GUIDE TO NY EVIDENCE

ARTICLE 3 PRIVILEGES

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3.01. Presumptions in Civil Proceedings

(1) This rule applies in civil proceedings to a "presumption," which as provided in subdivisions two and three is rebuttable; it does not apply to a "conclusive" presumption, that is, a "presumption" not subject to rebuttal, or to an "inference" which permits, but does not require, the trier of fact to draw a conclusion from a proven fact.

(2) A presumption is created by statute or decisional law, and requires that if one fact (the "basic fact") is established, the trier of fact must find that another fact (the "presumed fact") is thereby established unless rebutted as provided in subdivision three.

(3) Unless the court determines that a presumption is not applicable:

(a) The party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact.

(b) Upon presentation of rebuttal evidence, the court shall as provided by the statute or decisional law establishing the presumption, either:

(i) itself determine that the presumption has been rebutted, in which event the court shall not submit the presumption to the finder of fact; or

(ii) instruct the trier of fact to find that the presumed fact exists unless the trier of fact is persuaded that the presumed fact does not exist; or

(iii) proceed as set forth in subparagraph (ii) when the statute or decisional law

establishing the presumption does not otherwise dictate.

(c) Unless the applicable statute or decisional law provides otherwise, the burden of persuasion necessary to rebut a presumption is "substantial evidence."

Note

Subdivision (1) defines the scope of this rule. It begins by limiting the application of this rule to presumptions in civil proceedings.

(Presumptions in criminal proceedings are governed by a separate Guide to New York Evidence rule [3.03] because constitutional principles as developed by the United States Supreme Court and the Court of Appeals limit the operation of a presumption in a criminal proceeding.)

The rule further limits its application to a "rebuttable" or "true" presumption as defined in subdivision (2). It expressly excludes a "conclusive" presumption and an "inference" from its scope.

A conclusive presumption (also known as an "irrebuttable" presumption) requires the trier of fact to draw a particular conclusion after certain specified facts are established, regardless of proof to the contrary (*Cordua v Guggenheim*, 274 NY 51, 57 [1937]; *Brandt v Morning Journal Assn.*, 81 App Div 183, 185 [1st Dept 1903], *affd* 177 NY 544 [1904]). It is not a true evidentiary presumption but in reality "a rule of substantive law expressed in terms of rules of evidence" (Prince, Richardson on Evidence § 3-103 [Farrell 11th ed 1995]; *see Derby v Prewitt*, 12 NY2d 100, 106 [1962] ["Irrebuttable presumptions have their place in the law but only where public policy demands that inquiry cease"]). Conclusive presumptions have been created under the common law and by statute (*see e.g. Cordua v Guggenheim*, 274 NY 51, 57 [1937] ["There is a conclusive presumption that the parties intended to integrate in the deed every agreement relating to the nature or extent of the property to be conveyed"]; RPTL 1168 [2] ["After two years from the issuance of such certificate (of sale) or other written instrument, no evidence shall be admissible in any court to rebut such presumption unless the holder thereof shall have procured such certificate of sale or such other written instrument by fraud or had previous knowledge that it was fraudulently made or procured"]).

An inference permits, but does not require, the trier of fact to draw a conclusion from a proven fact (*see Foltis, Inc. v City of New York*, 287 NY 108, 119-120 [1941]; *Kilburn v Bush*, 223 AD2d 110, 116 [4th Dept 1996] [noting the difference between an inference, which "merely allows the trier of fact to draw a conclusion from a proven fact," and a "true" presumption, which places a burden

upon the adversary to produce evidence to rebut the presumed fact]). In this connection, the Court of Appeals has noted that "[a] study of the opinions of the appellate courts of this state reveals that judges have used the terms 'inference' and 'presumption' indiscriminately and without recognition that an 'inference' and a 'presumption' are not identical in scope or effect" (*Foltis, Inc.*, 287 NY at 121).

Subdivision (2). Subdivision (2) sets forth the traditional definition of a presumption (*see e.g. Ulrich v Ulrich*, 136 NY 120, 123 [1892] ["A presumption has been defined to be a rule of law that courts and judges shall draw a particular inference from particular facts, or from particular evidence, unless and until the truth of the inference is disproved"]; *Platt v Elias*, 186 NY 374, 381 [1906] [a presumption is "a particular inference (that) *must* be drawn from an ascertained state of facts"]; *see* Barker & Alexander, Evidence in New York State and Federal Courts § 3:18 [2d ed]).

Present New York law recognizes the existence of dozens of rebuttable presumptions, created by decisional law or statute. Each presumption sets forth the "basic fact(s)" that will give rise to a "presumed fact," which is then subject to rebuttal.

Decisional law presumptions include: presumption of mailing and delivery (*see Nassau Ins. Co. v Murray*, 46 NY2d 828, 829 [1978]); presumption of proper service of process (*see Kihl v Pfeffer*, 94 NY2d 118, 122 [1999]; *Wells Fargo Bank, N.A. v Leonardo*, 167 AD3d 816, 817 [2d Dept 2018]); presumption of negligence in rear-end collision (*see Tutrani v County of Suffolk*, 10 NY3d 906, 908 [2008]); presumption against suicide (*see Schelberger v Eastern Sav. Bank*, 60 NY2d 506, 509-510 [1983]); presumption of regularity (*see Matter of Driscoll v Troy Hous. Auth.*, 6 NY2d 513, 518 [1959]); presumption of the legitimacy of children (*see Matter of Matthews*, 153 NY 443, 448 [1897]).

Statutory presumptions include: CPLR 4540-a (presumption of authentication for records produced pursuant to discovery demand); Correction Law § 753 (presumption of rehabilitation); EPTL 2-1.7 (presumption of death after three years' absence); Public Health Law § 10 (presumptions of fact from orders of Department of Health records and records of state and local health officials); Vehicle and Traffic Law § 388 (1) (presumption of permissive use of motor vehicle); Vehicle and Traffic Law § 2108 (certificate of title of vehicle is presumptive evidence of vehicle's ownership). Some of the more important and frequently utilized presumptions are discussed in detail in Fisch on New York Evidence §§ 1122-1145 (2d ed); Martin, Capra & Rossi, NY Evidence Handbook § 3.2 (2d ed); and Prince, *supra* §§ 3-107, 3-138.

Subdivision (3). Subdivision (3) (a) restates the traditional view of a presumption, namely, that the party against whom a presumption is invoked may rebut the presumption by disproof of the basic fact or presumed fact (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 3:18 [2d ed]).

Unfortunately, as various commentators have observed, New York does not have a uniform approach on the effect of a presumption once rebuttal evidence is introduced (*see* Proposed NY Code of Evidence § 302, Comment [1991], available at: https://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/RESOURCES/1991_PROPOSED_NY_CODE_OF_EVIDENCE.pdf [there are "notorious difficulties and disparities concerning the effect of presumptions"]; Barker & Alexander, *supra* § 3:16 ["Searching for consistency in the law of presumptions in New York can be a frustrating exercise"]; Martin, Capra & Rossi, *supra* § 3.1; Prince, *supra* § 3-104 ["The operation and effect in New York of a presumption . . . is not free from doubt. No one principle explains all the New York cases"]).

The lack of a uniform rule may be traced to the works of two professors of law who advanced different theories on the procedural effect of a presumption (*see* Thayer, A Preliminary Treatise on Evidence at the Common Law 346 [1898]; Morgan & Maguire, *Looking Backward and Forward at Evidence*, 50 Harv L Rev 909, 913 [1937]), as well as the public policy behind the different presumptions. As to the public policy issue, the Proposed New York Code of Evidence noted:

> "Some presumptions, *e.g.*, receipt of a regularly mailed letter, are mainly authoritative embodiments of natural probabilities drawn from logic and experience. Others, such as the presumption that anyone driving an automobile had the owner's permission to do so, reflect substantive social policies rather than, or in addition to, considerations of natural probability or probative worth. The presumption that fixes the time of death at the end of the [three] year death-from-unexp[l]ained-absence period is actually contrary to natural probabilities, and is a purely arbitrary solution to an impasse in proof. Still, other presumptions, *e.g.*, that as between connecting carriers the damage occurred on the line of the last carrier, serve the interests of fairness by seeking to elicit evidence from the party who has superior means of access to it" (Proposed NY Code of Evidence § 302, Comment).

Thayer's approach would remove a presumption from the case once the trial court finds that the party affected by the presumption produced evidence to support a finding of the presumed fact's nonexistence (Barker & Alexander, *supra* § 3:21). The "classic" Thayer example is found in the presumption of receipt of a properly mailed letter: once the mailing of the letter is proved, the party affected by the presumption need only take the stand and deny receipt and the presumption would not be charged to the jury (*id.*; *see also People v Langan*, 303 NY 474, 480 [1952] ["A presumption of regularity exists only until contrary substantial evidence appears. It forces the opposing party . . . to go forward with proof but, once he does go forward, the presumption is out of the case. . . . (I)t will be for the Trial Judge to pass on all questions of fact, including the credibility of defendant and of any other

witnesses on either side" (citations omitted)]; *Fleming v Ponziani*, 24 NY2d 105, 111 [1969] [a presumption of a valid release from liability is "no longer in the case" once the party against whom the presumption is invoked puts in evidence to rebut, such as fraud or duress, in securing the release; then, the party claiming the release "must come forward with real evidence to sustain his burden as to the legality of the release or otherwise suffer a directed verdict"]). The Thayer approach is potentially unfair to the party for whom the presumption exists, and so appears ill-suited to the policy concerns behind various presumptions.

In moving away from the potential unfairness of the Thayer approach, the Court of Appeals explained, in a case involving the presumption that a driver operates with the consent of the owner, that statements by both the owner and the driver that the driver was operating without the owner's consent, without more, did not automatically rebut the presumption and warrant summary judgement for the owner: "Where the disavowals are arguably suspect, as where there is evidence suggesting implausibility, collusion or implied permission, the issue of consent should go to a jury" (*Country-Wide Ins. Co. v National R.R. Passenger Corp.*, 6 NY3d 172, 178 [2006]; *see also Bornhurst v Massachusetts Bonding & Ins. Co.*, 21 NY2d 581, 586 [1968] ["Where the evidence rebutting a presumption presents an issue of credibility, it is for the jury to determine whether the rebuttal evidence is to be believed and, consequently, for the jury to determine whether the presumption has been destroyed" (internal quotation marks and citation omitted)]). That view approaches the Morgan theory of presumptions.

For Morgan, it is "not enough that the opponent takes the stand and says she did not receive the letter. The jury will be instructed that, upon a finding that the letter was mailed, they must also find that it was received unless they are persuaded by the evidence favoring the opponent that it was not in fact received" (Barker & Alexander, *supra* § 3:22). Thus, the Morgan approach appears more suited to vindicate the policy considerations behind many presumptions, and its application "would be consistent in many cases with current practice" (*id.* § 3:23; s*ee e.g.* UCC 1-206, Presumptions ["Whenever this act creates a 'presumption' with respect to a fact, or provides that a fact is 'presumed,' the trier of fact must find the existence of the fact unless and until evidence is introduced that supports a finding of its nonexistence"]).

Subdivision (3) (a) and (b) recognizes that there is no uniform rule in New York on the effect of rebuttal evidence. Thus, subdivision (3) (a) and (b) (i**)** embodies the Thayer approach; subdivision (3) (a) and (b) (ii) encompasses the Morgan approach and the Thayer approach as modified by the Court of Appeals in *Country-Wide Ins. Co.* (6 NY3d at 178); and subdivision (3) (a) and (b) (iii) recognizes the Morgan approach so long as the law of the particular presumption does not set forth the procedure upon the presentation of rebuttal evidence (*see* Barker & Alexander, *supra* § 3:23 ["Across-the-board application of the Morgan rule would overcome the Thayer rule's inadequate promotion of the policies underlying presumptions, would be consistent in many cases with current practice,

would be easy to apply by trial judges and 'would abolish the prevailing confusion and complexities' "]; Proposed NY Code of Evidence § 302, Comment [commenting in favor of the uniform adoption of the Morgan approach]).

Subdivision (3) (c) recognizes that there is no uniform rule in New York with respect to the burden of proof necessary to rebut a presumption. In "most, but not all, of the presumptions in New York," the burden of proof is by "substantial evidence" (*see e.g. Matter of Board of Mgrs. of French Oaks Condominium v Town of Amherst*, 23 NY3d 168, 174–175 [2014] [the presumption of validity of the assessment of property made by a taxing authority requires the person challenging that assessment to come forward with "substantial evidence" that the property was overvalued by the assessor]; *Murdza v Zimmerman*, 99 NY2d 375, 380 [2003] ["proof of ownership of a motor vehicle creates a rebuttable presumption that the driver was using the vehicle with the owner's permission, express or implied. Once the plaintiff meets its initial burden of establishing ownership, a logical inference of lawful operation with the owner's consent may be drawn from the possession of the operator. This presumption may be rebutted, however, by substantial evidence sufficient to show that a vehicle was not operated with the owner's consent" (internal quotation marks and citations omitted)]; *People v Langan*, 303 NY at 480 ["A presumption of regularity exists only until contrary substantial evidence appears"]; *see generally* Prince, *supra* § 3-120).

In some instances, a presumption is subject to rebuttal by a preponderance of the evidence (*see e.g. Matter of Granger v Misercola*, 21 NY3d 86, 92 [2013] [a presumption in favor of visitation of children has been held subject to rebuttal by a preponderance of the evidence]; UCC 1-201 [b] [8] [" 'Burden of establishing' a fact means the burden of persuading the trier of fact that the existence of the fact is more probable than its nonexistence"]; CPLR 4540-a ["Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is not authentic, and shall not preclude any other objection to admissibility"]). Proposed New York Code of Evidence § 302 favored a uniform burden of persuasion of "a preponderance of evidence."

In some instances, the law sets forth the "higher" standard of persuasion: "clear and convincing" evidence (Prince, *supra* § 3-104). "The clear and convincing evidence standard is satisfied when the party bearing the burden of proof has established that it is highly probable that what he or she has claimed is actually what happened" (*Home Ins. Co. of Ind. v Karantonis*, 156 AD2d 844, 845 [3d Dept 1989]; *see Green v William Penn Life Ins. Co. of N.Y.*, 12 NY3d 342, 347 [2009] [presumption against suicide requires evidence that shows suicide to be "highly probable"]; *Murtagh v Murtagh*, 217 AD2d 538, 539 [2d Dept 1995] [the presumption that a child born during marriage is presumed to be the biological product of the marriage may be rebutted by clear and convincing proof excluding

the husband as the father or otherwise tending to disprove legitimacy]; *Matter of Jean P. v Roger Warren J.*, 184 AD2d 1072, 1072 [4th Dept 1992] [same]; *Matter of Penny MM. v Bruce MM.*, 118 AD2d 979 [3d Dept 1986] [same]).

3.03. Presumptions in Criminal Proceedings – Evidence in People's Case

(1) A presumption is created by statute or decisional law and requires proof of a specified fact (the "basic fact") from which another fact (the "presumed fact") may be inferred.

(2) When the prosecution submits evidence from which the trier of fact finds that a basic fact is proven beyond a reasonable doubt, the trier of fact may, but is not required to, infer the presumed fact.

(3) When the prosecution presents evidence in support of a basic fact, the defendant may, but is not required to, present evidence in rebuttal of that fact and the presumed fact. Unless the court determines that the presumption is not applicable, or that there is insufficient evidence warranting a finding of the basic fact, and irrespective of whether the defendant presents rebuttal evidence, it remains for the trier of fact to consider whether the basic fact has been proven beyond a reasonable doubt and whether to infer the presumed fact.

Note

Subdivision (1) provides that this rule applies to a presumption when applied against the defendant in a criminal proceeding. It recognizes that constitutional principles, both federal and state, limit the operation of a presumption in a criminal proceeding against a defendant.

The definition of a presumption is derived from the decisional law of both the United States Supreme Court and the Court of Appeals. (*See County Court of Ulster Cty. v Allen*, 442 US 140, 156 [1979] ["Inferences and presumptions are a staple of our adversary system of factfinding. It is often necessary for the trier of fact to determine the existence of an element of the crime—that is, an 'ultimate' or 'elemental' fact—from the existence of one or more 'evidentiary' or 'basic' facts"]; *People v Leyva*, 38 NY2d 160, 168 n 3 [1975] [a presumption is "a deduction or an inference which the trier of fact may draw from facts found or otherwise established during the course of the trial"].)

As noted by subdivision (1), presumptions may be established by statute (*see e.g.* Penal Law § 220.25 [presumption of possession of a controlled substance]), as well as by decisional law (*see e.g. People v Kirkpatrick*, 32 NY2d

17, 23 [1973], *appeal dismissed for want of a substantial federal question* 414 US 948 [1973] ["Generally, possession suffices to permit the inference that the possessor knows what he possesses"]; *People v Hildebrandt*, 308 NY 397, 400 [1955] ["presumptions, in criminal law, need not necessarily be statutory"]). Whether created by statute or decisional law and whether specific to an element of a crime or of general application (such as the presumption of regularity) the finder of fact must be instructed as set forth in subdivision (3).

Before a presumption may be presented to a jury, there must be (or have been) a judicial determination that there is a reasonably high degree of probability that the presumed fact follows from those proved directly. As the Court of Appeals explained in *Leyva* (38 NY2d at 165-166), the United States Supreme Court held that

> "a rational connection between facts proved directly and ones to be inferred from them requires a 'substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend'. (*Leary v United States*, 395 US 6, 36; see, also, *Turner v United States*, 396 US 398, 407.) Our court has exacted an even higher standard of rational connection. As we said in *People v McCaleb* (25 NY2d 394, 404), the connection must assure 'a reasonably high degree of probability' that the presumed fact follows from those proved directly."

Subdivision (2) sets forth the requirement that a presumption in a criminal case is in fact a permissive inference (*People v McKenzie*, 67 NY2d 695, 696 [1986]; *People v Leonard*, 62 NY2d 404, 411 [1984]; *People v Getch*, 50 NY2d 456, 466 [1980]). Thus, in the criminal law, the term "presumption" set forth by statute or decision law is used interchangeably with the term "inference" (*Leyva*, 38 NY2d at 168 n 3 ["Legislatures have been somewhat loose in their use of the word 'presumption' when an inference is clearly what is intended, thus leading to a good deal of unnecessary confusion"]; *see* CJI2d[NY] Penal Law § 220.25 [1] [instruction for the presumption of possession of a controlled substance: "What this (presumption) means is that, if the People have proven beyond a reasonable doubt (the 'basic' fact), then you may, but you are not required to, infer from that fact (the 'presumed' fact). Whether or not to draw that inference is for you (the jury) to decide and will depend entirely on your evaluation of the evidence"]).

The Court of Appeals has cautioned that a " 'mandatory' or 'conclusive' presumption, which operates to *require* the finder of fact to hold against the defendant in the absence of some showing by the defendant to the contrary, may never be applied in a criminal case with respect to one of the elements of the crime being prosecuted" (*Leonard*, 62 NY2d at 411 [a conclusive presumption of regularity as to the conduct of a public official was held to be impermissible]).

Requiring the basic fact to be proved beyond a reasonable doubt is a due process safeguard. (*Barnes v United States*, 412 US 837, 843 [1973] ["if a statutory inference submitted to the jury as sufficient to support conviction satisfies the reasonable-doubt standard (that is, the evidence necessary to invoke the inference is sufficient for a rational juror to find the inferred fact beyond a reasonable doubt)

as well as the more-likely-than-not standard, then it clearly accords with due process"]; *see* CJI2d[NY] Penal Law §§ 165.15 [4]; 165.55, 220.25, 265.15 [instructions for presumptions].)

Examples of the application of a presumption in a criminal case include:

- *Kirkpatrick* (32 NY2d at 23): "Generally, possession suffices to permit the inference that the possessor knows what he [or she] possesses, especially, but not exclusively, if it is in [the possessor's] hands, on [the possessor's] person, in [the possessor's] vehicle, or on [the possessor's] premises."

- *People v Everett* (10 NY2d 500 [1962]): The recent and exclusive possession of the fruits of a crime, if unexplained or if falsely explained, permits the inference that the possessor participated in the theft of the property.

- Penal Law § 165.05 (1): A person who takes, operates, exercises control over, rides in, or otherwise uses a vehicle without the owner's consent is presumed to know that he or she does not have such consent. (*See Matter of Raquel M.*, 99 NY2d 92, 94 [2002].)

- Penal Law § 220.25 (1): The presence of a controlled substance in an automobile is presumptive evidence of knowing possession of that substance by each and every person in the automobile at the time the controlled substance was found unless the controlled substance was concealed upon the person of one of the occupants. (*See Leyva*, 38 NY2d 160.)

- Penal Law § 220.25 (2): The presence of narcotic drugs in open view in a room, other than a public place, under circumstances evincing an intent to unlawfully prepare same for sale is presumptive evidence of knowing possession of the drugs by each person in close proximity to them (*see People v Tirado*, 38 NY2d 955, 956 [1976] [the basic facts establishing that the premises constituted a "drug factory" were proved and permitted the inference that those found in the premises were engaged in the illicit enterprise]; *compare People v Kims*, 24 NY3d 422, 433 [2014] [a basic fact that was necessary to establish the presumption, i.e. that the defendant was "in close proximity" to the drugs, was not proved and thus the presumption was not applicable]).

- Penal Law § 265.15 (3): The presence in an automobile (other than a stolen one or a public omnibus) of contraband weapon is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon is found except if the weapon is found upon the person of one of the occupants therein. (*See People v Lemmons*, 40 NY2d 505 [1976] [whether a pistol found in the handbag of a woman passenger of a car was found "on her person" was a question of fact for the jury]; *County Court of Ulster Cty.*, 442 US 140 [Lemmons'

codefendant unsuccessfully challenged the constitutionality of the presumption].)

- Penal Law § 250.45 (3) (b): When a person uses or installs, or permits the utilization or installation of an imaging device in a bedroom, changing room, fitting room, restroom, toilet, bathroom, washroom, shower or any room assigned to guests or patrons in a hotel, motel or inn, there is a rebuttable presumption that such person did so for no legitimate purpose.

Subdivision (3) is primarily drawn from *Leyva* (38 NY2d at 168-170):

"The purpose of the presumption was to prove the fact of possession [of drugs], inferential though such proof may be. As such, it formed part of the support for the prosecution's prima facie case. No less than with any other proof of facts offered by a prosecution, contrary evidence from a defendant does not negate the existence of a prima facie case; rather it presents an alternate set of facts, or inferences from facts, to the jury. The jury then has the right to choose between the two versions. . . .

"It might be possible, of course, that a defendant's evidence will prove the truth of his choice of inferences so conclusively that reasonable persons could no longer believe the inference authorized by the statute. There is nothing arcane about such a situation; where a defendant's proof is conclusive and reasonable persons cannot disagree about the matter at issue, our courts always have the power to issue a trial order of dismissal (CPL 290.10) or direct the jury's finding on an element of a crime. . . .

"In such a case, the fact that a jury is not given the opportunity to consider the inference authorized by the statute does not mean that the inference plays no role in the case. It merely means that, though the presumption suffices to enable the prosecution to make out a prima facie case, it is no longer sufficiently tenable to permit a jury, in the light of the defendant's evidence, to consider it. It receives the same treatment that any other 'fact' so thoroughly controverted would receive." (*See e.g. People v Adamkiewicz*, 298 NY 176, 181 [1948] [a statutory presumption of intent to possess a weapon unlawfully was rebutted]; *Kims*, 24 NY3d at 433 [a statutory presumption of criminal possession of drugs was inapplicable because the defendant was not in "close proximity" to the drugs].)