

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”].)