissions

The foundational requirements for the introduction in evidence of an "informal judicial admission" by a party's attorney are discernable from the facts in *Brown.* In that case, during an in-court *Sandoval* hearing, the defendant's attorney, as Brown's "authorized agent," represented what the defendant would testify to at trial. Brown was present at the hearing, was the "sole source" of the attorney's statements, and the attorney-client privilege was waived given that the attorney's statements were "made on the record in open court." The attorney's statements, "which unequivocally represented to the hearing court that Brown was present at the scene only to buy drugs, were inconsistent with his trial testimony that he was at the scene for purely innocent purposes." The trial court therefore properly allowed the prosecutor to use the attorney's statements to impeach the defendant on cross-examination. *(Brown* at 232-233; *cf. People v Cassas,* 84 NY2d 718, 722-723 [1995] [the attorney's statement was inadmissible here because "the attorney's statement was oral and made out of court, to a third party," there was "nothing to suggest the attorney had authority to speak on behalf of his client," and

there was "no evidentiary record support for a finding of waiver of the (attorney-client) privilege by defendant"]; *see generally* John Brunetti, New York Confessions § 10.03 [6] [Admissions by Counsel, 2014 ed].)

Notably, in *Brown,* the attorney whose statement was used for impeachment was not then representing the defendant; in the circumstance where the attorney is representing the party, the trial court may need to grant "counsel's request to withdraw" or declare "a mistrial." *(People v Ortiz,* 26 NY3d 430, 439 [2015].)

Statements of a defendant's attorney at the defendant's arraignment may constitute an "informal judicial admission" *(see People v Gary,* 44 AD3d 416, 416 [1st Dept 2007]) and may be introduced in evidence "by way of the testimony of a court reporter." *(People v Castillo,* 94 AD3d 678, 679 [1st Dept 2012]; *People v Killiebrew,* 280 AD2d 684, 685 [2d Dept 2001] ["The attorney who represented the defendant at arraignment informed the court that the defendant `tells me that the complaining witness . . . came towards him in a very threatening manner and he thought he was going to be attacked.' The trial court (properly) ruled that the defendant could be impeached with this statement if he testified and raised a defense which was inconsistent with justification"]; *but see People v L.D.,* 60 Misc 3d 729 [Sup Ct, Bronx County 2018].)

Statements of a defendant's attorney at a bail hearing may constitute an "informal judicial admission." *(People v Johnson,* 46 AD3d 276, 278 [1st Dept 2007]; *People v Mahone,* 206 AD2d 263, 264 [1st Dept 1994].)

A plea of guilty or admission of guilt may be a "formal judicial admission" in the action where entered and is admissible as an "informal judicial admission" in a separate action. *(See Ando v Woodberry,* 8 NY2d 165, 166 [1960] [a plea of guilty to a traffic offense is admissible in a civil negligence action as evidence of the defendant's carelessness, but the defendant may submit evidence on the reason for entering the plea that may affect the weight to accord the plea]; *People v Walden,* 236 AD2d 779, 779 [4th Dept 1997] [in a prosecution for sexual abuse and endangering the welfare of a child, the defendant's admission of guilt in a parallel Family Court proceeding was properly received into evidence against the defendant].)

Similarly, an "admission in a pleading in one action is admissible against the pleader in another suit" as an "informal judicial admission," provided "that it can be shown that the facts were alleged with the pleader's knowledge or under his direction." *(Jack C. Hirsch, Inc. v Town of N. Hempstead,* 177 AD2d 683, 684 [2d Dept 1991]; *compare* CPLR 3123 [b] ["Any admission made, or deemed to be made, by a party pursuant to a request (for an admission) made under this rule is for the purpose of the pending action only and does not constitute an admission by

him for any other purpose nor may it be used against him in any other proceeding"].)

A formal judicial admission in a pleading in a civil proceeding may become an "informal judicial admission" when the pleading is amended. See the section below on Formal Judicial Admissions in a civil proceeding.

An "informal judicial admission" of a party to a judicial proceeding by the party's attorney may be used to impeach that party's testimony given as a defense witness in another case. *(People v Davis,* 103 AD3d 810, 812 [2d Dept 2013] [the People properly impeached "the testimony of a defense witness with a statement made by that witness's former counsel in his presence at a plea proceeding *(see People v Brown,* 98 NY2d 226 [2002])"].)

Statements of a defendant's attorney in an affidavit may constitute an informal judicial admission. *(See Matter of Union Indem. Ins. Co. of N.* E, 89 NY2d 94, 99, 103 [1996] [statements made by a party's outside counsel in a sworn affidavit in a related action, incorporating supporting documentation and evidence, constituted informal judicial admissions].) That informal judicial admission may be used to impeach a defendant during cross-examination; in the discretion of the court, the affidavit itself may be received in evidence solely for impeachment purposes. *(People v Rivera,* 58 AD2d 147, 148 [1st Dept 1977], *affd* 45 NY2d 989 [1978] [the trial court did not commit error when it "permitted cross-examination based on this affidavit and received the affidavit in evidence, limiting however, both the exhibit and the related cross-examination to use for impeachment of credibility only"].)

Formal Judicial Admissions

A party may admit the truth of fact(s) in issue in an action that would thereby be conclusive of the fact(s) admitted in that action. The bedrock principle behind a "formal judicial admission" is: " `A controversy put out of the case by the parties is not to be put into it by us.' " *(People v Robinson,* 284 NY 75, 81 [1940].)

Criminal proceeding

Examples of a "formal judicial admission" in a criminal proceeding are:

- The defense concession in a murder trial that the deceased had been "brutally killed," "strangled by someone," in part justified the court in denying the defendant's request to charge the jury on the need for corroboration of a confession by some proof that the

crime charged has been committed by someone. *(People v Louis,* 1 NY2d 137, 141 [1956].)

- The trial court did not err "in failing to instruct the jury that, if they found that the value of the [stolen] property was less than $100, they should find the defendant guilty of a misdemeanor" because the defendant testified and admitted in his testimony that the value exceeded $100, "thus taking the issue of value out of the case." *(People v Brady,* 16 NY2d 186, 189-190 [1965].)

- In a bribery prosecution, the defendant's "guilty connection with the crime did not extend to actual payment of the money, only to bringing about the payment[;] the issue of whether or not [the bribe giver] actually gave the money to [the bribe receiver] was taken out of the case by defense counsel's numerous concessions on this point." The concessions "relieved the prosecution of any obligation of presenting further evidence on the question on the trial even though the jury was charged that it must find that a bribe took place in order to bring in guilty verdicts on the counts in the indictment on which [the defendant] was convicted." *(People v Morhouse,* 21 NY2d 66, 75 [1967].)

Civil proceeding

In a civil proceeding: "Facts admitted in a party's pleadings constitute formal judicial admissions, and are conclusive of the facts admitted in the action in which they are made" *(GMS Batching, Inc. v TADCO Constr. Corp.,* 120 AD3d 549, 551 [2d Dept 2014]; *see Kimso Apts., LLC v Gandhi,* 24 NY3d 403, 412 [2014] [quoting *GMS Batching* in holding that as a "general matter, statements in the corporations' pleadings that they owed (appellant) the settlement money constitute formal judicial admissions . . . (and these) assertions are `conclusive upon the party making (them)' " (citations omitted)]; *Cook v Barr,* 44 NY 156, 158 [1870] ["admissions contained in the pleadings" are admissible when shown "by the signature of the party, or otherwise, that the facts were inserted with his knowledge, or under his direction, and with his sanction"]; *Roxborough Apts. Corp. v Kalish,* 29 Misc 3d 41, 42-43 [App Term, 1st Dept 2010] ["Statements made in a pleading verified by a person with personal knowledge of the content of the statements are formal judicial admissions, which dispense with the production of evidence and concede, for the purposes of the litigation in which the pleading was prepared, the truth of the statements"]; *see also* CPLR 2104 ["An agreement between parties or their attorneys relating to any matter in an action, other than one made between counsel in open court, is not binding upon a party unless it is in a writing subscribed by him or his attorney or reduced to the form of an order and entered"]).

A statement in a pleading made on personal knowledge "constitutes a formal judicial admission," and "even though [the pleading is] subject to a subsequent, valid amendment, [the statement] remains evidence of the facts admitted"—i.e., the statement then constitutes an "informal judicial admission." *(Bogoni v Friedlander,* 197 AD2d 281, 291-292 [1st Dept 1994]; *Stauber v Brookhaven Natl. Lab.,* 256 AD2d 570, 570-571 [2d Dept 1998] ["If a complaint is amended with leave of the court, any formal judicial admission deleted by the amendment is relegated to the status of an informal judicial admission which, although not conclusive, constitutes evidence of the proposition alleged"]; *Resseguie v Adams,* 55 AD2d 698, 699 [3d Dept 1976], *affd on mem below sub nom. Locator Map v Adams,* 42 NY2d 1022 [1977] ["Even if a valid amendment of defendants' pleadings were made, the admissions are still evidence of the facts admitted"].)

A party cannot be charged with a "formal judicial admission" based on inconsistent pleadings which are authorized by law *(Scolite Intl. Corp. v VincentI. Smith, Inc.,* 68 AD2d 417, 421 [3d Dept 1979]).

Statements made in a pleading "on information and belief' do not constitute a "formal judicial admission." *(Empire Purveyors, Inc. v Weinberg,* 66 AD3d 508, 509 [2009]; *Scolite Intl. Corp. v Vincent J. Smith, Inc.* at 421; *but see Ficus Invs., Inc. v Private Capital Mgt., LLC,* 61 AD3d 1, 11 [2009].)

A "concession arguendo contained in a brief on a motion for summary judgment is not a formal judicial admission." *(1014 Fifth Ave. Realty Corp. v Manhattan Realty Co.,* 67 NY2d 718, 720 [1986].)

By statute, certain conduct generally directed to a settlement of an action "shall not be made known to the jury." (CPLR 3219 [Tender (of an amount deemed by party to be sufficient to satisfy the claim asserted against the party)]; 3220 [Offer to liquidate damages conditionally]; 3221 [Offer to compromise].)

8.24 Market Reports (CPLR 4533)

A report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or in an official publication or trade journal is admissible in evidence to prove the market price or value of any article regularly sold or dealt in on such market. The circumstances of the preparation of such a report may be shown to affect its weight, but they shall not affect its admissibility.

Note

This rule restates verbatim CPLR 4533. It sets forth a hearsay exception for a report of a regularly organized stock or commodity market published in a newspaper or periodical of general circulation or an official publication or trade journal when offered to prove the price or value of any article regularly sold or dealt in on such market.

"Reports of stock and commodity market prices . . . are considered trustworthy because members of the public generally rely upon them and the persons who compile the figures that go into the reports are motivated to be accurate in order to maintain such reliance" (Vincent C. Alexander, Practice Commentaries, McKinney' s Cons Laws of NY, Book 7B, CPLR 4533).

Thus, there is no requirement that the report be shown to have been accurately compiled or that the report is considered authoritative before it may be admitted. Evidence of the circumstances of the report's preparation, however, is admissible to affect the weight to be given to the report by the trier of fact. (CPLR 4533 [last sentence]; *see Auld v Estridge,* 86 Misc 2d 895, 907 [Sup Ct, Nassau County 1976] [finding reports of the National Quotation Bureau showing the value of over-the-counter stock to be admissible pursuant to CPLR 4533, albeit they had "only small probative force"], *affd* 58 AD2d 636 [2d Dept 1977].)

When the report is published in a newspaper or periodical of general circulation, a separate foundation for the "authenticity" of the report is not necessary as the report will be deemed self-authenticating (CPLR 4533; Guide to NY Evid rule 9.03 [4]).

8.25. Past Recollection Recorded

A memorandum or record made or adopted by a witness concerning a matter about which that witness had knowledge, but about which the witness lacks sufficient present recollection to enable the witness to testify fully and accurately, even after reading the memorandum or record, is admissible, provided: (a) the memorandum or record was made or adopted by the witness when the matter was fresh in the witness's memory and (b) the witness testifies that the memorandum or record correctly represented the witness's knowledge and recollection when made.

Note

This rule is derived from *People v Taylor* (80 NY2d 1, 8 [1992] ["(A) memorandum made of a fact known or an event observed in the past of which the witness lacks sufficient present recollection may be received in evidence as a supplement to the witness's oral testimony. The requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information" (citations omitted)]; *see also People v Tapia,* 33 NY3d 257 [2019] [a witness's prior grand jury testimony was properly admitted as past recollection recorded]; *People v Caprio,* 25 AD2d 145, 150 [2d Dept 1966], *affd* 18 NY2d 617 [1966]; *Halsey v Sinsebaugh,* 15 NY 485 [1857]). Once admitted, the "witness' testimony and the writing's contents are to be taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge" *(Taylor* at 9).

Tapia also held that the admission of a past recollection document did not violate the Sixth Amendment's right of confrontation:

> "Significantly, the right to confrontation guarantees not only the right to cross-examine all witnesses, but also the ability to literally confront the witness who is providing testimony against the accused in a face-to-face encounter before the trier of fact . . . . The Confrontation Clause is satisfied when these requirements are fulfilled—even if the witness's memory is faulty. . . . In *[United States v] Owens* [(484 US 554 [1988])], the Court held that [t]he Confrontation Clause guarantees only an *opportunity* for effective cross-examination, not cross-examination that is effective in

whatever way, and to whatever extent, the defense might wish' (484 US at 559 [internal quotation marks and citations omitted]). To that end, [i]t is sufficient that the defendant has the opportunity to bring out such matters as the witness' bias, his lack of care and attentiveness, his poor eyesight, and even (what is often a prime objective of cross-examination), . . . the very fact that he has a bad memory' (484 US at 559 . . .). [T]he Clause's ultimate goal is to ensure reliability of evidence, but it is a procedural rather than a substantive guarantee. It commands, not that evidence be reliable, but that reliability be assessed in a particular manner: by testing in the crucible of cross-examination' *(Crawford v Washington,* 541 US 36, 61 [2004])." *(Tapia,* 33 NY3d at 269-270.)

8.27. Statement of Pedigree

(1) An out-of-court statement by a declarant concerning the declarant's or another person's birth, adoption, death, lineage, marriage, legitimacy or other relationship between or among family members or other similar fact of personal or family history, made before the controversy, is admissible even though the declarant had no means of acquiring personal knowledge of the matter stated, provided that the relationship of the declarant with the family is established by some proof independent of the declaration itself, and the declarant is not available as a witness.

(2) A statement admissible under this exception may be in any form.

(3) A witness may testify to his or her own pedigree.

Note

Subdivision (1). Pedigree means the history of family descent that is transmitted from one generation to another and encompasses such matters as birth, descent, marriage, death and relationship. Pedigree declarations "extend to any inquiry necessarily involving these events, or which tend to show that either, some or all of them took place or did not." *(Washington v Bank for Say. in City of N.Y.,* 171 NY 166, 175 [1902].)

Pedigree declarations are "a well known and recognized exception to the general rule excluding hearsay evidence." *(Eisenlord v Clum,* 126 NY 552, 563 [1891].) They are "admitted on the principle that they are the natural effusions of persons who must know the truth and who speak on occasions when their minds stand in an even position without any temptation to exceed or fall short of the truth." *(Aalholm v People,* 211 NY 406, 412 [1914].) The exception encompasses statements by a declarant concerning his or her personal family history or another's personal or family history.

The formulation of the rule is based on the decisional law of the Court of Appeals. Thus, the Court has held that

- a pedigree declaration must have been made before the controversy giving rise to the action *(Aalholm,* 211 NY at 412-413; *Young v Shulenberg,* 165 NY 385, 388 [1901]);

- the declaration to be admissible "need not be upon the knowledge of the declarant" *(Eisenlord,* 126 NY at 564); and

- "[t]he declarant must be related either by blood or affinity to the family concerning which he speaks" *(Aalholm,* 211 NY at 413).

The Court of Appeals has emphasized as an "important qualification" to the exception that, "before a declaration can be admitted in evidence, the relationship of the declarant with the family must be established by some proof independent of the declaration itself," although proof of the family relationship may be "slight." *(Aalholm,* 211 NY at 414-415; *Young,* 165 NY at 388 [" `slight proof of the relationship will be required, since the relationship of the declarant with the family might be as difficult to prove as the very fact in controversy' " (citation omitted)].)

As to unavailability of the declarant, the Court of Appeals has recognized three grounds: death, incompetency, and absence beyond the jurisdiction. *(See Young,* 165 NY at 388.) *Young* does not indicate whether these are the only grounds of unavailability that are recognized for this hearsay exception or whether other grounds might be acceptable.

Subdivision (2) is derived from the numerous decisions in which this exception was in issue. *(See Aalholm,* 211 NY at 412 [oral statements]; *Young,* 165 NY at 388 [deeds and immigration acknowledgment before a United States minister]; *Matter of Whalen,* 146 Misc 176, 189 [Sur Ct, NY County 1932] [statements made "in a family bible, inscriptions on tombstones, etc."].)

Subdivision (3) is derived from *Koester v Rochester Candy Works* (194 NY 92, 97 [1909] [witness competent to testify to his or her own age]) and *People v Lewis* (69 NY2d 321, 324 [1987] [witness permitted to testify that defendant was her father]).

8.29. Present Sense Impression

A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition as it was unfolding or immediately thereafter is admissible, irrespective of whether the declarant is available to testify, provided that there is evidence, independent of the statement, that supports: (a) the accuracy of the contents of the statement and (b) that the statement was made contemporaneously with the event or immediately thereafter.

Note

This formulation of the present sense impression hearsay exception is primarily derived from *People v Brown* (80 NY2d 729, 734-735, 737 [1993]), wherein the Court of Appeals recognized the exception:

> "[W]e hold that spontaneous descriptions of events made substantially contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence. Further, such statements may be admitted even though the declarant is not a participant in the events and is an unidentified bystander . . .
>
> "What corroboration is sufficient will depend on the particular circumstances of each case and must be left largely to the sound discretion of the trial court. But before present sense impression testimony is received there must be some evidence in addition to the statements themselves to assure the court that the statements sought to be admitted were made spontaneously and contemporaneously with the events described."

(See People v Cantave, 21 NY3d 374, 382 [2013]). *Brown* requires that the present sense impression statement must be made while the declarant was observing the event as it was unfolding or "immediately thereafter." The statements at issue in *Brown* were "contemporaneous reports of events then being observed by the [declarant]" *(People v Brown,* 80 NY2d at 732), and thus the Court had no occasion to discuss what it meant by "immediately thereafter."

The Court had that opportunity in *People v Vasquez* (88 NY2d 561, 575 [1996]):

> "The . . . language ['or immediately thereafter'] . . . was meant to suggest only that the description and the event need not be precisely simultaneous, since it is virtually impossible to describe a rapidly unfolding series of events without some delay between the occurrence and the observer's utterance. The language in question was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded. Indeed, we noted in *Brown* that the description of events must be made `substantially contemporaneously' with the observations *(id,* at 734).
>
> "Thus, although we recognize that there must be some room for a marginal time lag between the event and the declarant's description of that event, that recognition does not obviate the basic need for a communication that reflects a *present* sense impression rather than a recalled or recast description of events that were observed in the recent past. Without satisfaction of this requirement, the essential assurance of reliability—the absence of time for reflection and the reduced likelihood of faulty recollection—is negated and there is then nothing to distinguish the declaration from any other postevent out-of-court statement that is offered for the truth of its contents."

The Court then found that the 911 call by defendant was not admissible under the exception as it was "after the entire sequence of events had come to a final and fatal end and defendant had run from the crime scene. At that point, it could no longer be said that defendant's statements were a description of his `present sense impressions' as his observations were made" *(People v Vasquez,* 88 NY2d at 578), and a statement by a victim was not admissible as it was made "several minutes after the assault took place." *(Id.* at 580.)

Consistent with this strict view of the contemporaneity element, the Appellate Divisions have indicated that a time lag of a few seconds after the event ended and the statement was made will satisfy the element of "immediately thereafter." *(People v Haskins,* 121 AD3d 1181, 1184 [3d Dept 2014] ["right away," but under the excited utterance exception]; *People v George,* 79 AD3d 1148, 1148 [2d Dept 2010] [the delay was insufficient to impair reliability]; *People v York,* 304 AD2d 681, 681 [2d Dept 2003] [same]; *People v While,* 297 AD2d 587, 587 [1st Dept 2002] ["substantially contemporaneous"].) A delay of seven minutes after the end, however, will not satisfy the element of "immediately thereafter." *(People v Demand,* 268 AD2d 901, 902 [3d Dept 2000].)

With respect to the difference between the "excited utterance" exception

and its "close relative" the "present sense impression" exception, *People v Vasquez* (88 NY2d at 574-575) explained:

> " `Excited utterances' are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative. `Present sense impression' declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant's excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of `excited utterances' are their spontaneity and the declarant's excited mental state, the key components of `present sense impressions' are contemporaneity and corroboration" (citations omitted).

With respect to corroboration of the present sense impression statement, the Court also elaborated on that requirement in *People v Vasquez* (88 NY2d at 575-576), as follows:

> "The general idea, as we stated in *Brown . . . ,* is that there must be some independent verification of the declarant's descriptions of the unfolding events. Although we stated in *People v Brown* . . . that `there must be some evidence . . . that the statements sought to be admitted were made spontaneously and contemporaneously with the events described,' we did not mean by that language that such proof would suffice to satisfy the entirely separate requirement that the content of the communication be corroborated by independent proof. Rather, we merely intended to reiterate the basic foundational requirements for admitting an out-of-court declaration purporting to be a *`present* sense impression.' Accordingly, contrary to appellants' arguments here, the corroboration element cannot be established merely by showing that the declarant's statements were unprompted and were made at or about the time of the reported event.
>
> "The extent to which the content of the declaration must be corroborated by extrinsic proof is, as we have previously said, dependent on the particular circumstances of the individual case *(People v Brown,* 80 NY2d, at 737). Because

> of the myriad of situations in which the problem may arise, it would not be productive to attempt to fashion a definitive template for general application. It is sufficient at this point to note that in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content."

The admissibility of a present sense impression is not conditioned on the declarant being unavailable to testify. *(People v Buie,* 86 NY2d 501, 506-507 [1995].) *Buie* did note, however, that the unavailability of the declarant "may be weighed by Trial Judges in assessing the traditional probativeness versus undue prejudice calculus for allowing evidence before a petit jury." *(Id.* at 506.)

In criminal actions, a statement admitted under this exception may be barred by the Confrontation Clause of the Federal and New York State Constitutions if it is found to be "testimonial." *(See People v Rodriguez,* 50 AD3d 476, 476 [1st Dept 2008] [declarants' statements to 911 operators describing the victim's pursuit of defendant and his accomplice were admissible under the present sense impression exception and they were not testimonial as the statements in the calls were primarily "to enable police assistance to meet an ongoing emergency"]; *People v Coleman,* 16 AD3d 254, 255 [1st Dept 2005] [information conveyed by the 911 caller was admissible under the present sense impression and excited utterance exceptions and was not testimonial as it was made for the "purpose of urgently seeking police intervention"].)

8.31 Prior Consistent Statement'

(1) Except as otherwise provided in this rule, a prior statement of a testifying witness that is consistent with the witness's testimony is not admissible in evidence.

(2) A statement of a witness made before the witness's testimony, at a time when there was no motive to fabricate, and which is consistent with that testimony, is admissible to aid in establishing the witness's credibility when a party creates the inference of, or directly characterizes the testimony of the witness as a recent fabrication, as set forth in Guide to New York Evidence rule 6.20.

(3) A statement of a witness made before the witness's testimony that constitutes a "prompt outcry" is admissible to the extent set forth in Guide to New York Evidence rule 8.37.

(4) A statement of a witness made before the witness's testimony that describes the person alleged to have committed the charged offense and is consistent with the witness's testimony is admissible, not for its truth, but rather as evidence that assists the jury in evaluating the witness's opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification.

(5) A statement of a witness made before the witness's testimony is admissible when the statement is admitted not for the truth of its contents but for some other relevant purpose, such as explaining what led to an investigation and arrest.

Note

Subdivision (1) states the general rule that excludes a testifying witness's prior consistent statements. As summarized in *People v McDaniel* (81 NY2d 10, 16 [1993]):

> "A witness' trial testimony ordinarily may not be bolstered with pretrial statements. Several rationales underlie the rule: untrustworthy testimony does not become less so merely by repetition; testimony under oath is preferable to extrajudicial statements; and litigations should not devolve into contests as to which party could obtain the latest version of a witness' story" (citations omitted).

McDaniel, however, also recognized exceptions to the general rule of exclusion.

Subdivision (2) sets forth an exception for the admission of a prior consistent statement of a witness when the testimony of the witness is challenged as a "recent fabrication," meaning "the defense is charging the witness not with mistake or confusion, but with making up a false story" *(People v Singer,* 300 NY 120, 123-124 [1949]; Guide to NY Evid rule 6.20 [Impeachment by Recent Fabrication]; *see generally,* Michael J. Hutter, *Admissibility of Prior Consistent Statement,* NYLJ, Dec. 4, 2014, available at https://www.law. com/newyorklawj ournal/a1m1D/ 1202677999322/admi ssibility-of-pri or-con si stent-statement/).

As stated by the Court of Appeals, "[t]his exception is rooted in fairness; it would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose" *(People v McDaniel,* 81 NY2d at 18).

The "recent fabrication" exception for admissibility of a prior consistent statement is derived from the substantial Court of Appeals precedent which holds that a prior consistent statement is admissible where the "cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication" *(People v Davis,* 44 NY2d 269, 277 [1978]; *see Fishman v Scheuer,* 39 NY2d 502, 504 [1976] ["The plaintiff had not attempted to assert that the testimony of [the] witness was a recent fabrication. In the absence of such claim, prior consistent statements are inadmissible"]; *Crawford v Nilan,* 289 NY 444, 450451 [1943]; *People v Seit,* 86 NY2d 92, 96 [1995] ["The implication that the testimony was recently fabricated arises only if it appears that the cross-examiner believes and wants the jury to believe that the witness is testifying falsely to `meet the exigencies of the case' " (citing *People v Katz,* 209 NY 311, 340 [1913])]). The further condition for admissibility that the statement was made before the charged fabrication is also derived from substantial Court of Appeals precedent *(see Davis,* 44 NY2d at 277 ["prior consistent statements made at a time when there was no motive to falsify are admissible to repel the implication or charge"]).

Consistent with the "recent fabrication" condition, the Court of Appeals has noted that mere impeachment with a prior inconsistent statement or other attack on the credibility of a witness is an insufficient basis for admitting a prior consistent

statement *(People v Ramos,* 70 NY2d 639 [1987]; *Crawford,* 289 NY at 450 ["testimony of an impeached or discredited witness may not be supported and bolstered by proving that he has made similar declarations out of court"]).

When a prior consistent statement is admissible under the exception recognized by this section, the Court of Appeals has noted that the statement "may be admitted, not to prove or disprove any of the facts in issue, but to aid in establishing the credibility of the witness" *(People v McClean,* 69 NY2d 426, 428 [1987]; *People v McDaniel,* 81 NY2d 10, 18 [1993]).

Proof of the prior consistent statement(s) may be testified to by the witness or otherwise by "independent verification of the prior statements" *(People v Mirenda,* 23 NY2d 439, 452 [1969] ["We see no reason why a witness cannot attempt to rehabilitate himself by testifying to prior consistent statements after a claim of recent fabrication. It is open to the adversary, of course, to point out to the jury that this rehabilitation testimony is a less reliable indication of veracity than if independent verification of the prior statements had been offered"]; *see People v Maldonado,* 97 NY2d 522, 529 [2002] ["composite sketch may be admissible as a prior consistent statement where the testimony of an identifying witness is assailed as a recent fabrication"]; *Sell,* 86 NY2d at 98 [a 911 tape should have been admitted in response to a claim of recent fabrication]; *People v Baker,* 23 NY2d 307, 323 [1968] [approving testimony by the witness and the person to whom the prior consistent statements were made]).

Subdivision (3) is explained in the Guide to New York Evidence rule 8.37 (Prompt Outcry) *(see People v Rosario,* 17 NY3d 501, 511 [2011] ["The prompt outcry rule—an exception to the inadmissibility of the prior consistent statements of an unimpeached witness—`permits evidence that a timely complaint (of a sexual assault) was made,' but does not allow further testimony as to the `details of the incident' " (citation omitted)]).

Subdivision (4) is derived from the Court of Appeals decision in *People v Huertas* (75 NY2d 487, 488-489 [1990]). In that case, the Court allowed the "admission into evidence, on the People's direct case, of the complaining witness's account of a description of her assailant given to the police shortly after she was raped" *(id.* at 488), noting that the "probative force of the complainant's description evidence is not based on an assumption that the prior description is or is not true, nor does the comparison conclusively establish the identification as accurate or inaccurate. It is, however, evidence that assists the jury in evaluating the witness's opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification—both important aspects of the critical issue. Thus, the description testimony was properly admitted for this nonhearsay purpose" *(id.* at 493; *but see People v Fluitt,* 80 NY2d 949, 950 [1992] [where the complainant's showup identification of the defendant had been suppressed, "it was improper for complainant to give a physical description of the robber—there having been no finding that such description, given for the first time *after* the showup, was

untainted"]).

In addition to the complainant's testimony of the description, a police officer to whom the "crime victim" gave a description of the perpetrator may testify "to a victim's description, where it does not tend to mislead the jury" by giving the jury, for example, the "false impression that there was `an impressive amount of testimony' corroborating [the complainant's] account" *(People v Smith,* 22 NY3d 462, 464, 467 [2013]).

Subdivision (5) is a catchall provision derived from Court of Appeals decisions allowing for the introduction in evidence of a prior consistent statement when the statement is admitted not for its truth but for some other relevant reason, such as explaining the "investigative process and completing the narrative of events leading to the defendant's arrest" *(e.g. People v Gross,* 26 NY3d 689, 694-695 [2016]; *People v Ludwig,* 24 NY3d 221, 231 [2014]). In those cases, witnesses were permitted to testify that the child whom the defendant was accused of sexually abusing had made "nonspecific statements," a "disclosure," relating to sexual abuse and the "steps they took after hearing the disclosure," not for the truth of the child's statements, but rather to explain the process that led to the investigation and arrest of the defendant.

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[1] In June 2022, this rule was amended to number the sole existing paragraph of the rule to be subdivision (2) and to amend the content of that subdivision to confoim with the addition of rule 6.02 on "recent fabrication." Further, subdivisions (1), (3), (4), and (5) have been added to reflect in the rule infoimation that was in part in the Note.

8.33. Prior Inconsistent Statement

(1) Civil Proceeding. If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony and the statement contains sufficient indicia of reliability justifying its admissibility.

(2) Criminal Proceeding. If a witness testifies at a proceeding and is subject to cross-examination concerning a statement made by the witness prior to the proceeding, the statement is admissible if the statement is inconsistent with the witness's testimony but solely for impeachment purposes.

Note

Subdivision (1) sets forth an exception for a prior inconsistent statement of a declarant where the declarant in a civil case testifies at the proceeding and is subject to cross-examination *(see Kaufman v Quickway, Inc.,* 14 NY3d 907, 908 [2010] ["hearsay exception for prior inconsistent statements"]). As derived from *Kaufman* (14 NY3d at 908), *Nucci v Proper* (95 NY2d 597, 602-603 [2001]), and *Letendre v Hartford Acc. & Indem. Co.* (21 NY2d 518, 524 [1968]), the statement must possess sufficient indicia of reliability to justify its admission. In *Kaufman,* the Court of Appeals found the statement in issue met that standard as it was in writing, made to a State Police trooper and signed under penalty of perjury (14 NY3d at 908); and in *Letendre,* the Court found the statement to be reliable since it was in writing and had the declarant been unavailable to testify at trial, the statement would have been admissible as a declaration against interest (21 NY2d at 524). However, in *Nucci,* the statements were found to possess no indicia of reliability, as under the circumstances "a significant probability exist[ed] that the statements may implicate the dangers of the declarant's faulty memory or perception, insincerity, or ambiguity—traditional testimonial infirmities which the hearsay rule is designed to guard against" (95 NY2d at 604).

Subdivision (2) sets forth the view of the Court of Appeals that a prior inconsistent statement of an adverse witness is admissible in a criminal proceeding for impeachment purposes only *(see People v Freeman,* 9 NY2d 600, 605 [1961]

[" `(A) witness' own prior statement in which he has given a contrary version' . may not be introduced as affirmative evidence"]).

By statute, in a criminal proceeding a party may impeach *its own witness* when that witness "gives testimony upon a material issue of the case which tends to disprove the position" of the party who called the witness by introducing "evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony" (CPL 60.35 [1]).

8.35. Prior Judgment of Conviction

(1) Civil proceeding. In a civil proceeding, evidence of a final judgment adjudging a person guilty of a crime is admissible as prima facie evidence of the facts involved in the criminal judgment.

(2) Criminal proceeding. If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he or she was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him or her may independently prove such conviction. If in response to proper inquiry whether he or she has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.

Note

Subdivision (1) is derived from *Schindler v Royal Ins. Co.* (258 NY 310, 314 [1932]) wherein the Court of Appeals held a party's prior conviction of a crime was admissible in a later civil action and the conviction was *"prima facie* evidence of the facts involved," i.e., the facts upon which the conviction rested.

Where a conviction is entered upon a guilty plea, the plea is admissible as a party admission. *(Ando v Woodberry,* 8 NY2d 165 [1960] [plea of guilty to a traffic violation admissible as an admission].)

Subdivision (2) is taken verbatim from CPL 60.40 (1).

8.36 Prior Testimony in a Civil Proceeding

Part I: CPLR 4517

(a) In a civil action, at the trial or upon the hearing of a motion or an interlocutory proceeding, all or any part of the testimony of a witness that was taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter, so far as admissible under the rules of evidence, may be used in accordance with any of the following provisions:

1. any such testimony may be used by any party for the purpose of contradicting or impeaching the testimony of the same witness;

2. the prior trial testimony of a party or of any person who was a party when the testimony was given or of any person who at the time the testimony was given was an officer, director, member, employee, or managing or authorized agent of a party, may be used for any purpose by any party who is adversely interested when the prior testimony is offered in evidence;

3. the prior trial testimony of any person may be used by any party for any purpose against any other party, provided the court finds:

(i) that the witness is dead; or

(ii) that the witness is at a greater distance than one hundred miles from the place of trial or is out of the state, unless it appears that the absence of the witness was procured by the party offering the testimony; or

(iii) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(iv) that the party offering the testimony has been unable to procure the attendance of the witness by diligent efforts; or

(v) upon motion on notice, that such exceptional circumstances exist as to make its use desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court;

4. the prior trial testimony of a person authorized to practice medicine may be used by any party without the necessity of showing unavailability or special circumstances subject to the right of any party to move for preclusion upon the ground that admission of the prior testimony would be prejudicial under the circumstances.

(b) Use of part of the prior trial testimony of a witness. If only part of the prior trial testimony of a witness is read at the trial by a party, any other party may read any other part of the prior testimony of that witness that ought in fairness to be considered in connection with the part read.

(c) Substitution of parties; prior actions. Substitution of parties does not affect the right to use testimony previously taken at trial.

Part II: Common Law

At a hearing or trial in a civil proceeding, the testimony of a witness that was taken at a prior hearing or trial or other legal proceeding before a tribunal may be admitted,

provided the witness is unavailable due to death or otherwise as a court may determine; the testimony referred to the same subject matter and was given under oath against the party contesting its admission; and the contesting party had the opportunity to be represented by counsel and cross-examine the witness.

Note

Introduction

The rule sets forth a hearsay exception governing the admissibility of former testimony in civil actions. It encompasses both the statutory former testimony exception for civil actions provided by CPLR 4517 and the former testimony exception recognized in civil actions under the common law.

Part I reproduces CPLR 4517 verbatim, including that statute's numbering system, except for the heading of the statute (Impeachment of witnesses; parties; unavailable witness) which is less informative, if not misleading, given that the statute and its embodiment in this rule simply set forth the requirements for the admissibility of former testimony.

Part II is derived from *Fleury v Edwards* (14 NY2d 334 [1964]) and sets forth the common-law rule on the admission of former testimony that continues to coexist with the statute in a civil case. There is no common-law former testimony exception applicable in criminal proceedings *(People v Harding,* 37 NY2d 130, 133-134 [1975]; *see* Guide to NY Evid rule 8.36.1).

Part I

Subdivision (a) requires that the former testimony must have been "taken at a prior trial in the same action or at a prior trial involving the same parties or their representatives and arising from the same subject matter." Cf. Part II: the common-law rule does not require that the former testimony be "taken at a prior trial" *(Siegel v Waldbaum,* 59 AD2d 555, 555 [2d Dept 1977]).

Subdivision (a) proceeds to define the authorized uses of the former testimony in its following paragraphs.

Subdivision (a) (1) provides for the use of the former testimony for impeachment of witnesses.

Subdivision (a) (2) governs the use of former testimony of an adverse party and the *adverse* party's employees.

Subdivision (a) (3) provides for the admissibility of the former trial testimony of a witness who is now deemed to be unavailable (by reason of one of the five categories of unavailability set forth in the rule) to testify against a party who, at the former trial, had an opportunity to cross-examine the party.

Subdivision (a) (4) permits the use of the former testimony of a physician by any party for any purpose without the need to show unavailability or special circumstances, subject to the court's discretion.

For an analysis of those paragraphs, see Vincent C. Alexander, Practice Commentaries (McKinney's Cons Laws of NY, Book 7B, CPLR 4517).

Subdivision (b) sets forth the common-law rule of completeness as applied to former testimony, which is also set forth in Guide to NY Evidence rule 4.03.

Subdivision (c), which provides that the "[s]ubstitution of parties does not affect the right to use testimony previously taken at trial," applies equally to the common-law rule set forth in Part II of this rule.

Part **II**

Part II sets forth the common-law rule and is derived as noted from *Fleury v Edwards* (14 NY2d 334 [1964]).

In *Fleury,* the Court of Appeals held that the common-law exception was conterminous with CPLR 4517's statutory predecessor. Thus, the common-law rule may provide a basis for the admission of former testimony where the statute does not *(Shaw v New York El. R.R. Co.,* 187 NY 186, 194 [1907] ["evidence was competent under the common law, even if not so under the statute"]).

In *Fleury,* the former testimony was taken not at a prior trial, but at a hearing held by the State Motor Vehicle Bureau. The Court held that the former testimony could be introduced in evidence by the deceased's administratrix at the trial of a personal injury suit against the party the deceased had testified against who had been present at the hearing with counsel and had cross-examined the deceased.

Thus, the first requirement of the common-law rule for the admission of former testimony is that the witness be unavailable. In *Fleury,* the unavailability of the witness was due to the witness's death. Whether the common-law rule extends to other forms of unavailability (e.g., incompetency, beyond the jurisdiction, illness) is an open question.

With respect to the remaining requirements of the common-law rule, the *Fleury* Court stated:

> "the prime and essential requirement for [the former testimony's] use is that it related to the same subject matter as given under oath and against the same party now contesting it with the right in the latter to have counsel present and to cross-examine." *(Id.* at 339.)

Of note, this common-law rule is not restricted to former testimony at a trial, as required by CPLR 4517 (a) and set forth in Part I, subdivision (a) of this rule, but extends to former testimony "given in any legal proceeding and before any tribunal employing cross-examination as part of its procedure," which includes administrative hearings *(id.* at 338 [driver's license revocation hearing]). *(See Siegel,* 59 AD2d at 555 [allowing testimony of a deceased given in an examination before trial]; *but see* CPLR 3117 [Use of depositions].)

8.37 Prior Testimony in Criminal Proceedings [CPL art 670]

(1) Prior testimony. **Under circumstances prescribed in [CPL article 670], testimony given by a witness at (a) a trial of an accusatory instrument, or (b) a hearing upon a felony complaint conducted pursuant to [CPL] section 180.60, or (c) an examination of such witness conditionally, conducted pursuant to [CPL] article six hundred sixty, may, where otherwise admissible, be received into evidence at a subsequent proceeding in or relating to the action involved when at the time of such subsequent proceeding the witness is unable to attend the same by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. Upon being received into evidence, such testimony may be read and any videotape or photographic recording thereof played. Where any recording is received into evidence, the stenographic transcript of that examination shall also be received.**

(2) *Subsequent proceedings, defined.* **The subsequent proceedings at which such testimony may be received in evidence consist of:**

> **(a) Any proceeding constituting a part of a criminal action based upon the charge or charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related; and**
>
> **(b) Any post-judgment proceeding in which a judgment of conviction upon a charge specified in paragraph (a) is challenged.**

(3) *Procedure in non-grand jury proceeding.* **In any criminal action or proceeding other than a grand jury proceeding, a party thereto who desires to offer in evidence testimony of a witness given in a previous**

action or proceeding, as provided [in subdivision one], must so move, either in writing or orally in open court, and must submit to the court, and serve a copy thereof upon the adverse party, an authenticated transcript of the testimony and any videotape or photographic recording thereof sought to be introduced. Such moving party must further state facts showing that personal attendance of the witness in question is precluded by some factor specified in [subdivision one]. In determining the motion, the court, with opportunity for both parties to be heard, must make inquiry and conduct a hearing to determine whether personal attendance of the witness is so precluded. If the court determines that such is the case and grants the motion, the moving party may introduce the transcript in evidence and read into evidence the testimony contained therein. In such case, the adverse party may register any objection or protest thereto that he would be entitled to register were the witness testifying in person, and the court must rule thereon.

(4) *Procedure in grand jury proceedings.* **Without obtaining any court order or authorization, a district attorney may introduce in evidence in a grand jury proceeding testimony of a witness given in a previous action or proceeding specified in [subdivision one], provided that a foundation for such evidence is laid by other evidence demonstrating that personal attendance of such witness is precluded by some factor specified in [subdivision one].**

Note

Except for the subdivision headings in italics, the words in brackets, and the substitution of "[CPL article 670]" for the words "this article" in the opening line of subdivision (1), this rule reproduces verbatim CPL 670.10 ("Use in a criminal proceeding of testimony given in a previous proceeding; when authorized") in subdivisions (1) and (2), and CPL 670.20 ("Use in a criminal proceeding of testimony given in a previous proceeding; procedure") in subdivisions (2) and (3).

The rule sets forth a hearsay exception governing the admissibility of testimony previously taken in certain, specified criminal proceedings in subsequent criminal proceedings.

Unlike its counterpart governing admissibility of former testimony in civil actions, its provisions are not supplemented by the common law *(People v Harding,* 37 NY2d 130 [1975]; *see* Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

The Confrontation Clause prohibits the "admission of testimonial statements of a witness who did not appear at trial unless [the witness] was unavailable to testify, and the defendant ha[s] had a prior opportunity for cross-examination" *(Crawford v Washington,* 541 US 36, 53-54 [2004]; *see People v Pealer,* 20 NY3d 447, 453 [2013]).

To the extent therefore that the witness is unavailable and there has been a full and fair opportunity for cross-examination by the party against whom the testimony is offered, the requirements of the Confrontation Clause are met. *(Compare People v Simmons,* 36 NY2d 126 [1975], *with People v Prince,* 66 NY2d 935 [1985], *affg for reasons stated below* 106 AD2d 521 [2d Dept 1984].)

As stated by the Court of Appeals: "Insofar as it allows a jury to convict a defendant based on a witness's previous testimony, CPL 670.10 (1) is an exception to the Sixth Amendment right of confrontation. Although the right of confrontation contemplates that testimony against an accused be `delivered live within eyesight and earshot of the jurors,' the statute makes, and the Constitution allows, limited departures based on necessity and fairness." *(People v Diaz,* 97 NY2d 109, 114 [2001] [citations omitted]; *see also* Guide to NY Evid rule 8.02, Admissibility Limited by Confrontation Clause *[Crawford]* and accompanying note.)

Subdivision (1) states verbatim CPL 670.10 (1). It sets forth three specific types of former testimony which are admissible when the declarant is proved "unable to attend" trial for specified reasons: testimony that was given at a trial on the accusatory instrument, at a preliminary hearing on a felony complaint, or at a conditional examination under CPL article 660 (CPL 670.10 [1]).

The Court of Appeals, construing strictly this statutory provision, has observed that its " `three carefully worded and enumerated exceptions' to the use of prior testimony of an unavailable declarant are essentially exclusive" *(People v Tapia,* 33 NY3d 257, 266 [2019] [citation omitted]). Thus, if the proffered testimony is given at a proceeding other than the three types stated in the statute, it is inadmissible under the exception. *(See e.g. People v Ayala,* 75 NY2d 422, 428-29 [1990]; *Harding,* 37 NY2d at 133.)

At the prior permitted proceeding, there must have been also, as noted, a full and fair opportunity to cross-examine the declarant. *(People v Simmons,* 36

NY2d 126 [1975]). "An adequate opportunity to cross-examine at the prior proceeding is an additional, constitutional requirement for the admissibility of prior testimony that otherwise satisfies CPL 670.10" *(Ayala,* 75 NY2d at 430).

Should the defendant, however, be the cause of the witness's absence, the defendant forfeits the limitations on the admission of former testimony irrespective of whether the defendant had an opportunity to cross-examine the witness. *(See People v Geraci,* 85 NY2d 359 [1995] [witness's Grand Jury testimony admitted].)

As to the triggering condition for the admissibility of permitted former testimony, the provision provides that the declarant must be "unable to attend . . . by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court." There is Appellate Division authority holding that the declarant may also be unavailable when the declarant invokes the Fifth Amendment privilege against self-incrimination. *(See e.g. People v Whitley,* 14 AD3d 403 [1st Dept 2005]; *People v Johns,* 297 AD2d 645 [2d Dept 2002]; *People v Snow,* 298 AD2d 985 [4th Dept 2002].) The Appellate Division, Third Department, has held that even if a witness does not assert his or her privilege against self-incrimination, the witness's persistent refusal to testify after threat of a contempt citation will render the witness unavailable for purposes of CPL 670.10 (1). *(People v Knowles,* 79 AD3d 16, 24-25 [3d Dept 2010].)

The People must demonstrate "due diligence" in attempting to secure the presence of a witness. *(People v Diaz,* 97 NY2d 109 [2001].) *Diaz* noted that the Court has required "that the prosecutor's failure to produce [a witness] . . . not [be] due to indifference or a strategic preference for presenting her testimony in the more sheltered form of [a transcript] rather than in the confrontational setting of a personal appearance on the stand." *(Id.* at 115 [internal quotation marks and citation omitted].)

Subdivision (1) concludes by providing that the former testimony when admissible may be read to the jury and any recording of the testimony may be played. When a recording is played, the stenographic transcript of the testimony must also be admitted.

Subdivision (2) states verbatim CPL 670.10 (2). It provides that the former testimony from any of the three types of specified proceedings may be used "at a subsequent proceeding in or relating to the action involved," including post-judgment proceedings.

Subdivision (3) states verbatim CPL 670.20 (1). It sets forth the procedure for the introduction of the former testimony into evidence in a criminal proceeding other than a grand jury proceeding. Of note, it requires the court to "conduct a hearing to determine whether personal attendance of the witness" is precluded by "some factor" specified in CPL 670.10 (1).

Subdivision (4) states verbatim CPL 670.20 (2). It sets forth the procedure for the introduction into evidence of the former testimony in grand jury proceedings.

8.38. Prompt Outcry

Evidence that the victim of a sexual assault promptly reported the matter to another person is admissible:

(1) for the purpose of assessing the credibility of the complainant with respect to the commission of the offense; or

(2) when relevant, and to the extent necessary, to explain the investigative process and complete the narrative of events leading to the defendant's arrest.

Note

This rule is derived from substantial Court of Appeals precedent holding that in a sex offense criminal prosecution, evidence that the victim of the crime reported the assault shortly after it occurred is admissible as bearing on his or her credibility, a non-truth purpose. *(See e.g. People v Rosario,* 17 NY3d 501, 515 [2011]; *People v McDaniel,* 81 NY2d 10, 16-17 [1993]; *People v Rice,* 75 NY2d 929, 932 [1990]; *People v Deitsch,* 237 NY 300, 304 [1923]; *People v 0 'Sullivan,* 104 NY 481, 486 [1887]; *Baccio v People,* 41 NY 265 [1869].) In essence, it is "admissible to corroborate the allegation that an assault took place." *(McDaniel,* 81 NY2d at 16; *see also Rosario,* 17 NY3d at 511 [viewing the rule as "an exception to the inadmissibility of the prior consistent statements of an unimpeached witness"].)

The "premise" for this evidence, as stated by the Court, is that "prompt complaint was `natural' conduct on the part of an `outraged [complainant],' and failure to complain therefore cast doubt on the complainant's veracity; outcry evidence was considered necessary to rebut the adverse inference a jury would inevitably draw if not presented with proof of a timely complaint." *(Rice,* 75 NY2d at 931.)

There are two limitations to admissibility under this rule. First, the complaint must be made promptly, which requires it to be made "at the first suitable opportunity." *(See Rosario,* 17 NY3d at 512, 515; *People v Shelton,* 1 NY3d 614, 615 [2004].) What constitutes the first suitable opportunity "is a relative concept dependent on the facts." *(McDaniel,* 81 NY2d at 17; *see also O'Sullivan,* 104 NY at 489 [noting "circumstances which will excuse delay"].) Second, only the fact of complaint, and not the details, is normally admissible. *(See Rice,* 75 NY2d at 932

[error to admit description of the assailant under the rule]; *Deitsch,* 237 NY at 304 [same]; *Baccio v People,* 41 NY 265, 269 [1869] ["particulars of the complaint" not within the rule].) This limitation, however, does not preclude the potential admissibility of the content of the statement under an exception to the hearsay rule such as the excited utterance exception. *(See People v Brewer,* 28 NY3d 271, 278 [2016] ["brief account of what (complainant) told (complainant's) mother can be viewed as both a prompt outcry and an excited utterance"].)

While the prompt outcry rule has been developed and applied by the Court of Appeals in criminal sexual offense proceedings, the Court's rationale for the rule suggests it is equally applicable in other proceedings involving the commission of a sexual assault or offense. The Appellate Division, First Department, has recognized the potential admissibility of prompt outcry evidence at fact-finding hearings in Family Court. *(Matter of Dandre H.,* 89 AD3d 553 [1st Dept 2011]; *Matter of Brown v Simon,* 123 AD3d 1120, 1121 [2d Dept 2014].) The Appellate Division, First Department, has also held in a malicious prosecution action commenced by the plaintiff after he was found not guilty of the crime of rape that the prompt outcries of the victim were admissible to corroborate her testimony that an assault had taken place. *(Moorhouse v Standard, N.Y.,* 124 AD3d 1, 5-6 [1st Dept 2014].)

The Court of Appeals has held that a child's belated report of sexual abuse by the defendant, which was testified to by the child as well as by two relatives, was properly admitted for the purpose of "explaining the investigative process and completing the narrative of events leading to the defendant's arrest." *(See People v Ludwig,* 24 NY3d 221, 230-234 [2014]; *People v Cullen,* 24 NY3d 1014, 1016 [2014].)

8.39. Reputation Evidence

(1) Character Trait.

(a) Evidence of a person's reputation among a "community of individuals" of a character trait is admissible as set forth in Guide to NY Evidence rule 4.11 [Character Evidence].'

(b) A "community of individuals" exists wherever the person's associations are of such quantity and quality as to permit the person to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability of that reputation.

(c) The foundation for the admission of such reputation evidence requires that a witness testify to views of a sufficient number of individuals who have had sufficient experience with the person whose reputation is being testified to.

(d) Reputation may not be proved by evidence of specific acts of a person, or by a witness's opinion of a person's character.

(e) Notwithstanding subdivision (1) (a), evidence of a defendant's bad reputation for a relevant character trait is not admissible unless the defendant first offers evidence of his or her good reputation for that character trait.

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[1] In June 2021, subdivision (1)(a) was revised primarily to include the cross-reference to the Guide's rule 4.11.

(2) Pedigree. Evidence of reputation within a family, before the controversy in issue arose, as to matters of pedigree, such as birth, death, lineage, marriage, legitimacy and relationships between and among family members, is admissible.

(3) Lands. Evidence of long-standing reputation in the relevant community as to boundaries of, or customs affecting, lands in issue, existing before the controversy arose, is admissible.

Note

Subdivision (1) (a) is derived from Court of Appeals precedents that reputation evidence of a person's relevant character trait when admissible pursuant to Guide to NY Evidence rule 4.11 may be used for its truth. *(See People v Bouton,* 50 NY2d 130, 139 [1980] [reputation evidence when admissible "may in and of itself give rise to a reasonable doubt of guilt where none would otherwise exist"], citing *People v Trimarchi,* 231 NY 263, 266 [1921]; *People v Colantone,* 243 NY 134, 136 [1926] ["This court has frequently stated that evidence of good character is a matter of substance, not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt"].)

For the rule on impeachment of a witness by reputation evidence for untruthfulness, and rebuttal by reputation evidence for truthfulness, see Guide to NY Evidence rule 6.23 [Impeachment by reputation for untruthfulness and rebuttal].

Subdivision (1) (b) is derived from *People v Fernandez* (17 NY3d 70, 76 [2011]) wherein the Court of Appeals noted:

> "[W]e rejected [in *People v Bouton]* the notion that one's community was restricted to `one's residential neighborhood.' Rather, we observed that `[a] reputation may grow *wherever* an individual's associations are of such quantity and quality as to `permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability' " (citations omitted).

In *People v Bouton* (50 NY2d at 139), the Court had observed that a person "might be better known in the community of his employment and in the circle of his vocational fellows, where opportunities to evidence the traits at stake may occur with greater frequency than in the environs of his dwelling place, nestled in the anonymity of a large city or suburb."

Subdivision (1) (c) is derived from *People v Fernandez* (17 NY3d at 77 [a proper foundation is laid when a witness reports "views of a sufficient number of people" who have had "sufficient experience" with the person in question]) and *People v Hanley* (5 NY3d 108, 113-114 [2005] [a proper foundation was laid when the witness "worked in a close setting with (the person) and regularly interacted and communicated with the same group of people"]).

Subdivision (1) (d) and (e) reflect the Court of Appeals statement in *People v Kuss* (32 NY2d 436, 443 [1973]) that "[w]hether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise. And although character is the issue (i.e., the unlikelihood of the defendant's committing the crime), reputation is the only proof which the law allows. Neither the defendant nor the prosecutor may introduce evidence of particular acts tending to prove or rebut the defendant's good character" (citations omitted). *(See also People v Bouton,* 50 NY2d at 139 [wherein the Court stated that reputation is "the aggregate tenor of what others say or do not say about him" and "is the raw material from which that character may be established"].)

Subdivision (2) is derived from *Badger v Badger* (88 NY 546, 556 [1882] [the application of reputation evidence "to cases of pedigree . . . is justified by difficulties of proof, and (is) confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen"]) and *McKinnon v Bliss* (21 NY 206, 217 [1860] ["That hearsay or reputation is admissible as evidence, upon questions of pedigree or family relationship, . . . is a familiar doctrine"]).

The proof of pedigree by means other than reputation evidence is governed by Guide to New York Evidence rule 8.33.

Subdivision (3) is derived from *McKinnon v Bliss* (21 NY at 217), wherein the Court of Appeals stated: "That hearsay or reputation is admissible . . . upon questions respecting the boundaries of lands . . . is a familiar doctrine." *(See also Village of Oxford v Willoughby,* 181 NY 155, 160-161 [1905] ["accepted belief of the community" as to location of public road]; *Hannah v Baylon Holding Corp.,* 34

AD2d 792 [2d Dept 1970] [in action to determine boundary lines, Court held evidence of reputation regarding boundaries insufficient to invoke "reputation" exception], *revd on other grounds* 28 NY2d 89 [1971] [declarations of a deceased person who owned or was in possession of land, as to the boundary line between him and the land of another, were admissible as an exception to the hearsay rule and were sufficient to establish boundary lines]; *Gardner v Town of Claverack,* 22 NYS2d 265, 268-269 [Sup Ct, Columbia County 1940], *affd* 259 App Div 1111 [3d Dept 1940].)

8.41 State of Mind'

(1) An out-of-court statement of a declarant describing the declarant's state of mind at the time the statement was made, such as intent, plan, motive, design, feeling or mental condition as it may bear on whether a person is of sound mind, but not including a statement of memory or belief to prove the truth of a fact remembered or believed, is admissible, even though the declarant is available as a witness.

(2) An out-of-court statement of a declarant which is heard by another may be admissible to establish the hearer's state of mind on hearing the declaration.

Note

Subdivision (1) is derived from several Court of Appeals decisions that recognize this exception *(see e.g. People v Reynoso,* 73 NY2d 816, 819 [1988] ["While . . . declarations may be received to show the declarant's state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them," such as a statement to a third party made after a shooting that the defendant believed the victim was armed]; *Matter of Putnam,* 257 NY 140, 145 [1931] ["The declarations of a testator which are commonly received in proceedings for the probate of wills are expressions that tend to show his mental conditions and feelings, as bearing upon the probability that the instrument in question was the product of a sound mind"]; *Schultz v Third Ave. R.R. Co.,* 89 NY 242, 248-249 [1882] ["It is always competent to show that a witness . . . is hostile in his feelings toward the party against whom he is called to testify or that he entertains malice toward that party"]; *see also People v Arnold,* 147 AD3d 1327, 1327-1328 [4th Dept 2017] ["(A) recording of phone calls defendant made from jail arranging for a relative to pick him up from jail . . . were nonhearsay evidence of his state of mind, that they were relevant to his claim that the police coerced his confession by promising him that he would be released if he confessed"]; *People v Cromwell,* 71 AD3d 414, 415 [1st Dept 2010] [" `The mere utterance of a statement, without regard to its truth, may indicate circumstantially the state of mind of the hearer or of the declarant' "]).

The prohibition on the proof of a statement to prove the truth of a past fact or belief initially recognized in *Shepard v United States* (290 US 96 [1933, Cardozo, J.]) has been consistently applied in New York *(see People v Vasquez,* 88 NY2d 561, 580 [1996] [the defendant's "911 statement was not admissible as proof of his state of mind at the time of the shooting, since it was made after that event occurred and its relevance to defendant's prior mental state depended entirely on

the truth of its contents"]; *Reynoso,* 73 NY2d at 818-819; *People v Goodluck,* 117 AD3 d 653, 653-654 [1st Dept 2014] ["The court properly precluded defendant from eliciting evidence of a statement by a codefendant, who was a fugitive, that purportedly exculpated defendant. Although defendant offered this statement as evidence of the codefendant's state of mind, it was essentially a factual assertion that was irrelevant unless offered to prove the truth of the matter asserted. Accordingly, the statement was hearsay"]; *People v Villanueva,* 35 AD3d 229, 230 [1st Dept 2006] ["The court properly precluded defendant from eliciting testimony that at the end of the incident, he made a self-exculpatory comment to his companion. Although . . . defendant offered this statement as evidence of his state of mind, it was essentially a factual assertion of his innocence constituting hearsay"]; *People v Oguendo,* 305 AD2d 140, 141 [1st Dept 2003] [in a prosecution for the sale of a controlled substance, the defendant's "postarrest statement that he was in the area only to purchase marijuana" was "clearly being offered for its truth and not as evidence of his state of mind"]).

Statements regarding the declarant' s present pain, illness, or physical condition are not included within the exception set forth in this subdivision *(see* Guide to NY Evid rule 8.42, Statement of Pain, Illness, or Physical Condition by an Unavailable Declarant).

For the rules governing a statement of future intent, see Guide to New York Evidence rule 8.13.

Subdivision (2) sets forth "a well-settled rule that where a witness' state of mind is relevant, the witness may testify to out-of-court statements made by others which would indicate circumstantially what the witness believed at that time" *(Matter of Bergstein v Board of Educ., Union Free School Dist. No. 1 of Towns of Ossining, New Castle & Yorktown,* 34 NY2d 318, 324 [1974]; *Provenzo v Sam,* 23 NY2d 256, 261-262 [1968] ["While the plaintiff was observing the respondent's vehicle meandering about the highway, he remarked to his wife, `This person must be sick, must have had a heart attack'. . . . The statement was not being introduced to prove that the defendant had had a heart attack or that she was sick but rather to shed light on the plaintiff's state of mind as to why he crossed the highway"]; *Ferrara v Galluchio,* 5 NY2d 16, 19-20 [1958] [since the "plaintiff's statement that the dermatologist told her she should have the shoulder checked every six months because there was a possibility that cancer might develop . . . 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 mental anxiety, such testimony was not objectionable hearsay"]).

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[1] In May 2023, subdivision (2) was removed from this rule and incorporated in rule 8.42; a new subdivision (2) was added; and the Note was amplified.

8.43. Statement Made for Medical Diagnosis or Treatment

A statement made by a declarant to a health care professional for purposes of medical treatment and diagnosis which describes medical history, or past or present symptoms, pain or sensations, or their general cause, and is germane to diagnosis or treatment is not excluded by the hearsay rule even though the declarant is available to testify.

Note

This formulation is derived from several Court of Appeals decisions.

In *Davidson v Cornell* (132 NY 228, 237-238 [1892]), the Court recognized a hearsay exception for statements by a person to his or her physician "indicating pain or distress or expressive of the present state of his feelings," which were made for purposes of treatment and diagnosis. The basis for this exception was the existence of a "strong inducement for the patient to speak truly of his pains and sufferings." *(Id.* at 237.) However, statements relating to past pain and suffering were not within this exception. *(Id.)*

Three recent decisions of the Court of Appeals, *People v Ortega* (15 NY3d 610, 617-620 [2010]), *People v Duhs* (16 NY3d 405, 408 [2011]) and *People v Spicola* (16 NY3d 441, 451 [2011]), broadened the scope of the exception as initially recognized in *Davidson.*

In *Ortega,* the Court held that a patient's statements as made to medical staff about the cause of his or her injuries, "domestic violence," and the need for a "safety plan" were admissible as they were relevant to treatment and diagnosis. Thus, in the context of domestic violence and sexual assault cases, the Court of Appeals has recognized as a general proposition that how a patient was injured is germane to diagnosis and treatment because it concerns not only how to treat physical injuries, but also whether and what psychological and trauma issues need to be medically addressed and the development of a safety plan upon discharge. *(See People v Ortega,* 15 NY3d at 617.) Further, the Court of Appeals has observed that in a domestic violence case, statements by the victim to a health care professional regarding a victim's abuser can be relevant to physical and psychological remediation. *(See People v Ortega,* 15 NY3d at 617-620.) The Court has not specifically addressed whether the declarant's identification of the individual who caused his or her injury is germane to treatment in other situations.

In *Duhs,* the Court held a child's statement to a pediatrician concerning the cause of his injuries was admissible as it was relevant to treatment and diagnosis.

In *Spicola,* the Court held a statement by a teenage boy to a nurse practitioner at a child advocacy center describing how he was sexually abused six to seven years before was admissible as it was germane to treatment and diagnosis. These statements were admissible "as an exception to the hearsay rule" as they were prompted by the "strong inducement for the patient to speak truly." *(See People v Duhs,* 16 NY3d at 408; *People v Spicola,* 16 NY3d at 451.)

Care need be taken that the statement is germane to diagnosis and treatment, and thus admissible. In *Williams v Alexander* (309 NY 283, 288 [1955] [emphasis and citations omitted]), for example, the Court explained:

> "In some instances, perhaps, the patient's explanation as to how he was hurt may be helpful to an understanding of the medical aspects of his case; it might, for instance, assist the doctors if they were to know that the injured man had been struck by an automobile. However, whether the patient was hit by car A or car B, by car A under its own power or propelled forward by car B, or whether the injuries were caused by the negligence of the defendant or of another, cannot possibly bear on diagnosis or aid in determining treatment. That being so, entries of this sort, purporting to give particulars of the accident, which serve no medical purpose, may not be regarded as having been made in the regular course of the hospital's business." *(Compare Benavides v City of New York,* 115 AD3d 518 [1st Dept 2014] [plaintiff's treating physicians did not need to know whether plaintiff jumped or was pushed off the fence in order for the physicians to determine what medical testing plaintiff needed], *and Nelson v Friends of Associated Beth Rivka Sch. for Girls,* 119 AD3d 536 [2d Dept 2014] [in action where the cause of child's fall was in issue, statement that child fell from monkey bars as opposed to a ladder was held germane to treatment].)

Where statements that are not admissible under this exception are contained in a medical record which is otherwise admissible, such statements must be redacted from the record before the record is received in evidence. *(See People v Ortega,* 15 NY3d at 622-623 [Pigott, J., concurring], citing *People v Johnson,* 70 AD3d 1188, 1191 [3d Dept 2010, Stein, J.].)

8.45. Statement of Pain, Illness, or Physical Condition by an Unavailable Declarant

An out-of-court statement made to a third party by a declarant who is unavailable at the time of the proceeding describing the declarant's pain, illness, or physical condition at the time the statement is made, is admissible, provided the statement is made at a time not remote from the event that is alleged to have caused the pain, illness, or physical condition.

Note

This rule is derived from a series of cases. An early rationale for the rule was set forth in *Teachout v People* (41 NY 7, 13 [1869]):

> "The natural and impulsive utterances of a person suffering under extreme illness, made to those who are in attendance, or present in the performance of offices of kindness, for the purpose of giving relief or alleviation, are proper evidence of the actual pressure of the symptoms which the sufferer describes. The universal consent of all mankind accords to them some credence, as indications of the state of the sufferer and they are acted upon in all ministrations for the relief of the distressed. It would be absurd to say . . . that complaints of pain, made in the usual and natural course, should not be accredited as proof of suffering."

The leading case on the subject is *Tromblee v North Am. Acc. Ins. Co.* (173 App Div 174, 176 [3d Dept 1916], *affd* 226 NY 615 [1919]). In that case, the plaintiff's husband fell accidentally and suffered a concussion; the following morning he complained to his daughter of pain; and the following day he died. The Court held that the deceased's declaration of pain to his daughter was admissible in that proceeding *(see Jiminian v St. Barnabas Hosp.,* 84 AD3d 647, 648 [1st Dept 2011] ["Plaintiff's testimony concerning his wife's complaints of dizziness and shortness of breath are . . . admissible as simple expressions of suffering by the injured party, who is no longer available by reason of her death, which occurred less than 12 hours following her complaints"]; *but see Crawford v Washington,* 541 US 36 [2004]).

By contrast, a deceased's declarations of tiredness and pain to a neighbor were held not admissible in *Rosenberg v Equitable Life Assur. Socy. of U.S.* (148 AD2d 337, 337-338 [1st Dept 1989]). In that case, the declarations were made "weeks" after the event that may have caused the condition and in addition to the complaints of pain, "consisted of a narrative" regarding the event.

As the rule states, declarations of pain, illness, or physical condition made to a third party are not admissible if the declarant is available at the time of the proceeding *(see Roche v Brooklyn City & Newtown R.R. Co.,* 105 NY 294, 299 [1887] ["the evidence of (a third party) as to the plaintiff's declarations of existing pain when they were walking in the street together long after the accident," in addition to the testimony of the plaintiff, "should not have been received"]; *Davidson v Cornell,* 132 NY 228 [1892]). Declarations of pain, illness, or physical condition, may, however, be admissible, even though the declarant is available, where the statement is admissible as one made to a health care professional under Guide to New York Evidence rule 8.43 *(see People v Duhs,* 16 NY3d 405, 408 [2011]), or as an excited utterance under rule 8.17, or as a present sense impression under rule 8.29 *(see e.g. People v McCray,* 102 AD3d 1000, 1009 [3d Dept 2013]; *Balzola v Giese,* 107 AD3d 587 [1st Dept 2013]; *Hyung Kee Lee v New York Hosp. Queens,* 118 AD3d 750 [2d Dept 2014]).

8.47. Verbal Act

When an act or transaction is itself admissible, statements or declarations made at that time that constitute the act or transaction, or are calculated to explain and elucidate its character and quality, and are so connected with it as to constitute one act or transaction are admissible as a "verbal act." A statement admitted as a "verbal act" is not hearsay because it is not admitted for the truth of its assertions, but rather to give significance, legal effect, or an explanation to the accompanying conduct.

Note

This rule is derived from a series of Court of Appeals cases, beginning with *Hine v New York El. R.R. Co.* (149 NY 154, 162 [1896]):

> "[W]hen an act or transaction is itself admissible, statements or declarations of the party at the time, calculated to explain and elucidate the character and quality of the act and so connected with it as to constitute one transaction, and so as to derive credit from the act itself, are admissible as part of the *res gestce."*

"Res gestae," as used in *Hine,* in modern times, refers specifically to "verbal acts" that "form[ ] part of the transaction itself' *(People v Marks,* 6 NY2d 67, 71 [1959]; *People v Seymour,* 183 AD2d 35, 38 [1st Dept 1992] ["res gestae, i.e., verbal acts forming part of the transaction itself']; *Schner v Simpson,* 286 App Div 716, 718 [1st Dept 1955] ["the `verbal act' doctrine where the utterance is admitted as a verbal part of an act, that is, of the *res gestae"]).*

"Verbal acts" are not hearsay because they are not offered "for the truth of their assertions, but, rather, to attach legal effect to the conduct which they accompany" *(People v Salko,* 47 NY2d 230, 239 [1979]; *People v Caban,* 5 NY3d 143, 149 [2005]); "to assist in giving legal significance to some `otherwise ambiguous conduct' " *(People v Guy,* 93 AD3d 877, 880 [3d Dept 2012]); to explain "otherwise ambiguous conduct" that accompanies it and lend "significance to it" *(People v Acomb,* 87 AD2d 1, 6 [4th Dept 1982]).

Examples of a "verbal act" include:

- *People v Caban* (5 NY3d at 149 [A statement accepting another's solicitation to commit a crime is a verbal act, not hearsay, when offered to prove a conspiracy to commit the underlying crime and is thus admissible

without prima facie proof of the conspiracy]; *see* Guide to NY Evid rule 8.09 [2], Coconspirator Statement).

- *People v Merante* (59 AD3d 207, 208 [1st Dept 2009] [In a larceny prosecution, the "court properly admitted evidence that defendant's accomplice demanded that the owner's sister pay him money to obtain the return of the (stolen) car. This was not offered for its truth, but as a verbal act that was part of the criminal transaction"]).

- *Matter of Corey v Corey* (40 AD3d 1253, 1254, 1255 [3d Dept 2007] ["The wife testified that the husband refused to leave her home . . threatened to break down the doors of her home if she attempted to bar his entry, and repeatedly became enraged and directed obscenities at her . . . (W)e find that the verbal acts (i.e., spoken obscenities and threats) made in the context described by the wife were not constitutionally protected" by the First Amendment]).

- *People v DeJesus* (272 AD2d 61, 61-62 [1st Dept 2000] [The undercover detective testified "that, after defendant's co-defendant Felix Rivera determined how many glassines the (undercover) detective wanted, he told him to `wait on the corner while he went to get it.' . . . Rivera's statement was a simple instruction given to the detective and was a necessary part of the detective's narrative to explain why he remained where he was while Rivera crossed the street to defendant. Thus, this remark was `a verbal act and part of the criminal res gestae establishing the theory of "acting in concert" ' and did not constitute inadmissible hearsay"]).

- *People v Thompson* (186 AD2d 768, 768 [2d Dept 1992] ["The challenged testimony established that as the officer approached an abandoned building utilized as a `peephole location' from which drug transactions were effected, he observed the codefendant motioning with his hands and directing prospective purchasers to the peephole by stating `the hole is working'. We find that the codefendant's statements accompanied equivocal conduct which could be interpreted by reference to the content of the statements . . . . Therefore, the statements constituted a verbal act and part of the criminal res gestae establishing the theory of `acting in concert' as charged in the indictment (and accordingly did) not constitute hearsay"]).