ARTICLE 8. HEARSAY

8.00. Definition of Hearsay

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

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

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

Note

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

Hearsay admitted without objection may properly be considered by the trier of fact and can be given such probative value as under the circumstances it may possess. (*See Matter of Findlay*, 253 NY 1, 11 [1930]; *Ford v Snook*, 205 App Div 194, 198 [4th Dept 1923], *affd* 240 NY 624 [1925].) However, the Appellate Division may in the interest of justice reverse or modify a judgment for error in admitting hearsay even though no objection was made at trial. (*See Alexander v State of New York*, 36 AD2d 777, 778 [3d Dept 1971] ["It is well established that in the interest of justice we have the right to reverse a judgment and grant a new trial where there is fundamental trial error, even though no objection was taken at the trial"]; *People v Clegg*, 18 AD2d 694 [2d Dept 1962]; CPL 470.15 [3] [c]; [6] [a].) The Court of Appeals review power is much more limited as it is precluded from reviewing a claim of error when no proper objection was made at trial except where the claim falls within "the narrow class

of mode of proceedings errors for which preservation is not required." (*People v Mack*, 27 NY3d 534, 536 [2016].) The Court of Appeals has never held that a claim of error in the admission of hearsay to which no objection was made, much less a general claim of error in the admission of evidence generally, is a "mode of proceedings" error.

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

However, a statement which is not offered to prove the truth of the matter asserted therein is not hearsay. (*See People v Salko*, 47 NY2d 230, 239 [1979] ["If, therefore, an extrajudicial utterance is offered, not as an assertion to evidence the matter asserted, but without reference to the truth of the matter asserted, the hearsay rule does not apply" (internal quotation marks omitted)]; *People v Becoats*, 17 NY3d 643, 656 [2011] [there was no need for defendant to rely upon a hearsay exception because he was not offering the out-of-court statements for their truth].)

If the statement is not offered for its truth, and is offered merely to show that the words were uttered or the conduct was engaged in, the issue of admissibility then becomes whether it is relevant and whether its probative value is substantially outweighed by the potential of unfair prejudice to the party against whom the statement is admissible. (*See* Guide to NY Evid rule 4.07.) There are many non-truth purposes for statements offered into evidence which the Court of Appeals has recognized. For example:

- A statement of a declarant which is heard by another and provides evidence of the hearer's state of mind. (*See People v Waters*, 90 NY2d 826 [1997]; *Ferrara v Galluchio*, 5 NY2d 16, 20 [1958].)

- A statement of a declarant which provides evidence of the declarant's state of mind. (*See People v Ricco*, 56 NY2d 320 [1982]; *Loetsch v New York City Omnibus Corp.*, 291 NY 308, 310-311 [1943].)

- A statement of a testifying witness which may be inconsistent with the witness's testimony and thereby tend to impeach the witness's credibility. (*See Larkin v Nassau Elec. R.R. Co.*, 205 NY 267, 268-269 [1912].)

- A timely complaint of a sexual assault by the victim, known as "prompt outcry." (*See People v McDaniel*, 81 NY2d 10, 16-17 [1993].)

- A statement of the victim of a crime describing the purported perpetrator of the crime. (*See People v Huertas*, 75 NY2d 487 [1990]; *People v Smith*, 22 NY3d 462 [2013].)

- A statement which provides an explanation of the conduct of a police investigation or simply completes the narrative of events leading to the defendant's arrest. (*See People v Gross*, 26 NY3d 689, 695 [2016]; *People v Ludwig*, 24 NY3d 221, 231 [2014].)

- A statement which has a legally operative effect under the substantive law (*see People v Caban*, 5 NY3d 143, 149-150 [2005] ["verbal act"]); or where conduct is ambiguous, which, accompanies the conduct and tends to explain or characterize it (*see People v Salko*, 47 NY2d 230, 239 [1979] ["verbal part of an act"]).

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

Subdivision (2). While no Court of Appeals decision has set forth a definition of "declarant," the term, in accord with its normal meaning, has been commonly used by the Court to mean a person who makes an extrajudicial statement. (*See People v James*, 93 NY2d 620, 630-631 [1999]; *People v Settles*, 46 NY2d 154, 166-167 [1978].) In connection with this definition, the courts have recognized that while the usual situation will involve the offered testimony of a witness who will testify about what he or she heard someone else say at a time prior to the trial or hearing, a declarant for purposes of the hearsay rule may also be a witness who seeks to testify about his or her own pre-trial statement. (*See People v Buie,* 86 NY2d 501 [1995] [witness permitted to testify to a statement she made prior to trial because it was admissible under the present sense impression hearsay exception].)

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

Subdivision (3). As recognized by the courts, a statement within the hearsay definition can be verbal, written or oral, or non-verbal, provided the verbal or non-verbal conduct is intended as an assertion, e.g., an expressive communication. (*See e.g. People v Salko,* 47 NY2d 230, 238-241 [1979] [the hearsay rule has, "as a general rule, no application to an act which is not intended to serve as an expressive communication"]; *see also People v Spicola,* 16 NY3d 441, 452 n 2 [2011] [infant's flushed skin and elevated heart rate, as testified to,

not “statements”]; *People v Madas*, 201 NY 349, 354 [1911] [identifying perpetrator by pointing to him a communicative gesture and therefore hearsay but admissible as a dying declaration]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887] [involuntary expressions and exclamations of pain not hearsay].)

8.01. Admissibility of Hearsay

(1) (a) Hearsay is not admissible unless it falls within an exception to the hearsay rule as provided by case law or statute or as required by the Federal Constitution or the New York State Constitution.

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

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

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

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

Note

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

New York evidence law provides for numerous hearsay exceptions, each with specific requirements which must be fulfilled before the statement is admissible. *(See People v James*, 93 NY2d 620, 634-635 [1999].) The source of these exceptions is both statutory and decision law. Statutory exceptions can be found in CPLR article 45 and CPL article 60, and throughout the consolidated laws. The judicially created exceptions are part of New York's common law of evidence. (*See Fleury v Edwards*, 14 NY2d 334, 340 [1964 Fuld, J., concurring] ["The common law of evidence is constantly being refashioned by the courts of

this . . . jurisdiction( ) to meet the demands of modern litigation. Exceptions to the hearsay rule are being broadened and created where necessary."]; *see also People v Lynes,* 64 AD2d 543 [1978], affd 49 NY2d 286 [1980] [the determination of preliminary questions of fact on the admissibility of evidence "is not restricted by the ordinary exclusionary rules of evidence"].)

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

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

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

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

8.02. Admissibility Limited by Confrontation Clause (*Crawford*)

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

(2) Testimonial statement, in general.

A hearsay statement is testimonial when it consists of:

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

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

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

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

(3) Statement to police.

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

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

(4) Statement to a court.

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

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

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

(6) Forensic Report.

> **(a) A forensic report is a testimonial statement when the primary purpose of the report is to provide evidence at trial that explicitly links the defendant to a crime. A testimonial forensic report includes one that identifies an item connected to the defendant as an illegal drug, or delineates the blood-alcohol content of a**

defendant's blood, or identifies the defendant through a fingerprint analysis or through a DNA analysis of incriminating evidence.

(b) A testimonial forensic report entitles a defendant to be confronted, as defined in subdivision one, with either the person who made the forensic report or with a person who is a trained analyst who supervised, witnessed or observed the testing, even without having personally conducted it.

(c) A forensic report does not constitute a testimonial statement when the report does not explicitly link the defendant to a crime and simply recites objective facts existing at the time of its making. Nontestimonial reports include:

(i) an autopsy report prepared by a medical examiner and describing only the observations and measurements of the deceased;

(ii) documents pertaining to the routine inspection, maintenance, and calibration of a breathalyzer machine; and

(iii) a report setting forth raw data of a DNA profile generated from an item in the contents of a rape kit before the defendant was a suspect in the crime.

Note

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

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

In *Crawford*, the Supreme Court held that

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

*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.

Last, a defendant may forfeit the right of confrontation where the defendant engaged or acquiesced in wrongdoing that was intended to and did procure the witness’s unavailability (*Giles*; *see also* Guide to NY Evid rule 8.19, Forfeiture by Wrongdoing, http://www.courts.state.ny.us/judges/evidence/8-HEARSAY/8.19_FORFEITURE%20BY%20WRONGDOING.pdf; Fed Rules Evid rule 804 [b] [6]; *see also People v Geraci*, 85 NY2d 359, 366 [1995] [“out-of-court statements, including Grand Jury testimony, may be admitted as direct evidence where the witness is unavailable to testify at trial and the proof establishes that the witness’s unavailability was procured by misconduct on the part of the defendant”]).

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

Subdivision (2) (b) (i) is derived from *Crawford* (541 US at 68), which itself directly held inadmissible a witness's statement obtained by formal station house interrogation (541 US at 68); and *Michigan v Bryant* (562 US 344, 358 [2011]), which declared that “the most important instances in which the [Confrontation] Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial.” (*See People v Goldstein*, 6 NY3d 119, 129 [2005] [“the statements made to (the expert) by her interviewees were testimonial.

. . . (The interviewees) knew they were responding to questions from an agent of the State engaged in trial preparation. None of them was making 'a casual remark to an acquaintance'; all of them should reasonably have expected their statements 'to be used prosecutorially' or to 'be available for use at a later trial.'. . . Responses to questions asked in interviews that were part of the prosecution's trial preparation are 'formal' in much the same sense as 'depositions' and other materials that the Supreme Court identified as testimonial"].)

Subdivision (2) (b) (ii). The rule that, absent a formal investigation, a statement is testimonial when the "primary purpose" of questioning was to prove criminal conduct or past events relevant to a criminal prosecution is derived from *Davis v Washington* (547 US 813, 822 [2006] [statements "are testimonial when the circumstances objectively indicate that there is no . . . ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution"]; *see Michigan v Bryant*, 562 US 344, 358, 370 [2011] ["although formality suggests the absence of an emergency and therefore an increased likelihood that the purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution, informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent" (citation and internal quotation marks omitted)]; *People v John*, 27 NY3d 294, 307 [2016] [deeming the primary purpose test essential to determining whether particular evidence is testimonial hearsay requiring the declarant to be a live witness at trial]).

That a statement is testimonial when its primary purpose is to create a substitute for trial testimony is derived from *Bryant* (562 US at 358 ["When . . . the primary purpose of an interrogation is to respond to an 'ongoing emergency,' its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute"]; *accord Ohio v Clark*, 576 US —, 135 S Ct 2173, 2177 [2015]; *People v John*, 27 NY3d at 307 [a "statement will be treated as testimonial only if it was procured with a primary purpose of creating an out-of-court substitute for trial testimony (*People v Pealer*, 20 NY3d 447, 453 [2013], quoting *Michigan v Bryant*" (internal quotation marks omitted)]; *see People v Pacer*, 6 NY3d 504, 512 [2006]; *Pealer* at 453 [an affidavit of an employee of the Department of Motor Vehicles attesting to the revocation of an accused's license in a prosecution was testimonial because it "had an accusatory purpose in that it provided proof of an element of the crime and resembled testimonial hearsay"]).

Subdivision (3) is derived from *Davis v Washington* (547 US at 822) which decided two cases. In the first case, a 911 caller's statements relating to an ongoing assault, including the identification of her assailant, were not testimonial, given that the "primary purpose" of the statements was to obtain help (*People v Nieves-Andino,* 9 NY3d 12, 17 [2007]; *People v Bradley*, 8 NY3d 124, 127 [2006]). In the second case, the police, responding to a "domestic disturbance" call, found no

ongoing emergency, and thus statements in response to their questions as to what happened were testimonial. (*See Michigan v Bryant*, 562 US at 349 [where the police found a mortally wounded person lying on the ground in a parking lot of a gas station, the victim's statement identifying his assailant, in response to police questions, was admissible because the " 'primary purpose of the interrogation' was 'to enable police assistance to meet an ongoing emergency' "].)

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

Subdivision (5) (a) is derived from *Ohio v Clark* (576 US at —, 135 S Ct at 2183 ["(M)andatory reporting (obligations) . . . cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution. It is irrelevant that the teachers' questions and their duty to report the matter had the natural tendency to result in Clark's prosecution"]).

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

Subdivision (6) (a) is derived from *Melendez-Diaz v Massachusetts* (557 US 305 [2009] [drug analysis]); *Bullcoming v New Mexico* (564 US 647 [2011] [blood-alcohol content]); *People v Rawlins* (10 NY3d 136, 157 [2008] [fingerprint report]); *People v John* (27 NY3d at 307-308 [DNA report that linked the defendant to possession of the weapon he was charged with possessing]); and *People v Austin* (30 NY3d 98, 104 [2017] [buccal swab was obtained and the resulting profile was compared with the DNA profile generated from the burglaries "with the primary (truly, the sole) purpose of proving a particular fact in a criminal proceeding—that defendant . . . committed the crime for which he was charged"]; *cf. People v Freycinet*, 11 NY3d 38, 41 [2008] [an autopsy report that did not link the defendant to the crime]).

Subdivision (6) (b) is derived from *Bullcoming* (564 US at 651 [holding that a surrogate analyst who was familiar with the laboratory's testing procedures, but "had neither participated in nor observed the test," did not satisfy the Confrontation Clause requirement]); and *People v Hao Lin* (28 NY3d 701, 705 [2017]) from which the language of subdivision (6) (b) is taken. (*See People v John*, 27 NY3d at 314 ["the claim of a need for a horde of analysts is overstated and a single analyst, particularly the one who performed, witnessed or supervised the generation of the critical numerical DNA profile, would satisfy the dictates of *Crawford* and *Bullcoming*"].)

Subdivision (6) (c) is derived from *People v Freycinet* (11 NY3d at 42 [autopsy report]); *People v Pealer* (20 NY3d at 455-456 [with respect to a breathalyzer machine, the Court noted that "*Melendez-Diaz* recognized the

possibility that records ‘prepared in the regular course of equipment maintenance’—precursors to an actual breathalyzer test of a suspect—‘may well qualify as nontestimonial records’ (557 US at 311 n 1). It may reasonably be inferred that the primary motivation for examining the breathalyzer was to advise the . . . Police Department that its machine was adequately calibrated and operating properly”]); *People v Meekins* (10 NY3d 136, 159-160 [2008] [decided with *Rawlins*]); and *People v Brown* (13 NY3d 332, 340 [2009] [a DNA raw data profile before the defendant was a suspect]). In *People v John*, however, the Court cautioned that "our focus in both of those cases was that extrajudicial facts were shepherded into evidence by a testifying expert whose subsequent independent analysis of that raw data provided the assurance that the DNA profile generated was accurate. Our sharpest focus was on the final stage of the DNA typing results, to wit, the generated DNA profile" (27 NY3d at 310; *see People v Austin*, 30 NY3d at 104).

8.03. Admission by Party

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

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

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

(c) made by an agent or employee of the party whom the party authorized to make a statement concerning the subject. The required authorization may be expressly given by the party or implied from the scope of the agent's duties or employment.

Note

Subdivision (1) (a) is derived from *Reed v McCord* (160 NY 330, 341 [1899]) which held that "admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made." *Reed* further held that the absence of personal knowledge on the part of the party making the statement does not preclude the statement's admissibility under the admission's exception. (*See Reed v McCord*, 160 NY at 341*, supra*.)

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

Subdivision (1) (b) is derived from a series of Court of Appeals decisions which adopted this privity-based admissions exception. (*See e.g. Murdock v*

Waterman, 145 NY 55 [1895] [joint obligor]; *Chadwick v Fonner*, 69 NY 404 [1877] [grantor]: *Hatch v Elkins,* 65 NY 489 [1875] [principal-surety].)

Subdivision (1) (c), which sets forth New York's so-called "speaking agent" exception, is derived from *Tyrrell v Wal-Mart Stores* (97 NY2d 650, 652 [2001] ["The Appellate Division correctly concluded that plaintiff failed to establish that the unidentified employee was authorized to make the alleged statement; thus, the statement did not constitute an admission binding on the employer"]); *Loschiavo v Port Auth. of N.Y. & N.J.* (58 NY2d 1040, 1041 [1983] ["(T)he hearsay statement of an agent is admissible against his employer under the admissions exception to the hearsay rule only if the making of the statement is an activity within the scope of his authority"]); *Spett v President Monroe Bldg. & Mfg. Corp.* (19 NY2d 203, 206 [1967] [statement of defendant's general foreman admissible against employer since he "was apparently the person who ran [his employer's business], in whom complete managerial responsibility for the enterprise was vested"]); and *Merchant's Natl. Bank of Gardner, Kennebec County, Me. v Clark* (139 NY 314, 319 [1893] ["Hearsay evidence of this character is only permissible when it relates to statements by the agent, which he was authorized by his principal to make . . . ."]).

Under this exception, where the requisite authority has not been given expressly to the employee by the employer, implied authority has been found to be present, as *Spett* recognizes, where the employee has been given extensive managerial responsibility over the employer's business. Thus, implied authority to speak has been found to exist where the employee was placed "in full charge" of the business (*see Stecher Lithographic Co. v Inman,* 175 NY 124, 127 [1903]); the employee was the "general manager" of the business (*see Vaughn Mach. Co. v Quintard,* 165 NY 649 [1903], *affg* 37 App Div 368, 372 [1st Dept 1899]); and the employee was the superintendent of the job site or facility (*see Brusca v El Al Israel Airlines,* 75 AD2d 798, 800 [2d Dept 1980]). There are cases concluding that an employer's general manager of one of the employer's stores did not have implied authority from that position, cases that apparently turn upon the extent of the responsibilities given to the general manager. (*See e.g. Alvarez v First Natl. Supermarkets, Inc.*, 11 AD3d 572 [2d Dept 2004]; *Scherer v Golub Corp.*, 101 AD3d 1286 [3d Dept 2012]; *compare Navedo v 250 Willis Ave. Supermarket,* 290 AD2d 246, 247 [1st Dept 2002] [implied authority present]; *Bransfield v Grand Union Co.,* 24 AD2d 586 [2d Dept 1965], *affd* 17 NY2d 474 [1965] [implied authority present].)

New York is one of three states which does not recognize an exception comparable to Federal Rules of Evidence rule 801 (d) (2) (D), which creates an exception for statements of a party's agent or employee made by the agent or employee in the scope of his or her relationship, even if the agent or employee does not have any authority to speak on behalf of the party. (*See* 4 Jones, Evidence § 27:22 [7th ed].) In *Loschiavo v Port Auth. of N.Y. & N.J.* (58 NY2d 1040, 1041-1042*, supra)*, the Court of Appeals noted that New York's rule has been widely

criticized but decided not to reconsider the rule due to a pending legislative modification of it.

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

8.05. Admission by Adopted Statement

(1) An out-of-court statement made by a person which is inconsistent with a party's position in the proceeding is admissible against that party, if the party heard and understood the statement and assented to the statement by word or conduct.

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

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

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

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

omission of critical details from the defendant's pretrial statement that would have been natural to include in that statement.

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

Note

Subdivision (1). An adoptive admission occurs "when a party acknowledges and assents to something '*already* uttered by another person, which thus becomes effectively the party's own admission' " (*People v Campney*, 94 NY2d 307, 311 [1999], citing 4 John Henry Wigmore, Evidence § 1609 at 100 [James H. Chadbourn rev]). The other person's statement is then admissible against the party as a party admission. In effect, it is as if the party himself or herself made the statement. The manifestations of assent are also admissible to establish the "relevant demonstrative response of the affected party" (*People v Lourido*, 70 NY2d 428, 433 [1987]).

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

The Court of Appeals has cautioned that an adoptive admission is allowed only when the statement was "fully known and fully understood" by the party against whom it is being offered (*People v Koerner*, 154 NY 355, 374 [1897]; *see also People v Allen*, 300 NY 222, 225-226 [1949]). Whether these foundation elements for the admissibility of the statement have been established is to be decided by the trial court in light of "all the facts and circumstances surrounding the incident" (*Ferrara*, 199 NY at 430).

Subdivision (2). Except as set forth in subdivision (3), subdivision (2) sets forth the rule governing an adoption of a statement in circumstances involving a party's silence or evasive or equivocal response. The Court of Appeals has held that "[a]ssent can be manifested by silence, because 'a party's silence in the face of an

accusation, under circumstances that would prompt a reasonable person to protest, is generally considered an admission' " (*Vining*, 28 NY3d at 690 [citations omitted]). 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) 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 142, 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]).

8.07. Ancient Documents

A statement in a document is admissible if it is proved to be in existence for more than thirty years, and its authenticity is supported by its proper custody or otherwise accounted for, and it is free from any indication of fraud or invalidity.

Note

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

The Court of Appeals explained the rule by noting that

> "[i]t is usually impossible to establish a very ancient possession of property by the testimony of persons having knowledge of the fact, and when a deed forming part of a chain of title is so ancient that there can be, in the nature of things, no living persons who can testify to acts of ownership by the grantor or grantee, it may be received in evidence without such proof."

(*Greenleaf v Brooklyn, 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].)

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 Appeals 2015] [collecting cases].)

8.17. Excited Utterance [1]

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

Note

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

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

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

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

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

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

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

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

8.17. Excited Utterance [1]

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

Note

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

[1] In May 2018, this rule was revised to substitute the words "a person who personally observed" the event for the words "a bystander to" the event to better reflect the need for the "bystander" to have personally observed the incident, as explained in the Note, and as emphasized by the Court of Appeals in *People v Cummings*, 2018 NY Slip Op 03306 (May 8, 2018).

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

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

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> " '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).

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

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

8.23. Impeachment of Hearsay Declarant

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

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

Note

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

8.25. Past Recollection Recorded

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

Note

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

8.27. Statement of Pedigree

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

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

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

Note

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

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

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

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

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

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

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

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

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

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

8.29. Present Sense Impression

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

Note

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

8.31. Prior Consistent Statement

A statement of a witness made prior to his or her testimony and consistent with that testimony is admissible when offered to rebut an express or implied claim of recent fabrication and when the statement was made prior to the circumstances supporting that claim.

Note

This rule sets forth an exception for a prior consistent statement of a witness where the witness testifies at a proceeding and the statement is offered to prove the truth of the matter asserted therein (*see e.g. People v Seit*, 86 NY2d 92, 95 [1995] [prior consistent statement was admissible "under the recent fabrication exception to the hearsay rule"]; *People v Singer*, 300 NY 120, 123 [1949] ["exception to the hearsay rule" for prior consistent statements that rebut a charge of recent fabrication]). As stated by the Court of Appeals, "[t]his exception is rooted in fairness; it would be unjust to permit a party to suggest that a witness, as a result of interest, bias or influence, is fabricating a story without allowing the opponent to demonstrate that the witness had spoken similarly even before the alleged incentive to falsify arose" (*People v McDaniel*, 81 NY2d 10,18 [1993]).

The exception's "recent fabrication" condition for admissibility is derived from the substantial Court of Appeals precedent which holds that a prior consistent statement is only admissible where the "cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication" (*People v Davis*, 44 NY2d 269, 277 [1978]; *see Fishman v Scheuer*, 39 NY2d 502, 504 [1976] ["The plaintiff had not attempted to assert that the testimony of [the] witness was a recent fabrication. In the absence of such claim, prior consistent statements are inadmissible"]; *Crawford v Nilan*, 289 NY 444, 450-451 [1943]; *Seit*, 86 NY2d at 96 ["The implication that the testimony was recently fabricated arises only if it appears that the cross-examiner believes and wants the jury to believe that the witness is testifying falsely to 'meet the exigencies of the case' " (citing *People v Katz*, 209 NY 311, 340 [1913])]). The further condition for admissibility that the statement was made before the charged fabrication is also derived from substantial Court of Appeals precedent (*see Davis*, 44 NY2d at 277 ["prior consistent statements made at a time when there was no motive to falsify are admissible to repel the implication or charge"]).

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

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

When a prior consistent statement is admissible under the exception recognized by this section, the Court of Appeals has noted that the statement may also serve to rehabilitate the witness (*see People v McDaniel*, 81 NY2d 10,18 [1993]; *People v McClean*, 69 NY2d 426, 428 [1987]).

Apart from the hearsay exception recognized by this section, a prior consistent statement may be offered for a purpose other than its truth, for example, to explain the investigative process leading to a defendant's arrest when such evidence is relevant to a jury's assessment of the witness's alleged motive to lie (*see People v Gross*, 26 NY3d 689, 694 [2016] [child's report of sexual abuse by the defendant testified to by her mother, a sister and school principal, and two police officers assigned to investigate her allegations]; *People v Ludwig*, 24 NY3d 221, 230-232 [2014] [a child's report of sexual abuse by the defendant testified to by her mother and older half-brother]).

Where the witness is the complainant in a proceeding involving the commission of a sexual offense, and at issue is the admissibility of a statement made by the witness/complainant reporting the matter after the purported incident, the prompt outcry rule may apply (*see* Guide to NY Evid rule 8.37, Prompt Outcry).

8.33. Prior Inconsistent Statement

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

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

Note

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

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

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

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

8.35. Prior Judgment of Conviction

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

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

Note

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

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

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

8.37. Prompt Outcry

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

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

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

Note

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

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

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

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

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

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

8.39. Reputation Evidence

(1) Character Trait. Evidence of reputation among a "community of individuals" of a person's character trait is admissible when that character trait is provable.

(a) 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.

(b) 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.

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

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

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

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

Note

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

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

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

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

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

Subdivision (1) (d) and (e) reflect the Court of Appeals statement in *People v Kuss* (32 NY2d 436, 443 [1973]) that "[w]hether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise. And although character is the issue (i.e., the unlikelihood of the defendant's committing the crime), reputation is the only proof which the law allows. Neither the defendant nor the prosecutor may introduce evidence of particular acts tending to prove or rebut the defendant's good character" (citations omitted). (*See also People v Bouton*, 50 NY2d at 139 [wherein the Court stated that

reputation is "the aggregate tenor of what others say or do not say about him" and "is the raw material from which that character may be established"].)

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

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

Subdivision (3) is derived from *McKinnon v Bliss* (21 NY at 217), wherein the Court of Appeals stated: "That hearsay or reputation is admissible . . . upon questions respecting the boundaries of lands . . . is a familiar doctrine." (*See also Village of Oxford v Willoughby*, 181 NY 155, 160-161 [1905] ["accepted belief of the community" as to location of public road]; *Hannah v Baylon Holding Corp.*, 34 AD2d 792 [2d Dept 1970] [in action to determine boundary lines, Court held evidence of reputation regarding boundaries insufficient to invoke "reputation" exception], *revd on other grounds* 28 NY2d 89 [1971] [declarations of a deceased person who owned or was in possession of land, as to the boundary line between him and the land of another, were admissible as an exception to the hearsay rule and were sufficient to establish boundary lines]; *Gardner v Town of Claverack*, 22 NYS2d 265, 268-269 [Sup Ct, Columbia County 1940], *affd* 259 App Div 1111 [3d Dept 1940].)

8.41. State of Mind

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

(2) An out-of-court statement by a declarant describing the declarant's physical condition at the time the statement is made is admissible provided the declarant is unavailable at the time of the proceeding.

Note

Subdivision (1) is derived from several Court of Appeals decisions that recognize this exception (*see e.g. People v Reynoso*, 73 NY2d 816, 819 [1988] ["While such declarations may be received to show the declarant's state of mind at the time the statement was made, they are not admissible to establish the truth of past facts contained in them," such as a statement to a third party made after a shooting that the defendant believed the victim was armed]; *Matter of Putnam*, 257 NY 140, 145 [1931] ["mental conditions and feelings"]; *Schultz v Third Ave. R.R. Co*., 89 NY 242, 248-249 [1882] [feelings of hostility]; *see also Hine v New York El. R.R. Co*., 149 NY 154, 162 [1896] [statement as to motive admitted as part of res gestae]).

The exception for "memory or belief," initially recognized in *Shepard v United States* (290 US 96 [1933, Cardozo, J.]), has been consistently recognized by the Court of Appeals (*see People v Vasquez*, 88 NY2d 561, 580 [1996]; *Reynoso*, 73 NY2d at 819).

Statements regarding the declarant's present pain or then-existing physical condition are not within the exception set forth in subdivision (1) (*see Davidson v Cornell*, 132 NY 228 [1892]; *Roche v Brooklyn City & Newtown R.R. Co.*, 105 NY 294 [1887]). See subdivision (2) and the Note thereto.

For the rules governing a statement of future intent, see Guide to New York Evidence rule 8.42.

Subdivision (2) is derived from *Tromblee v North Am. Acc. Ins. Co*. (173 App Div 174, 176 [3d Dept 1916], *affd* 226 NY 615 [1919]), which held that a statement made by a declarant concerning the declarant's present physical condition after an accident was admissible where the declarant was deceased at the time of the trial (*but see Crawford v Washington*, 541 US 36 [2004]).

Such a statement may be admissible, however, even though the declarant is available where the statement is admissible as one made to a health care professional under Guide to New York Evidence rule 8.43 (*see People v Duhs*, 16 NY3d 405, 408 [2011]), or the statement is admissible as an excited utterance under rule 8.12 or as a present sense impression under rule 8.15 (*see e.g. People v McCray*, 102 AD3d 1000, 1009 [3d Dept 2013]; *Balzola v Giese*, 107 AD3d 587 [1st Dept 2013]; *Hyung Kee Lee v New York Hosp. Queens*, 118 AD3d 750 [2d Dept 2014]).

8.43. Statement Made for Medical Diagnosis or Treatment

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

Note

This formulation is derived from several Court of Appeals decisions.

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

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

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

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

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

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

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

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