NEW YORK EVIDENCE LAW

What follows is commentary on New York Evidence Law designed to supplement Class discussion on evidentiary principles found in the Federal Rules of Evidence and federal common law. It is based for the most part on the Instructor’s own research but he also relied upon New York Criminal Procedure and Evidence outlines by Professors Robert Pitler (Brooklyn School of Law) and Gary Kelder (Syracuse University College of Law). In addition the author referred to cases analyzed by Professors Michael M. Martin and Alpin J. Cameron (Fordham University School of Law) as contained in Evidence Update, Furthering Justice Through Education (Court Attorneys Bulletin, 2002/2003) and are noted with an asterisk: (*). All mistakes belong to the author. Travis H. D. Lewin, Syracuse University College of Law (All Rights Reserved).

RELEVANCE

Like the Federal Rules [401] the question of relevance is for the trial judge.

The judge may take evidence outside the presence of the jury. The judge is not bound by the rules of evidence when determining relevance.

Computerized generated video that demonstrated the mechanics of “shaken baby syndrome” was properly admitted in People v. Yates, 290 A.D.2d 888, 736 N.Y.S.2d 798 (2nd Dept. 2002) (*).

In a slip and fall case on the issue of notice, the 2ND Department found reversible error where the trial judge admitted only one of four photographs of the accident site. The rejected photographs were not cumulative as they were more specific of the view of the scene and would have assisted the jury in determining whether the defendant had or should have had notice of the defect. Leventhal v. Forest Hills Gardens Corp., 2003 WL 22100233.

CONDITIONAL RELEVANCE - FRE R. 104(b).

Like federal judges applying FRE, Rule 104(b), the New York judge determines whether there is sufficient evidence for the jury to rationally base a finding that the condition has been met. Unlike the federal rule, however, New York has no uniform approach to the question of conditional relevancy and each rule must be examined separately. COMPARE: FRE, R. 104(b) with the New York position. Under Rule 104(b) the trial judge must make a finding that a jury could reasonably find the conditional fact by a preponderance of the evidence. See Huddleston v. United States, 485 U.S. 681 (1988). In most New York cases, the standard is simply whether a jury could rationally find the conditional fact. There is no uniform requirement that the judge find that the jury could do it by a preponderance of the evidence. Obviously, the element of the crime or civil issue itself must meet the standard or persuasion required for proof [e.g., beyond a reasonable doubt or by a preponderance or greater weight of the evidence.]

RELEVANCY - FRE R. 401
The test in New York for relevancy is substantially the same as the FRE.

The New York test is set forth in People v Scarola, 71 N.Y.2d 769 (1988): "All relevant evidence is admissible unless its admission violates some exclusionary rule. "Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence.

Illustrations: 1) Testimony by an eyewitness of her prior description to police of the perpetrator is relevant because it "assist the jury in evaluating the witness's opportunity to observe at the time of the crime, and the reliability of her memory at the time of the corporeal identification--both important aspects of the critical issue. People v. Huertas, 75 N.Y.2d 487 (1990)

2) Negative Identification Evidence. When the reliability of an eye witness's identification is at issue, evidence that the eye witness had previously rejected a suspect in a line-up tends to prove that the eye witness possesses the "ability to distinguish the particular features of the perpetrator." People v. Bolden, 58 N.Y.2d 741, 744 (1982). [In People v. Wilder, 93 N.Y.2d 352 (1999) the Court extended the Bolden rule and said that evidence of "negative identification" is admissible in the prosecution's case-in-chief. The Court said evidence that after a drug bust when other officers apprehended a suspect who was not the defendant, the undercover agent's statement to them that the man was not involved in the drug sale was relevant. This evidence demonstrated that the eye witness was able to distinguish the actual perpetrator from another person who was dressed in nearly identical clothing and shared common gender and racial characteristics. Thus, the evidence was probative in enhancing the reliability of the eye witness's in-court identification.

3) Clear link rule. a RULE FASHIONED BY Appellate Division courts was rejected by the Court of Appeals in People v. Primo, 96 N.Y.2d 351 (2001). The clear link rule required that before third-party culpability could be received the defendant had to show a clear “link between the third party and the crime. The Primo Court held that the applicability of general balancing analysis should govern admissibility of this principle and all other evidence. Thus, the Court must determine logical relevance, asking whether the evidence tends to prove the existence or non-existence of a fact directly at issue in the case. The court may exclude the evidence if it finds that the probative value is outweighed by the prospect of trial delay, undue prejudice * ** confusing the issues or misleading the jury.”

4) Illustrative Cases. In a personal injury action where plaintiff’s foot was caught in an escalator, it was held error to exclude evidence that on the day of the accident plaintiff had consumed five to six beers and that he tested positive at the hospital for “ETOH (ethyl alcohol ) smell” even in the absence of other evidence that he was intoxicated. The
evidence gave rise to a minimal probability that plaintiff’s faculties were impaired. *Huerta v. New York City Transit Authority*, 290 A.D.2d 33 (1st Dept. 2001).

In *People v. Torres*, 289 AD2d 136 (1st Dept. 2001), *Leave to Appeal Denied*, 97 N.Y.2d 762 (2002) the judge properly excluded defendant’s evidence of his cooperation with the police investigation offered to show “consciousness of innocence” since defendant would have had a strong motive to feign this conduct.

**COMPUTER GENERATED EVIDENCE**

Computer generated evidence can either be in the form of simulations programmed to recreate an event or animations designed merely as graphic illustrations of expert testimony. The judge must instruct the jury that the animations are for the limited purpose of illustrating an expert’s opinion and must not be considered as evidence of the event. *Kane v. Triborough Bridge & Tunnel Authority*, 8 A.D.3d 239 (2nd Dept. 2004).

There is a paucity of New York cases on computer generated evidence. See, Barker & Alexander, Evidence in New York State and Federal Courts, § 11:20 (West 2001). Although not yet reported by New York cases, other courts have admitted computer generated animations to illustrate a party’s case theory. See, e.g., *Commonwealth v. Serge*, (WL 1096364) (NO. 150 MAP 2004) (2006). The Pennsylvania Court noted the indigent defendant’s concern that if he had wanted to produce similar animation the cost would be prohibitive and said this is a factor that a trial judge should take into consideration before permitting the prosecution to offer this kind of demonstrative evidence.

**UNFAIR PREJUDICE - FRE R. 403**

New York courts apply the same principle as is followed by the federal courts.

Relevant evidence may be excluded by the trial court in the exercise of its discretion if its probative value is substantially outweighed by the danger that it will unfairly prejudice the other side or mislead the jury. [See *Scarola, supra*.]

**NEW:** Evidence of 3rd party guilt is admissible in a criminal case if it raises a reasonable inference or presumption as to defendant’s own innocence but the judge has discretion to exclude it if it merely casts a “bare suspicion” upon another or raises “a conjectural inference as to the commission of the crime by another.” However, to deny admissibility of probative evidence that another person has committed the crime because the prosecution’s case against the defendant is strong denies the defendant the right to have “a meaningful opportunity to present a complete defense.” *Holmes v. South Carolina*, 126 S.Ct. 1727 (2006).

**WITNESS COMPETENCY**
New York has also all but abandoned the old Common Law disabilities. It retains only the following:

1. **In actions founded on ADULTERY there is a limited spousal disability provision.** The CPLR §4502(a) provides that neither spouse can testify against the other except to
   a. prove the marriage,
   b. disprove the adultery, or
   c. disprove any other defense after the other party has first put in evidence in support of the defense.

   **NOTE:** The disability lasts only as long as the marriage lasts.

2. **LORD MANSFIELD'S RULE:** This is a judge made disability: A witness cannot testify to non-access during wedlock if the effect would be to show illegitimacy. However, this limited principle is all but eliminated by the Family Court act which permits such evidence in filiation and support proceedings.

   **CONTRAST:** In New York [and elsewhere, including the Proposed Federal Rules --not adopted by Congress--R. 505] there is a "spousal privilege" which is not to be confused with "spousal disability." The spousal privilege prohibits either spouse over the objections of either spouse from relating confidential communications made during the course of the marriage. This privilege outlasts the marriage.

3. **INFANTS IN CRIMINAL CASES:** In criminal cases only, New York has a unique provision. The CPL provides [§60.20] that a child under 12 years may testify w/o being sworn if the court determines:
   A. that the child cannot take an oath; and
   B. the child "possesses sufficient intelligence to justify reception of the testimony."

   **NOTE:** A conviction cannot be based on the uncorroborated testimony of a child.

4. **DEADMAN'S STATUTE.** CPLR §4519.

   This is far too complex a doctrine to set it out, even in outline form. Richardson's text contains a concise summary and analysis of the statute. It should be carefully read before the New York bar examination. The topic will also presumably be covered by the evidence lecturers.

   Some points:

   1. The statute applies ONLY in civil actions or proceedings.

   2. A party to an action, a witness with an interest in a transaction being litigated or a party or interested witness on behalf of a successor who takes by assignment or
otherwise cannot testify to an oral personal transaction with a deceased or mentally ill person [who is found incompetent to testify because of mental illness]. The reason behind the rule is that it is deemed unfair to permit the survivor to testify to an alleged oral transaction when the other party's lips are sealed by reason of death or severe mental illness.

3. The disability is enforceable by any representative of the deceased [mentally ill] person or by any person who is a successor in interest to the transaction or the estate of the deceased.

5. JUDGES & JURORS

A judge may not testify in a trial in which she is presiding but an objection should be made in order to preserve the error for appeal. [Note: a judge doesn't have to "formally" be sworn in to testify. A judge's incidental remarks to the jury might be "testimony."]

Originally in New York, a juror could testify. Neither the CPLR nor the CPL address the matter. A juror may not testify to matters affecting the verdict if those matters occurred during the deliberations. In other words, you cannot impeach the jury verdict. However, a judge may inquire of the jurors in order to "clarify" a verdict. Further, there is one exception to the "no-impeachment of the verdict" rule. Jurors may testify to improper outside influences, including improper communications by court officials, unauthorized visits to the crime scenes, independent research using sources not admitted in evidence and out-of-court experiments conducted by the jurors. It is improper for jurors to use expertise to resolve a material issue and thus testimony could be received on this issue without violating the jury impeachment rule. People v. Maragh, 94 N.Y.2d 569 (2000). Maragh does not apply to a lawyer juror who “instructed” jurors on the law but did not use his expertise to resolve facts, 23 Jones St. Associates v. Berretta, 280 AD.2d 372 (1st Dept. 2001). Maragh was held not to apply in a case involving an assault by defendant on his girl friend. Defendant sought to strike for cause a prospective juror who said she had a minor in women’s studies, who had done substantial research on the battered woman’s syndrome and battered women and who said she thought she ought not to sit as a juror in the case. The judge rejected the cause challenge and defendant had to use a peremptory to release the juror. The Court said that it was not shown that the woman had such “specialized knowledge that would enable her to exhibit undue influence on her fellow jurors.” People v. Arnold, 96 N.Y.2d 358 (2001).

CHARACTER EVIDENCE

1. NEW YORK CHARACTER RULES

A. Character evidence is admissible in criminal actions similarly to the procedures followed by the Federal Courts with several important restrictions or limits.
1) First, **unless it is in issue by the pleadings**, character evidence in a criminal action is provable only by **COMMUNITY REPUTATION EVIDENCE**. Personal opinion evidence permitted by FRE, R. 405(a) is **not** permitted.

2) Generally, character evidence is not admissible in civil actions. [SEE **DEFAMATION EXCEPTION BELOW.**]

3) Habit testimony is admissible in civil and criminal actions, but sometimes habit evidence is little more than character evidence in disguise. If the "habit" evidence merely describes traits or disposition toward a certain behavioral pattern, this is character and not habit evidence.

4) In criminal actions, the defendant has the option of putting in character evidence. It must be by way of community reputation and the witnesses may not give their personal opinions or set forth specific instances of conduct. The witnesses must have lived in or associated in defendant's community. A community includes but is not exclusively a geographic community. Anything that is the equivalent of a geographic community qualifies [e.g., a law school; a condo enclave--anything in which persons engage in 'living' situations.]

5) The defendant may prove only his reputation for the character trait in issue [e.g. murder = peace & quietude or non violence; rape = non violence and morality; etc.]. However, the defendant may offer proof of his good general character since if he has a reputation as a good person he obviously does not have a reputation for any bad character trait.

6) A defendant's character witness may be asked on cross-examination whether he had **heard** about any prior criminal act committed by the defendant that
   a) involves the same character trait;
   b) that is not too remote;
   c) that is notorious in the community.
   d) the prosecutor must have a good faith belief that such acts occurred.

   * NOTE: Because the character witness testifies only to his/her knowledge of community reputation, he can only be asked on cross-examination, if he "heard" of relevant criminal acts, **not** if he **knew** personally of such acts.

7) The prosecution may in rebuttal offer evidence of the defendant’s bad character trait provided the defendant has first offered evidence of his good character. See, e.g., Prince – Richardson on Evidence, Sec. 4-404 (Farrell 11th Ed. 1995). By statute the prosecution may in addition prove defendant’s convictions if they contain the same character trait as that offered by defendant or if defendant put in evidence of his general good character if the convictions relate to the character
trait of the crime or crimes charged. CPL §60.40(2). For example, after defendant’s witnesses testified to defendant’s good character that was known to the “whole neighborhood” the prosecution properly proved defendant’s conviction for possessing a weapon. \textit{People v. Ortiz}, 741 N.Y.2d 741 (4\textsuperscript{th} Dept. 2002). (*)

8) Evidence of good character \textbf{does not} in itself raise a reasonable doubt as to guilt.

\textbf{B. VICTIM'S CHARACTER IN A HOMICIDE CASE}

1. Unlike FRE, R. 404(a)(2) if the defendant relies on self-defense he may NOT show that the victim had a \textit{community reputation} for violence on the issue of whether the defendant or the victim was the \textit{first aggressor}. \textit{In the Matter of Roberts}, 522 N.Y.2d 1046 (1981). New York remains one of the few states that reject this evidence. Thus, it is also improper in a manslaughter action to admit prosecution testimony of the \textit{non-violent} nature of the victim absent evidence showing that the defendant was aware of the victim’s peaceful nature. \textit{People v. Folger}, 740 N.Y.S.2d 741 (4\textsuperscript{th} Dept 2002), \textit{appeal denied}, 98 N.Y.2d 652 (2002).(*)

2. \textbf{NOTE:} On the issue whether the defendant acted in reasonable fear of his life or bodily harm, he may also prove the victim's character trait of violence \textbf{and may prove the victim's prior acts of violence, but ONLY IF DEFENDANT HAD KNOWLEDGE OF THE VICTIM'S VIOLENT NATURE OR HIS VIOLENT ACTS.} \textbf{NOTE:} This is NOT character evidence.

3. The defendant may NOT offer evidence that the victim committed violent acts against others for the purpose of proving that the victim was the first aggressor.

4. The Court of Appeals in \textit{People v. Petty}, 7 N.Y.3d 777 (2006) held where there was evidence that the homicide victim threatened to kill the defendant, that a jury must be instructed on both the first aggressor element of self defense and the defendant’s reasonable fear where he alleged that the victim was the first aggressor and that he was aware of the threats but that found under the factual circumstances it was harmless error to fail to charge the jury on the initial aggressor issue.

\textbf{C. EVIDENCE OF CHARACTER TO IMPEACH/REHABILITATE}

1. The character trait of untruthfulness may be proved once any witness, including the defendant witness in a criminal case. It is proved by
community reputation.

2-A. Any witness, including the defendant witness in a criminal case, may be shown to have committed an act of misconduct if it is immoral, touches logically on truth telling or, if a conviction had been obtained, would have been a felony or a misdemeanor. This is the so-called Sorge rule. [Compare and contrast with FRE, R. 608(b) limiting acts of misconduct to those that are logically related to truth telling.] There is a balancing rule imposed by the Court of Appeals in People v. Duffy, 36 N.Y.2d 258 (1975) that will be discussed in the materials on impeachment.

2-B. Contrary to a comment in the Advisory Committee's notes to FRE, Rule 608(b) a witness does not waive his 5th Amendment right not to incriminate himself as to acts of misconduct offered solely to impeach. People v. Betts, 70 N.Y. 289.

3. Any witness, including the defendant witness in a criminal case, may be shown to have been convicted of any felony or misdemeanor. There is a balancing provision imposed by the Court of Appeals in People v. Sugden, 34 N.Y. 371 (1974) that will be discussed in the materials on impeachment.

4. REHABILITATION: Any witness who has had his character trait of trustfulness attacked by any means, including evidence of community reputation, proof of convictions or prior acts of misconduct, may call character witnesses and establish that the witness has a good reputation in his community for truthfulness.


D. CHARACTER EVIDENCE IN CIVIL ACTIONS


2. Evidence of character in defamation actions. The cases are sparse but apparently New York follows the common law principles. The common law principles are as follows [taken from 1A Wigmore, §70, at pp 1483-
a. On the issue of truth, the libeler [defendant] may prove that the libellee [plaintiff] is what the defendant said he was.

**Method of Proof:** Because character is "now in issue" it may be proved by community reputation or by proof of specific acts of misconduct.

b. On the issue of truth, the plaintiff may produce evidence in rebuttal to show he does not have the trait charged in the defamatory statement. Many common law courts allow plaintiff to put in that evidence in the plaintiff's case-in-chief just like a defendant in a criminal case may do, reasoning, that since it is implicit in the defense and discussed in the opening statement by defendant, it seems only fair to permit the plaintiff to meet the charge.

**Method of Proof:** Plaintiff can deny the acts of misconduct but otherwise is limited to community reputation.

c. The libeler [defendant] at the libellee [plaintiff] had a bad general character on the issue of damages. [E.g., if the plaintiff had a bad general character than he did not suffer much damage.]

**Method of Proof:** By community evidence only--not by prior acts of misconduct.

d. If the defendant attacks the plaintiff's general bad character, the plaintiff in his case-in-rebuttal may establish his good general character, by community reputation only.

Note: some common law courts at the urging of Wigmore allow the plaintiff to put in his general good character before the attack reasoning that since the attack is bound to occur, plaintiff may as well be permitted to meet it first and not allow the defendant to attack him on the "blind side." However, there is no New York case on this point.

**UNCHARGED CRIMES**

I. The Molineux Rule
1. Like FRE, R. 404(b) New York provides that uncharged criminal acts may be relevant in civil or criminal actions on some issue other than the actor's character.

2. Although most frequently used by the prosecutor in a criminal case, the uncharged crime evidence is admissible in any action for or against a party or for other relevant reasons. See, e.g., Matter of Brandon, 55 N.Y.2d 206 (1982).

3. The landmark case is People v. Molineux, 168 N.Y. 264 (1901).

4. When uncharged criminal act evidence is offered against the defendant in a criminal case there is a grave danger that the jury will improperly consider it as character evidence--that defendant did the act charged because he committed other criminal acts. The "other act" evidence is also objectionable because it raises collateral issues that could delay the trial of the case and confuse the jury and it compels the defendant to meet a charge of which he had no notice. Thus, judges should not admit other act evidence unless there is a clear showing of relevance--other than as character evidence. The evidence must be "directly probative" of some specific issue in the case other than the character of the defendant [actor]. People v. Ventimiglia, 52 N.Y.2d 350 (1981). The probative value must be weighed against the prejudicial effect. If the point on which it is offered has been established through other evidence, the other act evidence should not be admitted as it is cumulative and potentially unfairly prejudicial. A hearing must be held prior to any attempt to establish the other act evidence--before or at the trial but before the prosecution asks any questions about the evidence. Thus, the Ventimiglia court recognized the danger of "letting the cat out of the bag" and put the burden on the prosecution to bring the matter to the attention of the court before mentioning the acts.

The Ventimiglia rule was extended by the Second Department to apply in a case in which the prosecution offered evidence of joint crimes committed by a key prosecution witness and defendant in order to prove the depth of their long-time criminal association and relationship. People v. Marthy, 740 N.Y.S.2d 381 (2002)

In People v. Foster, 743 N.Y.S.2d 429 (1st Dept. 2002) the court reversed a possession of stolen property conviction. Df was charged with stealing a credit card holder from a woman at the 72nd Street stop. The arresting officer testified that he arrested Foster at the 96th Street stop after a man shouted, “He took my wallet” and Foster acted suspiciously. The second crime had no relationship to any element charged and was not “inextricably intertwined” with the charged offense. (*).

5. Unlike the corresponding federal rule [FRE, R. 404(b)] which is not a rule of law
but a principle of discretion other acts evidence in New York is a rule of law reviewable on appeal in a manner similar to any rule of law.

6. The five principle reasons for admitting other act evidence identified in the *Molineux* are:

   a) motive;
   b) intent;
   c) absence of mistake or accident;
   d) common scheme or plan; or
   e) identity.

However, those reasons are not exclusive. Any non-character reason may justify admissibility. Where evidence of prior crimes are offered to show identity there must be proof of a unique *modus operandi*, *People v. Toland*, 284 A.D.2d 798 (3rd Cir. 2001).

In *People v. Rojas*, 97 N.Y.2d 32 (2001) the Court held in a prosecution for assault on a prison guard that it was not error to admit testimony that defendant was in segregated custody due to a prior assault on another inmate. The trial judge received the evidence to explain why defendant was in this custody after defendant in his opening had contended that the segregated detention was cruel and the charge against him thus unfair. The judge specifically told the jury that they should not consider the incident as “any evidence of (defendant’s) guilt as to the specific charges.” (Id. at 36.)

*People v. Person*, 26 A.D.3d 292 (1st Dept. 2006) contains several examples of prior criminal conduct admissible for purposes other than propensity. E.g., evidence that Person shot a man in the presence of an accomplice who testified as it was relevant on the witness’s credibility. It showed his fear leading him to commit the crime with Person and it explained his initial concealment of defendant’s involvement. Evidence of other robberies perpetrated by Person with one of the accomplices was admissible to explain his relationship with the accomplice and in addition those robberies were “inextricably intertwined” with the instant offense.

7. What amount of evidence must be produced to show that the defendant [actor] committed the uncharged acts? In contrast to the Federal Rule, the Court of Appeals adopted a "clear and convincing standard" in a case in which uncharged acts were offered to show identification. *People v. Robinson*, 68 N.Y.2d 541, 548 (1986). [There is language in *Robinson* suggesting that where the uncharged acts are offered other than on identification, the lesser "preponderance" standard might suffice.]
8. OPENING THE DOOR. Defendant’s attorney in his Opening Statement argued that his solitary confinement was punitive and cruel. This conduct opened the door for the prosecution to produce evidence that defendant was in solitary confinement because he had stabbed another inmate with a pencil, a criminal act the judge had previously ruled was not admissible. *People v. Rojas*, 70 CrL 104 (2001)

9. MOTIVE ILLUSTRATION—CIVIL ACTION. Plaintiff sued the City of New York after a police officer shot him. The officer testified that he shot Plaintiff only after Plaintiff had fired a gun at him and after refusing an order to drop the gun. Plaintiff testified that he was shot after he dropped his weapon and as he was raising his arms into the air. The trial judge admitted testimony that Plaintiff was a member of the “Five Percenters” which “espouses a vicious ideological hatred of the police” and urges members to shoot and kill police rather than submit to an arrest. This evidence as well as testimony that documents expressing this view were found in Plaintiff’s apartment was relevant under the *Molineux* to show motive. *Barnes v. City of New York*, 745 N.Y.S.2nd 20 (1st Dept. 2002).

10. EFFECT OF AQUITTAL OF PRIOR CRIME. In federal courts, the fact that the defendant was acquitted of prior crimes does not bar the government from proving that they occurred under Rule 404(b). That is the *Dowling* rule. *Dowling v. United States*, 493 U.S. 342 (1990). New York does not follow *Dowling*. If a New York defendant has been previously acquitted of a crime it cannot be used under *Molineux* as evidence against defendant.

   *Molineux* applies even if the prior act has resulted in a conviction. *People v. Lack*, 752 N.Y.S.2d 176 (4th Dep. 2002)

12, ABUSE OF MOLINEUX. The 3rd Department reminded prosecutors in *People v. Wlasiuk*, 831 N.Y.S.2d 285 (2006) that the trial judge must balance the probative value of the probative evidence against its potential to unduly prejudice. In *Wlasiuk* defendant was charged with the murder of his wife. The prosecution offered testimony of 24 persons prepared to testify as to prior acts and threats of violence against the victim. Although prosecution offered the acts and threats to prove defendant’s motive, the court warned that evidence “of the uncharged crimes and bad acts should be closely controlled so that those acts do not *** eclipse the reason for the trial, i.e., the crimes with which defendant is charged.”

**HEARSAY - THE GENERAL PRINCIPLES**

1. DEFINITION

   It is not different from the Federal Rules of Evidence. As one court put it, "Out-of-court statements offered for the truth of their content constitute hearsay, and may not be admitted unless they come within an exception to the hearsay rule. *People v. Slaughter*,
In a medical malpractice wrongful death action plaintiff charged that one of the defendants, the chief of surgery, had directed another surgeon not to perform an operation and as a result the patient died. The surgeon testified that an unnamed operating nurse told him as he was about to begin the operation that the defendant chief of surgery had directed him not to proceed. This statement was hearsay when offered to prove that the directive was given. Hasbrouck v. Caedo, 745 N.Y.S.2d 294 (3d Dept. 2002). (*)

A common example of non-hearsay is the admission of declarations that provide back ground information explaining why the police acted as they did. Thus, an officer may be permitted to state what a bystander or another officer told her to explain why the officer pursued and arrested the defendant. See People v. Tosca, 98 N.Y.2d 660 (2002). This is not an exception to the hearsay rule, although one lower court judge called it an exception in People v. Goldston, ___ A.D.2d ___, 2004 WL 690182 (3rd Dept. 2004).

1A. NOTE: The Court of Appeals in Nuccie v. Proper, 95 N.Y.2d 597 (2001) held that out of court statements offered for the truth may be “received in evidence only if they fall within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable.” Although at issue in Nucci was the admissibility of inconsistent statements that did not independently qualify under any recognized exception to the hearsay rule, the Court’s opinion is broader and would seem to require independent proof of reliability for any out-of-court declaration even if it qualifies under a recognized exception to the hearsay rule.

1B. NON-HEARSAY: STATEMENTS OFFERED ON THE STATE OF MIND OF A THIRD PERSON.

Ordinarily such statements are not hearsay. However, it must be shown that the 3rd person heard (or in the case of writings, read) the statements. In a murder prosecution, People v. Wlasiuk, 821 N.Y.S.2d 285 (3rd Dept. 2006) the wife-victim’s diary entries setting forth reasons why she intended to leave the defendant (her husband) were improperly admitted absent proof that defendant had read the entries. Letters containing this information addressed to the defendant were relevant and admissible.

2. STATEMENTS IMPLIEDLY ASSERTIVE OF THE TRUTH Under the common law, statements impliedly assertive of the existence of some fact were treated as hearsay. See Wright v. Doe d. Tatham, 112 Eng.Rep. 488 (18370. This appears to be the same rule in New York today, although subject to criticism.
Illustration: On the issue whether a boat was seaworthy, W testifies that he saw X, the captain, with his wife and children board the boat.

At first glance the hearsay is hard to find. It seems that W is testifying to a fact; that X was merely seen to board the boat. That would be some evidence of seaworthiness because the captain would be unlikely to take his family on an unseaworthy boat. But the English Common Law courts reasoned that this was impliedly assertive conduct--that the captain by boarding the boat was in effect saying, "This boat is seaworthy."

The Federal Rules of Evidence by virtue of the definitional section of hearsay would treat the captain's conduct as non-hearsay and admit it if relevant. New York appears to follow the common law impliedly assertive conduct/statement rule.

3. STATEMENTS IMPLIEDLY ASSERTIVE OF THE DECLARANT'S STATE-OF-MIND

Statements impliedly assertive of a state of mind offered to prove that state of mind are not hearsay [in New York or elsewhere]. Contrast these statements with assertive declarations of the state of mind.

HEARSAY: In a homicide action for the death of V, D's wife, On the issue of D's affection towards V, D calls W who testifies he heard D say to V, "I love you." This is hearsay if offered to prove that D loved V when he made the statement. [There is an exception that would receive it: declaration of a present state of mind.] See People v. Wlasiuk, supra, where diary entries by defendant's wife stating intention to leave defendant were offered to show the declarant’s statement of mind. Her state of mind was hearsay would only be relevant on defendant’s motive if defendant had read the entries.

NON-HEARSAY: In the same action, W testifies that he heard D say to V, "You are the best wife, ever." This is not hearsay because it is not offered to prove that V was the "best wife ever" but merely to show D's affection. Since that is indirect evidence of the state of mind, it is not hearsay and is admissible if relevant.

What is the difference between "impliedly assertive statements/conduct" which under the Wright v. Doe d. Tatham are "hearsay" and statements impliedly assertive of a state of mind? In the former case, the statements or conduct are offered to prove a condition or fact perceived by the speaker or actor or the state of mind of a third person. In the latter case they are offered only to prove the state of mind. The former situation involves all the dangers of hearsay--lack of trustworthiness; questionable first hand knowledge, etc. The latter situation calls only for a recital of a statement of mind as it was then expressed so there is less danger that there would be error of memory [though motivation would be in doubt]. Finally, the direct declaration of a present state of mind, though hearsay, is admissible under a standard exception to a hearsay rule [Declaration of Present State of Mind - or FRE, R. 803(3)]. Thus, even if we treated an indirect assertion of a state of
mind as hearsay, it should still come into evidence as an exception to the rules.)

4. DECLARATIONS THAT NEW YORK TREATS AS HEARSAY WHICH THE FEDERAL RULES TREAT AS NON-HEARSAY.

A. Inconsistent Statements offered to impeach. These are generally inadmissible hearsay if offered for the truth unless they meet some independent exception to the hearsay rules.

The rule in civil actions from Letendre v. Hartford Accident & Indemnity Co., 21 N.Y.2d 518 (1968). Where statements are in writing and made under conditions assuring accuracy and truth and where necessary to a fair determination of the issues, the New York Court of Appeals said that they could come in both to impeach and for the truth.

It was error to receive as evidence-in-chief, statements properly received to impeach there being no independent exception to the hearsay rule. Adam v. South Buffalo Ry. 742 N.Y.S.2d 459 (4th Dept. 2002).

In criminal cases, inconsistent statements are admissible only to impeach unless they otherwise qualify as an exception to the hearsay rules.

B. Prior Consistent Statements. New York treats them as hearsay and apparently will not admit them for the truth--only to disprove an improperly assigned motive. See People v. Seit, 86 N.Y.2d 92 (1995). If, the statements qualify under some other exception to the hearsay rules they may, of course, come in for the truth. E.g., People v. Buie, 86 N.Y.2d 501 (1995) [prior statement qualified as a present sense impression].

C. STATEMENTS OF IDENTIFICATION OF PERSONS. Statements of Identification are controlled by statute. See CPL §60.25 & §60.30. Please carefully note that New York rules are not as liberal as the FRE.

1. A declarant may testify that he/she made an out of court identification of a person and that this person is the defendant. [CPL §60.30]

2. An observer to that out-of-court identification may not testify to what the declarant said or did unless the declarant is unable to make in-court identification. If, however, a declarant is unable to state, on the basis of present recollection, whether the defendant is the person previously seen in the line-up or show-up, then any person who saw the line-up or show-up identification may testify to the fact of the out-of-court identification and testify that the defendant is the same person as the one in the line-up
or show up. Such testimony constitutes evidence in chief [thus it is admissible for the truth]. [CPL §60.25]

3. The testimony in Section 2 above [CPL §60.25] may be received only if the declarant's failure to make in-court identification is due to a lack of recollection and not because of fear of retribution should the witness testify.

4. Ordinarily, a witness's recollection is adversely affected because of lapse of time or because a change in the appearance of the defendant. Necessary recollection foundation was not laid where a retarded victim could not state why he was unable to make in-court identification. [People v. Quevas, 81 N.Y.2d 41 (1993)]. Nor could a third person testify to the out-of-court identification where the defendant absented himself from the courtroom during the eyewitness' testimony. [People v. Torres, 184 A.D.2d 605 (1992)]

5. It was improper for the prosecutor in summation to argue that a prosecution witness’s identification of defendant was more reliable because both the witness and defendant were Afro-Americans since this constituted an improper voucher by the prosecution of his witness’s credibility. People v. Alexander, 94 N.Y. 2d 382 (1999).

D. STATEMENTS OF IDENTIFICATION FROM PHOTOGRAPHS OR PHOTOGRAPHIC ARRAYS. This form of pre-trial identification is not covered by the CPL and is therefore may not be proved by the prosecution. Neither statements of identification nor the photographs themselves are admissible as direct evidence of guilt against a defendant. See People v. Mosley, (3rd Dept. 2002). However, the defendant may open the door to admissibility by its conduct (suggesting misidentification, for example). People v. Robinson, 2004 WL 584574 (4th Dept.) (2004) (memorandum). See also, People v. Vasquez, 822 N.Y.S.2d 124 (2nd Dept. 2006).

COMPOSITE SKETCHES. Composite sketches of the perpetrator are generally inadmissible. They may be admissible if the defense on cross-examination contends that an eye witness has recently fabricated his testimony. People v. Maldonado, 97 N.Y.2d 522 (2002)

E. EVIDENCE OF "FRESH COMPLAINT" IN SEXUAL CRIME CASES. A victim's fresh complaint comes in for the truth as an exception to the hearsay rule, but the contents--i.e., a description of the attacker or statement of identification of her attacker is not admissible. People v. Rice, 75 N.Y.2d 929 (1990).
**Impliedly Assertive Conduct/Statements**

There is no definitive New York case on the *Wright v. doe & Tatham* "impliedly assertive" conduct/statement principle. In *People v. Salko*, 47 N.Y.2d 230 the Court did say that the hearsay rule has no application to acts not intended to serve as an expressive communication. Some authors take that statement to mean that New York accepts the Federal Rule that impliedly assertive statements or conduct are not hearsay. However, that is a far cry from affirmance or rejection.

**The Confrontation Clause**

Since the issues are controlled by the Federal Constitution, the New York State Constitution is applicable only if it provided greater--though not lesser protection to persons charged with crime.

In *People v. Cintron*, 75 N.Y.2d 249 (1990) the Court applied the *Coe & Craig* case principles to a statute that provided for video taping of a child's testimony if the child was 12 years of age or under on a "clear & convincing' finding by the judge that the child was "vulnerable." The Court held that the statute was constitutional provided the judge receive evidence of the child's condition and not base the finding only on his own subjective evaluation of the child's condition. [N.Y.Crim.Pro.Law. Art. 65]

For a very important case on the admissibility of Grand Jury testimony offered by a defendant to exculpate himself, see *People v. Robinson*, infra [FORMER TESTIMONY]

Testimony by a detective that during the interrogation of defendant, he received a call from a second detective who was then interrogating a co-defendant and that as a result of that call he immediately advised defendant of his *Miranda* rights violated the Confrontation Clause. Even though the detective did not report the substance of the telephone call, his conduct was implied to the jury that the co-defendant had accused defendant of participating in the crime. *Ryan v. Miller*, 303 F.3d 201 (2nd Cir. 2002) (*).

The Supreme Court in *Crawford v. Washington*, 124 S.Ct. 1354, (2004) held that testimonial communications are inadmissible absent the opportunity for cross-examination. Thus, even long standing, well recognized hearsay exceptions may not pass muster in criminal cases if the communication is testimonial and given to a court or law enforcement official. Left undecided is the whether non-testimonial declarations made admissible by new and novel hearsay exceptions to the hearsay rules are not subject to the Confrontation Clause. Prior to *Crawford* the declarations would have been subject to federal Constitutional review. The Second Circuit in *United States v. Saget*, 377 F.3d 223 (2004) and in *United States v. McClain*, 377 F.3d 219 (2004) also noted this problem but assumed that non testimonial but unreliable hearsay would remain subject to the Confrontation Clause. See *White v. Illinois*, 502 U.S. 346 (1992) and *Idaho v. Wright*, 497 U.S. 805 (1990).
In *Davis v. Washington*, 126 S.Ct. 2266 (2006) the Court clarified the meaning of “testimonial.” The Court said, “Statements are non-testimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.” In *Davis* the statements were made during a 911 call in which a victim was reporting a then occurring domestic violence incident. At a later point the 911 Operator sought information that was probably testimonial but the Washington Court held that even if testimonial it was harmless. The Supreme Court did not disagree noting that a 911 call could start out non-testimonial but could become testimonial and that the trial courts would be compelled to hold *in limine* hearings to determine this and redact any testimonial statements. In *Davis* the Court found that an Indiana investigation was testimonial where officers investigated a report of a domestic dispute and took an affidavit from the victim. The events described had already occurred and thus the Court concluded that the affidavit was primarily obtained for purposes of prosecution. Compare the facts in the Washington case in *Davis* with those from a companion case, *Hammon v. Indiana*, 122 U.S. 1457 (2006). In *Hammon*, police responded to a reported domestic disturbance at Hammon’s home. Amy Hammon admitted the police but after denying that there was a problem, while defendant was kept in another room, gave an affidavit and statement to the officers about a battery defendant committed on her. Amy did not appear at defendant’s trial and her affidavit and verbal statements were admitted against Hammond. The Supreme Court held that her statements were testimonial; there was no emergency in progress; the officer was seeking to determine what had already happened; he was investigating a possible crime. *Davis* can be read to hold that only testimonial hearsay is protected by the Confrontation Clause. See, e.g., *United States v. Tolliver*, 454 F.3d 660 (7th Cir. 2006). If so, then the *Roberts* case has been completely overruled. The only remaining federal constitutional protection against non-testimonial hearsay hearsay would be the due process clause.

The Court in *Wharton v. Bockton*, 127 S.Ct. 1173 (2007) held that the *Crawford* rule is not retroactive to cases already final on direct review. See *Howard v. Walker*, supra (See Opinion Evidence) where the 2nd Circuit in a habeas case heard after *Crawford* was decided applied pre-*Crawford* Confrontation Clause law to determine that an expert’s opinion as to the cause of death based in large part on inadmissible co-conspirators’ statement violated the petitioner’s 6th Amendment right.

**Defining Testimonial**

The *Davis/Hammond* court stressed the factors involved in taking the statement. There is yet no consensus from the state and federal courts as to how to define what is testimonial. Some courts conclude that any statement the declarant could reasonably expect would be used for prosecution would be testimonial. See *U.S. v. Arnold*, 410 F.3d 895 (6th Cir. 2005). While others reject that subjective approach and ask whether the factors making up the taking of the declaration show that the police were seeking to obtain evidence for prosecution or were seeking to resolve an immediate emergency. See *Mungo v. Duncan*, 393 F.3d 327 (2d Cir. 2004).
The California Supreme Court in 2007 held a statement non-testimonial made by a 15-year-old boy to a treating physician after he was asked what happened and the boy said that his grandmother had held him down while his mother cut him. The Court said that the statement did not have the “formality or ceremony that characterizes testimony by witnesses.” A similar statement made to a police officer who accompanied the boy to the hospital was held to be testimonial and in violation of *Crawford* but was deemed harmless error. *People v. Page*, 2007 WL 10395108 (Cal Sup. Ct. 2007)

**Harmful Error**

The Court of Appeals in *People v. Goldstein*, 6 N.Y.3d 119 (2005) held that a confrontation clause violation under *Crawford* is subject to the harmful error rule.

**Dying Declarations**

In a footnote in the *Crawford* opinion the Court acknowledged that the common law permitted admissions of dying declarations as did the Court itself in a 19th Century opinion. The Court said that they “need not decide in this case whether the Sixth Amendment incorporates an exception for testimonial dying declarations (and said that if the exception must be accepted on historical grounds it is *sui generis*).” The Nevada Supreme Court joined several other state courts holding that a statement made to a 911 Operator by the victim of a shooting that “defendant had shot him and had been paid to do it” was neither testimonial under *Davis* nor in violation of the *Crawford* rule. The Court ruled that dying declarations are exceptions to the Sixth Amendment right of confrontation. *Hopkins v. State*, 143 P.3d 706, (Nev., Oct 12, 2006).

**Unavailability.** The Washington Supreme Court held in *State v. Price*, P.3d (2006 WL 3333540 Wash. Sup. Ct.) that a 6-year-old child victim of sexual abuse who testified but could not remember the events which occurred when she was 4-years-old was not “unavailable” for purposes of the *Crawford* rule and therefore statements made by her to her mother and others that qualified as exceptions to the hearsay rule were not barred by the 6th Amendment Confrontation Clause.

**New York Cases Interpreting Crawford.**

The following cases occurred before the *Davis* case but do not appear to be in conflict.

Declarations not offered for the truth of the matter asserted do not take subject to the *Crawford* rule. Thus, a non testifying co-defendant’s statement to the police offered only to show the officer’s state of mind, was not hear say. *People v. Reynoso*, 2 N.Y.2d3d 820 (Mem.) (2004). See also, *People v. Newland*, 6 A.D.3d 330 (1st Dept. 2004) and *People v. Guerro*, 22 A.D.3d 266 (1st Dept 2005). A statement offered to impeach the defendant did not violate *Crawford*. *People v. Moye*, 11 A.D.3d 212 (1at Dept. 2004). *Crawford* violations take subject to the Harmless Error rule so that plea allocutions by various participants in defendant’s fraudulent enterprise were testimonial but harmless when offered against defendant. *People v. A.S.Goldmen, Inc.*, 779 N.Y.S.2d 489 (1st

Business Records: A business record in a rape case entries containing the victim’s post-incident blood alcohol test results were held to have been admitted in violation of Crawford since the court found that the record was testimonial as it was prepared in response to a request by the police for the purpose of prosecution. It was used as a basis for a prosecution expert’s testimony as to the victim’s blood level which was relevant on her ability to consent. Defendant had a right to cross-examine the witness regarding the authenticity of the sample and to question the testing methodology used to get the sample. People v. Rogers, 8 A.D.3d 888 (3rd Dept. 2004). Blood test reports held testimonial and inadmissible in People v. Fisher, 9 Misc.3d 1121(A) (2005 Slip Op., Rochester City Court) as they were prepared for prosecution. However, foundational DWI reports were found non-testimonial. Medical examiner’s DNA report of a test performed on defendant’s blood held non testimonial. People v. Grogan, 28 A.D.3d 579 (2nd Dept. 2006). Autopsy report held non-testimonial in People v. Bryant, 27 A.D.3d 1124 (4th Dept. 2006).

An affidavit based on “information and belief” made by the DMV to show that notice of license revocation had been sent to the defendant was deemed to be testimonial and in violation of Crawford. Df then age 16 had his license in 1987 following an accident. About the same time he moved to Georgia and secured a license there. In 2003 again in New York he was in an accident and was charged with (inter alia) with aggravated unlicensed operation of a motor vehicle. To show his knowledge, the prosecution offered the affidavit. The Court held that this record was testimonial and that absent the maker of the affidavit the defendant had no opportunity to cross-examine into the “information and belief.” People v. Pacer, 6 N.Y.3d 504 (2006).

NOTE: Some courts are holding that Business Records are per se non-testimonial (e.g. Massachusetts and North Carolina even when they contain police laboratory reports providing incriminating evidence against a defendant. The Minnesota Supreme Court in State v. Caulfield, 722 Minn. 304 (2006) held that a police lab report of suspected controlled substances fit within the description of “testimonial” statements set forth in Crawford.

AUTOPSY REPORTS. In United States v. Feliz, F.3d (2006WL 3021118) (2006) the 2nd Circuit held that statements in Autopsy reports as to the cause of death, offered in a murder prosecution that qualify as exceptions to the hearsay rule under both 803(6) (business records) and 803(8) (public records) are not testimonial and are not barred by the Confrontation Clause.
911 Calls: New York courts have gone both ways. One Bronx County judge found testimonial a call reporting an ongoing chase and shooting and held it inadmissible despite the fact that the declaration meant the requirements of both an excited utterance and a present sense impression. The judge found that the caller was responding to questions by the 911 operator. People v. Cortes, 781 N.Y.S.2d 403 (2004). A second Bronx County judge, however, in People v. Muscat, 3 Misc.3d 739 (2004) said the 911 calls were not testimonial because they constituted a cry for help. A Nassau County judge held 911 calls testimonial in People v. Isaac, 4 Misc.3d 1001A (2004) finding that the calls were not excited utterances and were the product of interrogation. A Queen’s County judge found that a mother’s screams for help were excited utterances not intended to be testimonial and not therefore in violation of the Crawford rule. People v. Conyers, 4 Misc.3d 346 (2004). A New York County judge in People v. Dobbin, 791 N.Y.S.2d 897 (Dec. 2004) found a 911 call about an ongoing robbery to be testimonial where the caller answered numerous questions about the suspects size, dress, race, and clothing. The Court applied the Crawford’s “objective witness” test saying that it would not be unreasonable for the caller to believe that the facts in his formal statement would require him to testify against the accused. The issue pends before the United States Supreme Court. A Rockland Supreme Court judge found that a statement by a victim to her sister saying she had to terminate their call in order to meet a man was doing power washing was a casual remark not controlled by Crawford. People v. Herrera, 11 Misc.3d 1070(A) (2006). The 4th Department in People v. Bryant, 27 A.D.3d 1124 (2006) found a victim’s statements that qualified as excited utterances were made to police “outside the context of any ‘structured questioning.’” See also People v. Bradley, N.Y.2d 2006 WL 3716030 (Ct. App. 2006) where victim’s statement to an investigating officer was found non-testimonial. Victim had a bloody face and clothing, was bleeding profusely from her hand, was emotionally upset and when asked what had happened, said her boy friend had thrown her through a glass door. The office found the defendant and the shattered door. The Court held that the statement was not intended for prosecution but a cry for help and the officer took the information for purposes of investigating an emergency situation. The Court compared the Hammon and Davis case facts.

EXCITED UTTERANCE. A statement by a victim to a police officer who observed a large amount of blood on the victim’s pants and legs after the officer said, “Hot did this happen” “they stabbed me, they fucking stabbed me” was found to have been an excited utterance and not produced for testimonial purposes. Instead the court said that purpose for the officer’s question was to enable him to “assist the victim in an emergency situation.” In re German F., 821  N.Y.S.2d 410 (Family Court Queen’s County, 2006).

If the declarant testifies at the trial, his out-of-court statements were said not to violate the Crawford rule in People v. Nunez, 7 A.D.3d 398 (1st Dept. 2004). However, the declarations were offered to show what affect they had on the police and so appear not to have been hearsay.
Co-conspirator statements held not testimonial in United States v. Saget, supra.

Psychiatrist’s opinion based in part upon statements made to her by people not available for cross-examination violated defendant’s right of confrontation and resulted in an order for a new trial. People v. Goldstein, 6 N.Y.3d 119 (2005).

ADMISSIONS

There is not much difference between N.Y. & Federal law as to party admissions.

1) Admissions in N.Y. are exceptions to the hearsay rules rather than exclusions. Any conduct or statement that is arguably against the position taken by the party at trial is an admission.

2) ADMISSION BY SILENCE - CIVIL ACTIONS. A party's silence is an admission provided the party heard the accusation and that a reasonable person in like circumstances would have denied it if untrue.

3) ADMISSION BY SILENCE - CRIMINAL ACTIONS. A suspect in New York is entitled to his Miranda warnings as soon as he comes into contact with the police. If a police officer accuses him of a crime his silence is deemed "too ambiguous" to constitute an admission. Contrast that rule with the Federal Rule in which a defendant's right to remain silent does not come into being until the Miranda warnings have been given or until the police interrogate him in custody.

ILLUSTRATION: DEFENDANT is accosted by a police officer on the street and accused of a crime. DEFENDANT remains silent. Under the Federal Rules, his silence may be an admission but not under N.Y. rules.

4) REPRESENTATIVE ADMISSIONS. The biggest difference between N.Y. rules and the FRE is found in representative or agent admissions. Under the FRE, if an agent speaks about a matter within the scope of the agent's employment while the agent is still employed, the statement is admissible against the master [employer]. This is not the law in New York. In New York, the agent must have been authorized to speak about an event--something that is unlikely to happen with the ordinary employee. Or, the agent must have made a statement as the event was occurring. Thus a statement by an amusement park employee who told plaintiff injured when an iron bar fell and struck her that a screw holding the bar had broken was not made by one authorized to speak on behalf of the defendant. Laguesse v. Storytown, U.S.A. Inc., 745 N.Y.S.2d 323 (3rd Dept.) (citing Loschiavo v. Port Authority of N.Y. & N.J., 58 N.Y.2d 1040). Rule applied in Tyrell v. Wal-Mart Stores, Inc., 97 N.Y.2d 650 (2002) (memorandum).

Compare Loschiavo with Navedo v. 250 Willis Ave. Supermarket, 735 N.Y.S.2d 132 (1st Dept 2002) where a store manager’s statement was heard by the plaintiff and another witness in a slip-and-fall case that “he had directed an employee to ‘clean that up awhile
ago’ was admissible as a representative admission since the manager had authority to speak for the principle on that matter. (*)

Consider PROBLEM 21A. The engineer's [and arguably, the conductor's] statements seem admissible under the FRE against the railroad since 1) the employees were employed by the rr at the time of the statements and 2) it appears that they spoke about matters within the scope of their employment [that may not be true as to the conductor--there would have to be proof that his duties included looking out at the passing warning signs]. In N.Y., however, the engineer's statements would be admissible only if the rr authorized the engineer [conductor] to speak for the rr--an unlikely event.

**Odd Case:** The 1st Department in a strange holding said in a rape case where defendant was accused of raping a 14-year-old child, said that a statement previously made to the child’s 19-year-old baby sitter was a statement admissible of present intent to do a future act and was back ground information. She reported that the statement was made when the defendant raped her. She testified, “He told me that (complainant) was lucky I was there, because if I wasn’t there it would be her (referring to the 14-year-old.)” This statement is clearly an admission if relevant and it is relevant as it shows the defendant’s general intent including future intent to attack the child. Although the Court did say that it was alternatively admissible as an admission the concurring judge correctly pointed out it is unnecessary to predicate a party’s admission on another hearsay exception (declaration of intent to do a future act.) *People v. Jackson*, 29 A.D>3d 409 (1st Dept. 2006).

4A) ATTORNEY’S STATEMENTS IN CRIMINAL PRE-TRIAL HEARINGS. An attorney’s statements in a *Sandoval* hearing may be admissible to impeach a defendant should he testify contrary thereto. Counsel told the court that the defendant was present at a cocaine sale only to purchase but not to sell cocaine. Defendant, however, testified he was only a bystander. The prosecutor was properly permitted to impeach him based on his attorney’s statements to the court. *People v. Brown & Burgos-Santos*, 98 N.Y.2d 226, 232-233 (2002). Compare the holding in *Brown* with the holding in *Burgos-Santos* in which the Court held that a withdrawn plea of alibi may not be used to impeach a defendant who testified that although at the scene of the shooting he accidentally shot the victim. *Supra* at 233-234.

5) CO-CONSPIRATOR'S STATEMENTS. A co-conspirator's statements are admissible against all other conspirators provided they were made while the conspiracy was in existence and were made in furtherance of the conspiracy. That principle does not differ from the FRE. However, in N.Y., the conspiracy must be proved independent of the conspirator's statements. See *People v. Salk*, 47 N.Y.2d 230 (1979).

A second difference between N.Y. law and the FRE as to conspirators' statements exists. In N.Y. the underlying conspiracy can be established by some evidence--though not necessarily by a preponderance of the evidence. Under the FRE in criminal cases, the prosecution must establish the existence of the conspiracy to the satisfaction of the judge by a preponderance of the evidence. See the *Bourjaily* cases in Chapter I of the problem book.
6) FIRST HAND KNOWLEDGE. The same rule governs party admissions in N.Y. as under the FRE. There is no requirement that the party have first hand knowledge of the matters he addresses. He may base his statements on hearsay and the statements will still be admissions. However, if the statements are made by his agents and are offered vicariously, New York requires that the agent either have first hand knowledge of the alleged facts or have been authorized to speak for the master. See Cox v. State, 3 N.Y.2d 693. It is unclear whether agents under the FRE must have first hand knowledge. There is nothing in the FRE that excepts agents or employees from the general principles and thus several courts hold that neither the agent nor the principle must be shown to have had first hand knowledge.

7) ILLUSTRATIONS. It was proper to prove defendant’s Grand Jury testimony on rebuttal that was inconsistent with testimony of defendant’s alibi witnesses. His testimony qualified as a party admission.

8) ADOPTIVE ADMISSIONS. Defendant’s brother was a co-defendant. His confession was properly admitted against defendant on proof that in defendant’s presence, after his brother had confessed implicating defendant and was asked if he would sign it, the brother asked defendant what he should do and defendant said, You might as well sign it, you already told them all about what happened. The Court said that this statement amounted to implied adoption of the contents of the brother’s confession. People v. Campney, 94. N.Y.2d 307.

WITNESS STATEMENTS

Please examine the notes to the Introductory section on hearsay. We have already looked at statements of identification [admissible by statute as hearsay exceptions], prior inconsistent statements [admissible only to impeach unless the statement meets the conditions of another hearsay exception] and prior consistent statements [admissible as hearsay exceptions if offered to disprove an assigned motive].

In this section we look at a unique New York case: Letendre v. Hartford Acc. & Ins. Co., 21 N.Y.2d 518. This case has been cited for the proposition that prior inconsistent statements may be admissible in civil actions [but not criminal actions] for the truth if they are properly admissible to impeach. However, that gives a broader reading to this landmark case than the Court of Appeals probably intended. The facts of the case are important. Letendre had a summer resort in the Adirondacks which he left in care of an employee during a winter while he was in Florida managing property in that state. When he returned he discovered a shortage in funds and notified the defendant insurance company which had a bond covering employee defalcations. The insurance company interviewed the primary employee suspect who 1) gave an oral statement denying the theft; 2) when confronted with inconsistencies admitted the theft in writing but only for a small amount and 3) when further confronted by the Hartford agent admitted taking the entire amount. Defendant, however, refused to pay and Letendre brought a civil action to recover on the surety bond. Letendre called the employee who denied stealing any money. Pursuant to statute, [CPLR §4514] Letendre was permitted to impeach his own witness.
with the written out-of-court inconsistent statements. The trial judge admitted them for the truth as well. On appeal, the Court of Appeals affirmed finding that under the unique circumstances in which the statements were made and given the compelling need for them, it was proper to receive them for the truth. The Court said that "none of the classic dangers which justify the hearsay rule, are present in this case. Hence a departure from the general rule excluding hearsay evidence is proper."

Some lower New York courts have cited *Letendre* as standing for the proposition that written and signed or sworn out of court statements may be received for the truth in civil actions. That probably is too broad a rule. The *Letendre* court admitted inconsistent statements because there was compelling need and substantial assurance of trustworthiness under the circumstances in which the statements were made.

Keep in mind that the *Letendre* rule has no application in criminal cases.

**FORMER TESTIMONY EXCEPTION**

1. **GENERAL COMMENT**

New York's rules are taken from two statutes--Section 4517 of the CPLR and 670.10 of the CPL. In *criminal cases*, the statute controls and only if the former testimony meets the conditions set forth in the statute may it be received. *See People v. Robinson*, 89 N.Y.2d 648 (1997), *but see People v. Robinson*, infra. In *civil actions*, however, the statute may be expanded by principles of the common law. *E.g., Fleury v. Edwards*, 14 N.Y.2d 334.

In *People v. Diaz*, 97 N.Y. 109 (2001) the Court held that the failure to use a Spanish interpreter when they contacted an eyewitness by telephone in his new and permanent location in Mexico, constituted a failure to act with due diligence as required by statute. The witness expressed misgivings about returning to New York despite efforts by the police and prosecution callers to allay his concerns. The use of testimony from a prior trial was therefore held improper. In three previous trials, the prosecution had used an interpreter for his testimony to the juries. Although the witness could understand English, the Court said that a bilingual caller could have evaluated the witness' misgivings and explained the lengths to which the State was willing to go to assuage them.

2. **CRIMINAL ACTIONS - UNAVAILABILITY**

The grounds for unavailability are limited to death, sickness, physical or mental incapacity or absence where the witness is either outside the jurisdiction of the court or cannot be found after a diligent search. *CPL §670.10(1).* CONTRAST this rule with the FRE where six grounds are listed: 1) privilege, 2) death, 3) physical disability, 4) mental disability, 5) absence from the jurisdiction and out of reach of court process; 6) absence and location unknown despite a diligent search; 7) loss of memory; and 8) contumacious refusal to testify after being ordered to do so by the judge.
3. CIVIL ACTIONS - UNAVAILABILITY

The grounds for unavailability are the same as for criminal actions. CPLR § 4517 (as amended, Ch. 268, Laws, 2000, Eff., Jan. 1, 2001). However, as noted below, in civil actions the statute is not all encompassing and other grounds may be asserted if not inconsistent therewith. The CPLR § 4517 (a)(2) permits the unrestricted use of prior testimony of any person who was a part when the testimony was taken, though is no longer a party, provided the testimony is being used by a party who is “adversely interested when the prior testimony is offered” in evidence. There is no need for a showing of unavailability. Prior testimony of any person may be used by any party against any other party if the witness is determined to be unavailable as set forth in the statute. There is also a special provision authorizing the prior testimony of a “person authorized to practice medicine” without the need of showing unavailability. There are conditions permitting preclusion. See §4517(a)(3). For a comprehensive review of this statute see Barker & Alexander, Evidence in New York State and Federal Courts, at 963-969 (2001). Prior case law under former CPLR §4517 should be unchanged.

4. CRIMINAL ACTIONS - PROCEEDINGS THAT QUALIFY

Only testimony from a trial of an accusatory instrument, hearing upon a felony complaint or a conditional examination of the witness may be used and only if they were offered against this defendant who was had an opportunity and similar motive to cross-examine or to develop the testimony. CPL §670.10.

Illustration: Defendant police officer was charged with receiving a bribe. The bribe giver was dead. His testimony in a previous police administrative proceeding was offered against the defendant. The Court of Appeals said that the statute controlled and since former administrative proceedings or civil actions were not set forth in the statute, testimony from them could not be used against the defendant. People v. Harding, 37 N.Y.2d 130.

In People v. Robinson, ___ N.Y.2d ___, ___ N.Y.S.2d ___ (1997 WL 138009) the Court of Appeals said that in order to conform to due process and confrontation standards, grand jury testimony that would not qualify under CPL §670.10 was admissible where there was great need, substantial reliability and where the prosecutor had fully developed the witness’s testimony at the grand jury.

5. CIVIL ACTIONS - PROCEEDINGS THAT QUALIFY

In civil actions former testimony in any proceeding even though not set forth in the statute may be offered if given against the same party or a predecessor party.

Illustration: In Fleury v. Edwards, 14 N.Y.2d 334 testimony from an unavailable witness given in a police administrative proceeding was admissible against the same defendant in a subsequent civil action, even though the statute does not list police administrative proceedings as among those from which former testimony may be used.
6. IDENTITY OF SUBJECT MATTER

The actions do not have to be the same provided that the party against whom the former testimony is now offered had a fair opportunity and motive to cross-examine or to develop the testimony. Thus, defendant was charged criminally following an automobile accident. At that criminal trial a passenger in plaintiff's car testified against defendant. In a later negligent action, the testimony of the passenger who was now unavailable was offered against the defendant. The Court of Appeals said that since the defendant had the incentive and opportunity to cross-examine the witness during the criminal trial with respect to the aspect of the accident that was relevant in the civil trial, the testimony in the criminal action was admissible in the civil trial. *Healy v. Rennert*, 9 N.Y.2d 202.

7. METHODS OF PROVING FORMER TESTIMONY

**CIVIL TRIALS:** The testimony may be proved by the original stenographic notes but the statute does not limit the means by which former testimony may be proved. Thus, any person who heard it may testify. *McRorie v. Monroe*, 203 N.Y.426.

**CRIMINAL CASES:** In criminal cases, however, the party offering the former testimony must produce an authenticated transcript of the testimony. CPL §670.20.

DECLARATIONS AGAINST INTEREST

ELEMENTS OF THE EXCEPTION

1. **Declarant must be unavailable.** Unavailability may be established by evidence
   A. that the declarant is dead;
   B. that the declarant is absent & beyond the power of the court to compel attendance;
   C. of a claim of privilege;
   D. of a physical or mental disability;
   E. of a testimonial disqualification as in the Deadman's Statute; and possibly
   F. the contumacious refusal to testify. See, *People v. Morgan*, 76 N.Y.2d 493, 497-98.

2. The proponent must show that the declaration was against interest when made.

3. The proponent must show that the declarant was aware that the statement was against interest when it was made. This can be proved by applying an objective "reasonable person" test.

4. Declarant must have had first hand knowledge of the facts.
5. Declarant must have had no motive to misrepresent the facts.

6. IN THE CASE OF A DECLARATION AGAINST PENAL INTEREST, there must be corroborating circumstances that clearly indicate the trustworthiness of the statement.

7. The Declaration must be against **Pecuniary, Proprietary or Penal interest**.
**Pecuniary Interest:** The declaration must "prejudice a money interest. The declaration must be an admission of a sum certain owing or a sum capable of being made certain.

**Proprietary Interest:** The declaration must "prejudice" a property interest--a claim to an estate less than a fee simple is a statement against proprietary interest although it cannot be used to prove the lesser estate. e.g, "I hold Blackacre in trust for X." The statement shows that declarant does not own Blackacre. It may not, however, be offered by the declarant to prove that he holds the property in trust for X.

8. The interest must exist at the time the declarant possessed the property.

9. **Declarations Against Penal Interest**

   A. Prior to 1970 Declarations against Penal Interests were *not admissible* in New York. In the landmark case of *People v. Brown*, 26 N.Y.2d 88 the Court of Appeals recognized the exception. In a criminal case, both the prosecution and the defendant may offer declarations against interest. However, there are different requirements that must be met depending upon who is making the offer.

   B. Prosecution Offer of a Declaration against Penal Interest: [Because of the Confrontation Clause, there is a special need to ensure reliability or trustworthiness of the declaration.] The following conditions were set down in *People v. Maerling*, 46 N.Y.2d 289.

   1) The interest must be of sufficient magnitude or consequence to the declarant to all but rule out any motive to falsify;

   2) Courts should only admit that portion of the declaration that is opposed to a declarant's interest. [NOTE: This compares favorably with the Supreme Court's limitation in *Williamson v. United States*, 114 S.Ct. 2431 (1994) in which the Court held that only so much of the declaration as was actually against the declarant's interest could be admitted.]

   3) When a showing of admissibility has been made, the court should allow the opponent to produce proof of the circumstances in which the declaration was made in order to show that the criteria advanced for admissibility are illusory.

   C. Criminal Defense use of Declarations against Penal Interest. Before a defendant in a criminal action may offer a declaration against penal interest, there must be other evidence tending to show that the declarant or his accomplice whom he implicates actually committed the crime.

10. **Collateral Facts.** In civil actions involving declarations against pecuniary or proprietary interest, neutral facts contained within declarations that are as a whole against interest may be received if necessary to give meaning to the relevant declaration against interest. **NOTE:** That
principle of long standing has been rejected in the case of Declarations against Penal
Interest by the United States Supreme Court in the *Williamson* case as noted above.

**STATEMENTS MADE IN CONTEMPLATION OF DEATH**

1. **ELEMENTS**
   A. **Unavailability.** The Declarant must be dead--no other ground of unavailability
      suffices.
   B. **Belief in Impending Death.** The declarant must have had a belief in impending
deaht without any hope of recovery.
      *Illustration.* X was shot and as he lay dying said, "Oh my God. I've been shot by
      D. Help me get to the hospital or I'll die."
      X had a hope of recovery and the statement is not admissible as a dying
      declaration.
   C. **Admissible only in homicide actions.** A dying declaration is not admissible in
civil actions nor in a criminal action unless it is a homicide.
   D. **The death must be subject of the homicide action.** This is a rule pretty much
unique to New York. If D shoots and kills two persons but is charged only with
the death of one of them only that person's declarations are admissible.
      *Illustration.* A & B are shot with a single bullet. D is charged with the murder of
      B. A is heard to say, "I am dying. D shot me."
      Since A's death is not the subject of the homicide action, his statement is not
      admissible.
   E. **The declaration must concern only facts leading up to or causing the injuries
resulting in death and any attending circumstances.** Declarations that contain
relevant history will not qualify.
      *Illustration.* D was charged with the murder of V. V was heard to say just before
she died, "I am dying. D shot me. Last month D tried to poison me."
      The reference to the prior month's attempted poisoning would not qualify.
   F. **The declaration is admissible for or against the person charged in the
homicide action.**
   D. **Testimonial Qualifications.** The decedent must have had first hand knowledge
and must have met the rules of witness competency.

**SPONTANEOUS UTTERANCES**

1. **PRESENT SENSE IMPRESSIONS.** Until recently, New York did not
   recognize present sense impressions if they did not qualify as excited utterances.
   The Court of Appeals in *People v. Brown*, 80 N.Y.2d 729 (1993) recognized the
   exception for the first time. The rule is exactly the same as FRE, R. 803(1).
   However, before this evidence is admitted the trial judge must find that there is
   other evidence corroborating both the contemporaneity and the accuracy of the
   declaration. See *Irizarry v. Motor Vehicle Indemnification Corp.*, 287AD2d 716
1A. INTERPRETIVE CASE: See People v. Vasquez, 88 N.Y.2d 561, 647 N.Y.S.2d 697 for a case that interprets People v. Brown and which discusses in depth the requirement that the declaration must have been while the declarant was perceiving the event or condition or immediately thereafter. The case also examines the requirement of corroboration, as a present sense impression and the spontaneity requirement for an excited utter. It is a very good review case.

1B. Anonymous 911 calls made from 11/2 to 3 hours after a street shooting in which the callers stating they were at the scene and described the attacker did not qualify as spontaneous utterances and were impermissibly hearsay. Because the defendant objected only on hearsay grounds and not on Confrontation grounds, the non-constitutional harmless error doctrine was applied. People v. Kello, 96 N.Y. 740 (2001).

1C. Mere fact that an amusement park employee made a statement indicating blame to an injured patron did not qualify the statement as an excited utterance since the employee was under the stress of excitement caused by the accident which he did not witness. Laguesse v. Storytown U.S.A., Inc., 745 N.Y.S.2d 323 (3rd Dept. 2002).

1D. Statements from a group of “kids” made seven minutes after police received a 911 report of a street altercation that the defendant had chased the victim down the street were not sufficiently contemporaneous with the event to qualify as present sense impressions. People v. Ortiz, 822 N.Y.S.2d 327 (3rd Dept. 2006).

2. EXCITED UTTERANCES. This was once a very narrow exception. Formerly called the "res gestae" exception it is simply referred to as "spontaneous declaration" or "excited utterance." Under the former rule, the declaration had to have been made upon or immediately after the exciting event; it could not have been made in response to questions, and it had to have been made by a participant in the exciting event—not a bystander. Now, however, the rule is interpreted consistent with the Federal Court interpretation of FRE, Rule 803(2).
The judge must determine whether at the time the utterance was made, the declarant was under the stress of excitement caused by an external event sufficient to still the reflective qualities of his/her mind. Richardson on Evidence, Farrell's 11th ed., §8-605.

The lapse of time is relevant only on the issue whether the declarant had a significant opportunity to reflect and thus fabricate--it is not a rule of arbitrary limitation [People v. Brown, 70 N.Y.2d 513 (1987)].

The party offering hearsay bears the burden of establishing that the declaration satisfies an exception to the hearsay rule. The Court of Appeals therefore reversed the Third Department which after correctly holding that Wal-Mart employees’ statements in a slip and fall case did not constitute representative admissions improperly concluded that the record contained “no evidence to suggest that the statement was anything other than a spontaneous utterance.” This improperly relieved the plaintiff of the burden of showing that at the time the statements were made the declarants “were under the stress of excitement caused by an external event sufficient to still the reflective faculties” with no opportunity to deliberate. Tyrell v. Wal-Mart Stores, Inc., supra. (*)

The fact that the declaration was made in response to a question is merely a factor to be consider in determining spontaneity--not a determinant.

A bystander's declaration may qualify for admissibility.

There is some authority for the proposition that the declarant must be identified before the statement is admissible--at least if it is claimed that exculpatory statements by the defendant in a criminal action. See People v. Smith, 52 N.Y.2d 802 (1980).

Statement made by stabbing victim in narrative form in hospital an hour after the attack did not qualify as an excited utterance but the court held it was harmless error. The Court discussed in detail the elements of the excited utterance exception. People v. Johnson, 1 N.Y.3d 302 (2003).

Incompetence of Declarant. New York departs from the apparent common law rule to the effect that excited utterances did not require proof that the declarant could have qualified to take an oath. In New York, a declaration by a person who would not be competent at trial is not admissible.

DECLARATIONS OF BODILY CONDITION FOR MEDICAL PURPOSES
New York law is radically different from FRE, Rule 803(4).Unlike other exceptions, New York Courts have been slow to liberalize this rule. Where a patient complains of a body or mental condition to a physician it must have been made to the physician and not to one of his medical teams and the physician must be a treating and not just a diagnosing expert. See Barker & Alexander, *Evidence in New York State and Federal Courts*, pp. 854-857 (2001).

1. **DECLARATIONS OF PRESENT BODY CONDITION.** Unlike most of the rest of the Common Law [and FRE] jurisdictions, in New York statements of present body condition have limited admissibility. They are admissible if made to a treating physician and are necessary for treatment. They are inadmissible if made to any other person **unless the declarant is dead.** The declarations will also be admissible if they qualify under some other exception or exclusion to the hearsay rule [e.g., excited utterance or dying declaration].

2. **DECLARATIONS OF PAST BODY CONDITION.** Declarations of past pain are not admissible even when made to a treating physician. this is known as the rule in *Davidson v. Cornell*, 132 N.Y. 228. This is a "bad" result, unsupported in logic and was the result of an apparent error by the New York Court of Appeals. In the *Cornell* case, the declarations were actually made to a non-treating physician who sought to use them as a basis for his trial testimony. The Court of Appeals, however, lost sight of that fact and its holding extended to treating physicians as well as non-treating physicians. We assume that the next time the Court of Appeals hears the issue they will limit the *Davidson v. Cornell* holding to non-treating physicians. The case has been repeatedly cited by lower courts and in 2002 the Second Department applied the rule to bar testimony by a non-treating physician about statements of past bodily condition made to him by a patient. *Adkins v. Queens Van-Plan, Inc.*, 740 N.Y.S.2d 389 (2002).

3. **DECLARATIONS OF CAUSATION.** Declarations of the cause of the body condition are not admissible for the truth even if a treating physician testifies she needed the information in order to diagnosis and treat. However, if the causative statements are found in business records, and provided that an expert at the trial testifies that the statements pertained to the business of the hospital and were relied upon the treatment team for diagnosis and treatment, they may come in for the truth of the causative matter asserted. There is also authority for the proposition that in criminal cases, statements of causation found in business records relied upon by an expert at the trial may be received for the truth. This, of course, is an anomaly. Why should causative statements be treated as more trustworthy merely because they were found in business records?

An emergency room treating physician was permitted to testify to the history taken from a victim of a robbery including that the patient had been assaulted and robbed. The Third Department said that the physician’s testimony established that this history was “patently germane to his treatment and diagnosing of Vale's life-
threatening injuries.” People v. Scott, 742 N.Y.S.2d 681 (2002). [NOTE: This is a good result but seems to expand the rule that declarations of causation are not admissible. Even under the Federal Rules, it is not clear how knowledge that the patient was “robbed” would be essential to treatment.] Compare Scott with People v. Benedetto, 744 N.Y.S.2d 92 (2002) where the 4th Department applied the stricter rule prohibiting declarations of causation and reversed a trial court that had admitted statements made to a treating counsel. The statements were made by a victim of sodomy abuse and described in detail the events.

4. INVOLUNTARY EXPRESSIONS OF PAIN. Called the "grunt and Groan" rule involuntary expressions of pain are always admissible regardless of to whom made or who heard them. Such expressions are not hearsay.

DECLARATIONS OF PRESENT STATE OF MIND.

1. New York basically follows the principles set forth in FRE, R. 803(3).
2. The Hillmon rule has been adopted by the New York Court of Appeals in People v. James, 93 N.Y.2d 620 (1999) where in a perjury action, the court admitted a telephone statement by a transit police office that the defendant and another intended to come to his home to look at leaked answers to a transit police promotional examination. This holding was followed by a Rockland Supreme Court judge in People v. Herrera, 11 Misc.3d 1070(A) (2006). See Barker & Alexander, Evidence in New York State and Federal Courts, at 851-52 (2001)

REGULARLY KEPT RECORDS [BUSINESS RECORD EXCEPTION]

1. The rule is controlled by Statute--NY CPLR §4518 [applies in both civil & criminal actions]. The Statute is sometimes called the COMMONWEALTH FUND ACT [CFA]. Many jurisdictions adopted the CFA including Congress [prior to the adoption of the Federal Rules of Evidence].

2. Only matters that differ from the FRE are noted below. You may thus assume that the CFA and the FRE are the same unless otherwise noted.

3. Foundation Rules [Not substantially different than FRE, R. 803(6).

   A. The record must have been made and kept in the regular course of business.
   B. It must have been the duty of the employee to make and to keep the record.
   C. The record must concern matters within the scope of the business.
   D. The entry must have been made at or near the event described.
   E. Someone in the business must have had personal knowledge of the fact reported. Known as the Johnson v. Lutz rule. This will be described in
more detail below.

F. It is not necessary to call the person who made the record or who had first hand information of the event described in order to lay the foundation. It suffices that the witness be an employee familiar with the office routine. Someone in the business, however, must lay the foundation unless the parties stipulate as to the foundation. See People v. Kennedy, 68 N.Y.2d 569 (1986) where an expert attempted to testify as to the meaning of defendant/loan shark's entries in his "little black book." The expert was a stranger to the defendant's business and could not provide the necessary foundation.

G. Computer records and copies printed out for use at trial qualify as business records provided the printout is of a record regularly kept and used in the organization business. Ed Guth Realty, Inc. v. Gingold, 34 N.Y.2d 440 (1974).

H. The rule in Johnson v. Lutz [253 N.Y. 124 (1930)]. This landmark case has been followed by all CFA jurisdictions including the Federal Courts. However, because Congress slightly altered the language of FRE, R. 803(6) it is now uncertain whether the Federal Courts continue to apply it. The rule is that someone in the business must have had personal knowledge of the fact reported. If the fact was reported by a stranger to the business, it is double hearsay and the stranger's declaration is not admissible for the truth unless there is an independent exception [or exclusion] to support it.

Illustration #1: P v. D for injuries sustained in a traffic accident, P contending D drove through a red light.
1) P offers an accident report made by Investigating Officer, W-1, who had a business duty to investigate and make the report. In the report W-1 states, "I was following D's car and saw it enter the intersection on a red light."
2) This report is admissible to prove that D had a red light. Officer W-1 had personal knowledge of the fact, a business duty to record it, it pertained to the business of the police and provided W-1 made the entry at or near the event it qualifies as a business record. Contrast the results in Illustration #1 with the following:

Illustration #2. P v. D for injuries sustained in a traffic accident, P contending D drove through a red light.
1) P offers an accident report made by Investigating Officer, W-2, who had a business duty to investigate and make the report. In the report, W-2 states, "I talked with X, who said he was following D's car and saw him go through a red light before hitting P's car."
2) The report is admissible as a business record but it is not admissible to prove that D went through a red light. Here the information was provided by someone with no business duty to report. Absent an
independent exception to the hearsay rule, X's information is not admissible for the truth.

I. Under the *Johnson v. Lutz* rule, the stranger's statement may be relevant without regard to the truth. If so, it may be received for that limited non-hearsay purpose.

**Illustration.** In a criminal action it becomes important to establish the time the crime occurred. A police blotter entry is offered after a proper foundation to show that it was a properly made and kept police record. In the entry is the following statement made by Sgt. W-1, "At 1:15 p.m., X came into the police station and said that D shot V and killed him and that the shooting occurred a half block down the street. I dispatched officers to the scene."

1) This entry is not admissible to prove that D shot V even if X had first hand knowledge, since X is a stranger to the police business. However, the fact of the report is admissible to show that a report of a shooting was made at 1:15 p.m."

J. If a business report contains a hearsay statement from a stranger to the business, that statement may be received for the truth if it qualifies independently as an exception [or exclusion] from the hearsay rule.

**Illustration.** P v. D to enforce a life estate. P contended that D promised her she could live in D's house for P's life, if P took care of D's ailing mother. D denied the promise. P was a welfare recipient. P produces a welfare office record duly authenticated as a record of the office with an entry made immediately after an interview between a welfare officer and D concerning an investigation by the welfare office into P's living in an expensive home. In the report the agent wrote, "D said P had a life estate in the home in return for taking care of D's mother."

1) The statement by D to the welfare agent pertained to the welfare department's business but reported a fact not within the first hand knowledge of any member of the department.
2) Therefore, the record could not be offered to prove the truth of the statement by D unless D's statement independently met a hearsay exception.

3) D's statement was a party admission and therefore was receivable for the truth.
4) NOTE: The federal courts would follow the same principle and admit D's statement by applying FRE, R. 805. The record qualifies for admissibility under FRE, R. 803(6) and D's statement is an exclusion and admissible under 801(d)(2)(A).

K. **NEW CASE:** *People v. Cratsley*, 86 N.Y.2d 81. In *Cratsley* the Court held that it was not improper to receive a statement made by a third person found in business records under the following circumstances. *Cratsley*
was charged with raping a resident of ARC, a sheltered workshop. At issue was whether the employee could give consent. On that issue, an I.Q. test prepared by a psychologist was not a member of ARC was received in evidence as a business record of ARC. The Court said that while the "mere filing of papers received from other entities, even if they are retained in the regular course of business is insufficient to qualify the documents as business records." This is so because a business representative would not be able to lay the required foundation as to regularity and timeliness. Further, the business representative would not be aware whether the information in the report was provided by one who had a business duty to report it. But in this case, the testimony of the ARC employees established that the psychologist was not a complete stranger to the ARC; that he acted on behalf of the ARC in making the report; that he was aware of ARC requirements for the report; that the reports conformed to the statutory and regulatory requirements that governed the sheltered workshop with which he was familiar. Finally, the reports were routinely relied upon by ARC and used in the regular course of ARC business.

[NOTE: The above commentary is not a "rule." Under the peculiar facts and circumstances of this case, the Court was willing to extend or bend the rule of Johnson v. Lutz, supra. NOTE particularly that the outsider's report was adopted for use and used in the regular course of the business of the workshop in the same manner as if the report had been prepared by its own employees.]

4. **ACCIDENT REPORTS**

New York does not follow the Palmer v. Hoffman rule in which the Supreme Court held that accident reports do not qualify as business records. Instead the issue in New York is whether an accident report has business usage other than for litigation. If it has, then it should qualify. See Toll v. State, 32 A.D.2d 47.

5. **BEST EVIDENCE RULE**

A. The best evidence rule applies and a part seeking to prove a business entry must produce an original or account satisfactorily why it cannot be produced.

B. Temporary entries on paper made for convenience until a formal permanent book entry is made are not "original records" for purposes of the rule.

C. Computer printouts are admissible as business records. To the extent that printouts are not original documents, the "voluminous writings" exception is applied. See Ed Guth Realy v. Gingold, 34 N.Y.2d 440 (1974).
6. HOSPITAL RECORDS

Hospital records can be qualified as business records and entries relevant to diagnosis or treatment qualify for admission. The "history" portion of a record, consisting on information supplied by the patient or others not hospital employees is not admissible for the truth unless the subject matter pertains to the business of the hospital and the patient/stranger's statement independently qualifies as an exception to the hearsay rules.

Illustration. In a hospital record, an entry based on information provided by the plaintiff/pedestrian injured when struck by defendant's car, to the effect: "I was injured when [X's] car was struck from behind by a truck and pushed into me." P's "admission" was offered against him by D in support of D's claim that he was fully stopped at the crossing and was struck from behind by a truck. The statement by the plaintiff is a party admission. However, it was not a statement necessary for treatment [that the plaintiff was struck by a car might be needed for treatment but not that the car was pushed into the plaintiff when struck from behind]. Therefore, since the Plaintiff's statement did not pertain to the business of the hospital, it was not a business record and could not be received. See Williams v. Alexander, 309 N.Y. 283 (1955).

A disability report in a physician’s office was distinguished from ordinary hospital records and held in admissible because it was prepared specifically for litigation purposes. Flaherty v. American Turners N.Y., Inc., 738 N.Y.S.2d 29 (1st Dept. 2002).

RESIDUAL OR OMNIBUS EXCEPTION

Unlike the Federal Rules of Evidence Rule 807, with but one exception New York has not recognize exceptions unless they meet the conditions in recognized exceptions. The one exception is for witness statements found in the Letendre case noted above. The Court of Appeals, however, made clear that they were not creating a new exception to the hearsay rules in that case. The Court in Nucci v. Proper, 95 N.Y.2d 597 (2001) implied that hearsay not meeting the conditions of any rule might be admissible if there was need and sufficient reliability. However, the Court found that the record did not support the admissibility of casual out of court statements made by a witness at a picnic days after the event she observed. Nucci v. Proper, 95 N.Y.2d 597 (2001).

PRESUMPTIONS - CIVIL ACTIONS

1. Operation of a Presumption. A presumption in New York operates just like a presumption anywhere else in so far as its creation. However, when a party seeks to overcome a presumption, no one principle applies to all New York presumptions. As you know there are two major theories of presumptions plus a so-called middle ground position when a party seeks to overcome one. Before reviewing the New York position,
consider the three approaches that apply.

A. The *Thayer* Approach

Under the *Thayer* rule a presumption disappears whenever some evidence is introduced which viewed alone tends to disprove the existence of the presumed fact. This is a question for the judge. If it is overcome, the jury does not affect the burden of persuasion which remains with the proponent.

B. The *Morgan* Approach

Under the *Morgan* rule a presumption remains in the case and is sent to the jury. The jury is told about the presumption and is told to find for the party holding the presumption unless they find that the opponent has disproved the existence of the presumption by the greater weight of all the evidence. The effect is to assign the burden of persuasion as well as the burden of production to the opponent.

C. The "Pennsylvania Compromise." There is a minority view that would send the presumption to the jury and let them determine if the presumption has been overcome but the burden of persuasion remains with the holder of the presumption.

2. **Basic New York Approach - Thayer Plus.** Most presumptions remain in the case only until the judge finds that the opponent has overcome the presumption with SOME SUBSTANTIAL EVIDENCE. This is more than the "some evidence" required in pure *Thayer* jurisdictions. Generally speaking what this means is that the evidence necessary to overcome the presumption must, viewed alone, disprove the nonexistence of the presumed fact. In other words, the opponent must do more than submit evidence that "tends" to disprove it.

3. **The Unique Presumptions.** Five presumptions require more or less evidence to overcome them than does the basic presumptions.

A. **The Clear & Convinging rule.** Some strong policy presumptions require more than "substantial" evidence to overcome them. These include the presumption of the validity of a marriage; the presumption of legitimacy; the presumption that a deliberately prepared and executed instrument manifests the full intention of the parties and a few presumptions found in the Banking Law. However, the judge still has
the burden of determining whether the presumption has been overcome and the burden of persuasion remains with the party holding the presumption.

B. **Morgan Presumption.** In the case of a presumption against suicide, the party opposing the presumption may overcome it only by producing evidence that preponderates against the presumption and supporting evidence. The burden of persuasion passes to the opponent. The jury determines the issue. See *Schelberger v. Eastern Savings Bank*, 60 N.Y.2d 506 (1983); *Begley v. Prudential Ins. Co. of America*, 1 N.Y.2d 530 (1956).

In automobile accident cases there is a presumption that the driver was driving with permission of the owner. In such cases testimony by the owner that no permission had been given, even if corroborated by the driver and/or other persons *does not destroy* the presumption. The presumption remains in the case unless and until the evidence of lack of consent is believed by the jury--the presumption "continues until there is substantial evidence to the contrary." This sounds like the *Morgan* presumption. However, consider that the N.Y. pattern jury instructions provide that the jury is told that the victim has the burden of persuasion on the issue of consent but they may weigh the presumption of permission together with other evidence in determining the question. *Leotta v. Plessing*, 8 N.Y.2d 449 (1960). Thus, the presumption of driving with permission is a hybrid type *Morgan* presumption that goes to the jury but does not pass the burden of persuasion to the opponent.

C. **Slightest Credible Evidence—Legal Insanity.** Until changed by statute, the prosecution had to prove that the defendant was legally sane. However, the prosecution was entitled to a presumption of sanity. This presumption was considered an evidentiary presumption to be weighed by the jury. It could be overcome by the slightest credible evidence--just enough evidence to raise a reasonable doubt. This presumption no longer exists in criminal cases because the legislature has made "insanity" an affirmative defense. *See People v. Silver*, 33 N.Y.2d 475.

D. **The Presumption of Innocence.** This is not really a presumption at all. The prosecution must prove each and every element beyond a reasonable doubt. It is said that the defendant is presumed innocent unless and until the prosecution meets its burden of proof. The jury is told about the presumption and determines if the presumption of innocence has been overcome.
4. **Conflicting Presumptions.** When there are conflicting presumptions, the stronger prevails. The determination of strength is a law issue for the judge. If the presumptions are of equal weight, they are disregarded.

5. **Presumptions in Criminal Cases.** There is no difference between presumptions in Criminal Cases favoring the prosecution in New York and the rules that protect the defendants under the Federal constitution.

6. **Specific Presumptions.** It would burden this outline to set forth a list of the various presumptions recognized in New York. Any of the several New York text books discuss the various presumptions.

7. **Contrast Presumptions with Inferences.** Inferences permit but do not require the jury to find the assumed fact. *Res Ipsi Loquitur* permits an “inference” but a not a required finding of negligence. Thus, ordinarily, the doctrine will not justify a motion for summary judgment on the issue of negligence. Where, however, plaintiff as injured when a raised parking ate arm fell on his head as he walked under it, summary judgment was justified where the opponent failed to rebut an “inescapable” inference of negligence. *Kemak v. Syracuse University*, 2002 WL484331 (N.Y. Sup. Seneca Cty 2002) , (cited in Martin, 2001-2002 Survey of New York Law, Evidence, 53 Syr.L.Rev. 539, 546 (2003).

**OBJECTIONS AND TRIAL MOTIONS**

1. **Comparison with Federal Rules of Evidence**

   As a general proposition there is not much difference between the New York rules regulating the admission or reject of trial evidence and the Federal Rules of Evidence. The leading New York case is *Bloodgood v. Lynch*, 293 N.Y. 308 (1944).

2. **General v. Specific Objections**

   A. To preserve a record for appeal, an objector must make a specific objection--must state the grounds on which he relies.

   B. An appeal from a general objection that is *sustained* and thus evidence is *excluded* will be denied so long as any ground existed for the exclusion. The proponent has the right to request that the objector state the specific grounds. If he does not do so, the appellate court will assume that the grounds for exclusion were understood and that they were deemed the correct grounds. In other words, when a general objection is sustained the person offering the evidence is deemed to have waived his right to a correct ruling if he does not act to request the stated grounds.
C. A general objection that is overruled preserves nothing for appeal unless there was no basis whatever for admitting the evidence.

D. A specific objection that is erroneously overruled preserves the record for appeal. However, the appellate court will consider only the ground asserted by the objector--no new ground can be stated. In other words, a specific objection waives all other objections.

E. A specific objection that is erroneously sustained preserves the record for appeal, provided that the record indicates that relevant evidence was lost. Therefore, the injured party--the one proffering the evidence must make an offer of proof for the record so that the appellate court can determine what evidence was lost. If what was kept out is evident from the record, an offer of proof is not necessary. See e.g., People v. Shook, 294 A.D.2d 710, 743 N.Y.S.2d 573 (3rd Dept. 2002).

F. Defendant failed to preserve an alleged error admitting a witness’s previous consistent statements as he neither objected nor made any appropriate motion to strike. (*)

G. Failure to raise a Confrontation Clause objection but only the common-law New York state hearsay objection precluded the trial court from considering a claim of constitutional error. People v. Kello, 96 N.Y.2d 740 (2001). (*)

May a party on appeal cite as error a ruling made to an objection by another party to which he did not join? The 4th Department in People v. Cook, 286 A.D.2d 917 (2001) held that Cook waived error when he failed to object on relevance grounds to testimony from a prosecution expert that a lack of semen does not mean that a rape did not occur. Co-defendants had made that objection but Cook had joined only in a second objection that the testimony was inflammatory. Prof. Michael Martin in 2001-2002 Survey of New York Law, Evidence, 53 Syr.L.Rev. 539 (2003) questions this decision since the judge had a fair opportunity to rule on the objection and a second objection would appear to be “fruitless.” However, Prof. Martin noted that if a co-defendant does not join another defendant’s objection for strategic reasons, waiver is clear.

3. Harmless Error. Even if a proper specific objection was made, an appellate court will not reverse if the error was harmless. In criminal cases, the standard for non-constitutional harmless error is governed solely by New York State law. That standard is stated as follows:

"[Reversal will be required] if the properly admitted evidence [of guilt] was not 'overwhelming' and there is a 'significant probability * * * that the jury would have acquitted the defendant had it not been for the error or errors which occurred.'" People v. Ayala, 75 N.Y.2d 422 (1990).
Constitutional error, on the other hand, must result in a "reversal unless there is no reasonable possibility that the error might have contributed to the conviction." *People v. Ayala, supra.* This is the same rule as is applied by courts interpreting the federal constitution.

The rule in civil cases is found in CPLR §2002.

"An error in a ruling of the court shall be disregarded if a substantial right of a party is not prejudiced."

In the CPLR Practice Commentary, Dean McLaughlin writes that reversal is appropriate only if the error probably had a "substantial influence" on the outcome.

4. **Exceptions.** An "exception" to a judge's ruling receiving or rejecting evidence is **not** required in order to preserve the record for appeal. This was the early practice in New York as well as in most jurisdictions.

5. **Continuing Objections.** New York courts recognize that a timely objection once stated serves as a "continuing" objection to other questions calling for the same objectionable evidence. *Kulak v. nationwide Mutual Ins. CO.,* 40 N.Y.2d 140 (1976).

6. **Waiver.** There is no waiver of a timely specific objection because the opponent produces rebuttal evidence to counter the improperly admitted evidence.

7. **Plain Error Rule.** The intermediate appellate courts may review unpreserved errors in the interest of justice. CPL §470.15(6); *People v. Robinson,* 39 N.Y.2d 224. The Court of Appeals, however, is limited in its review of unpreserved errors. In criminal cases it may review conduct that "implicates the organization of the court or the mode of proceedings prescribed by law." *People v. Mehdmedi,* 69 N.Y.2d 759. The Court of Appeals, however, may ordinarily not review errors admitting or rejecting evidence unless a specific and timely objection is made.

**MEMORY REVIVED & PAST RECOLLECTION RECORDED**

1. **PAST RECOLLECTION RECORDED.** The procedure in New York does not differ markedly from the Federal Rules of Evidence [FRE, R. 803(5)].

   A. Memory must be incomplete. It is not necessary that the memory be utterly exhausted before a writing may be substituted for the lost memory. *People v. Weinberger,* 239 N.Y. 307 (1925). What we seek is a complete memory--an accurate recitation of past events. When the memory is incomplete, though not exhausted, and when it cannot be revived, then a qualifying document may be used as an auxiliary to the witness' testimony.
Before resorting to proving a document in lieu of memory, the attorney must establish that the witness' memory cannot be refreshed. [SEE # 2 - PRESENT MEMORY REFRESHED.]

B. The document must have been produced by the witness at a time when her memory was fresh. **NOTE:** There is no litmus test as to when too much time has elapsed.

C. The witness must "attest to the accuracy" of the document. The witness must swear that she wrote it accurately. The document may then be received into evidence. In some jurisdictions a witness may testify that it is his/her regular habit to accurately record facts. That, however, does not appear to be the rule in New York. See *People v. Taylor*, 80 N.Y.2d 1 (1992). Testimony of "habit" is insufficient to establish accuracy.

D. If the document was made by someone other than the witness, both the maker and the declarant/witness may testify.

1) Procedure when the declarant/witness did not see the document.

   The declarant/witness must testify that while her memory was fresh she accurately reported what she perceived to another person. That second person must testify that she accurately recorded what the declarant told her. The document then may be received in evidence.

2) Procedure to be followed when the declarant/witness did not write down what she perceived and reported to the other person but did read over the completed document.

   The document maker need not testify provided the declarant swears that what she told the document maker was accurate, that she read the document after it was completed and that the document was accurate as to what she reported to the maker.

E. The document is read to the jury but the jury is *not* permitted to read from it--it does not go to the jury room as an exhibit.

F. Although not treated like other exhibits, the document must be marked for identification.

2. PRESENT MEMORY REVIVED
A. New York procedure does not differ markedly from the Federal Rules of Evidence [FRE. R. 612].

B. Any document may be used to refresh memory. It need not have been prepared by the witness or even seen by the witness prior to trial. As one judge put it, even a "ham sandwich" may be used as the question is not what document is used but whether memory has truly been refreshed. In contrast with the doctrine of PAST RECOLLECTION RECORDED, some New York courts require that the memory be "exhausted." That does not mean that memory must be totally extinguished. The document may be used where the memory is incomplete as to some important facts.

C. The document must be marked for identification even though it will not be received into evidence [unless offered by the opponent].

D. Before a document may be shown to a witness, a foundation must be laid. The witness must testify that he/she has an incomplete memory.

E. The witness may be shown the document and asked to read it silently. The document may not be read nor its contents displayed to the jury.

F. When the witness has finished reading it, the attorney asks if the document has refreshed the lost memory. If the witness testifies that his/her memory is not refreshed, the document is taken from the witness and the question the witness could not previously answer or answer fully is repeated.

G. The opponent has the right to inspect the document and use it on cross-examination. The opponent may introduce the document into evidence on cross-examination for purposes of impeachment. The judge has the discretion to permit the opponent to view or examine the document before it is shown to the witness but the right to inspect it does not occur until the witness is turned over to the opponent for cross-examination.

H. Subject to the Rosario rule set forth in & 3 below, the opponent has no "right" to inspect a document used to refresh the memory of a witness before trial. However, recently, all the Department Supreme Courts have expanded the opponent's right of inspection to include documents the witness used to prepare himself for trial. See Barker & Alexander, Evidence in New York State and Federal Courts, Sec. 6:81 (2001) See Chabica v. Schneider, 213 A.D.2d 579, 581 (2nd Department 1995). [See the Rosario rule in criminal cases in & 3 below.]

3. INSPECTION IN CRIMINAL CASES. Like the federal Jenks rule, in criminal cases, both prosecutors and defense counsel must disclose prior written or recorded statements of witnesses they intend to call. The rule was originally a judge made rule in People v.
Rosario, 9 N.Y.2d 286 (1961). The rule was codified and expanded by NY CPL §240.05.

The People must deliver their witnesses' statements to the defense prior to the opening statement. The defendant must deliver the statements of his witnesses [other than the defendant's own statements, which are protected by the lawyer/client privilege and by the 5th Amendment] to the prosecution prior to presenting the defense case.

The People may object to the defendant's request for production of its witnesses' statements on two grounds:

A) that the statement does not relate in part or whole to the testimony of the witness.

B) that the statement was privileged in that the "necessities of effective law enforcement" require that it be kept confidential.

[CONTRAST this with the federal Jenks Act rule. In federal courts the Government can object only on non-evidence grounds.

In the event that the People object, the Court must hold a hearing in limine without the presence of the defendant. If the judge finds that there are portions of the statement that are relevant, those portions are delivered to defense counsel. Any irrelevant portions or portions protected by the privilege are redacted and placed in the record under seal for review by an appellate court.

A violation of Rosario results in an automatic reversal even if the prosecutor made a good faith error and even if there is no showing that the error contributed to the verdict. This strict rule is designed to punish the prosecution for not abiding by the rule.

CROSS-EXAMINATION

1. RULES RELATING TO THE LOSS & SCOPE OF CROSS-EXAMINATION.

   A. LOSS OF CROSS-EXAMINATION

   Loss of adequate cross-examination due to the death of the witness or unjustifiable refusal to answer questions during cross-examination, renders the direct examination null and void and the jury will be directed to disregard the direct. People v. Cole, 43 N.Y. 508 (1871).

   If some cross-examination has been conducted before the witness becomes unavailable, it may be possible to preserve that portion of the direct to which the completed cross-examination related.
On the loss of cross-examination of an important witness the court may grant a mis-trial to the party losing cross-examination.

On the other hand, the failure to accept a mistrial constitutes a waiver of the right of cross-examination.

**Application of the 5th Amendment.** If the witness asserts the Fifth Amendment to collateral matters--unimportant matters--the direct examination will not be struck. This principle is the same as the Federal Rules [SEE FRE, R. 608(b), last &.] See for a general discussion of decisional law relating to the loss of cross-examination because of the invocation of the Fifth Amendment: *People v. Cole,* 67 N.Y.2d 22 (1986).

Illustration: W-1 testifies that he saw D shoot the sheriff. On cross-examination, D asks W-1 if he stole money from his employer. W-1 takes the 5th Amendment and refuses to answer the question. The prosecutor advises the court that embezzlement charges are pending against W-1. The judge accepts the 5th Amendment privilege and will not strike the direct. The attack on credibility goes only to character evidence and is considered collateral.

Facts relating to bias, hostility, reason for testifying, interests for or against either party may be inquired into on cross-examination and are considered non collateral and important. If the witness asserts the Fifth Amendment, the direct should be struck.

If the witness asserts the Fifth Amendment to important matters the direct examination will be struck. If this occurs, the witness has probably waived his 5th Amendment by his testimony on direct examination and thus his attempt to assert the Fifth Amendment is improper.

**B. SCOPE OF CROSS-EXAMINATION**

Cross-examination is restricted to the development of matters brought out on direct examination and all reasonable inferences therefrom as well as to matters bearing on credibility. The New York rule is thus not dissimilar to FRE, R. 611(b). The judge has the discretion to permit the cross-examiner to go into matters outside the scope of the direct as on direct examination [no leading questions, limits on impeachment, etc]. The judge can require that if the cross-examiner wants to go into new matters that she wait until her next case-in-chief or in rebuttal.

The Second Department has held that in criminal cases, a party may prove through cross-examination any relevant proposition, regardless of the scope of the
direct examination. *People v. Kennedy*, 70 A.D.2d 181 (2nd Dept. 1979). However, other New York courts apply the general limitation above stated in criminal as well as in civil cases.

**Defendant witness.** Where the defendant testifies on his own behalf he may be cross-examined as to any matter relevant in the case. Cross-examination is not restricted to the direct. The reason for this difference is because the "scope-of-cross-examination" rule is a rule relating to the orderliness of the presentation of evidence and that has no application to the defendant when a witness. The prosecution cannot take the defendant as its own witness at any time in the case.

**LAY & EXPERT WITNESS OPINION RULE**

1. **LAY WITNESS RULE - IN GENERAL.** FRE, Rule 701 generally expresses current New York law. The Court of Appeals has not specifically abandoned the old "need" requirement. However, New York courts very liberally permit a lay witness to give an opinion or conclusion where it would be helpful to the jury, where the lay person had first hand knowledge and where there was a sufficient showing of experience to justify the opinion as relevant and not speculative.

   An opinion will not be received where the subject matter calls for special knowledge not within the competence of the witness. Thus, a witness might qualify to judge the speed of an automobile because he has had experience driving, riding in, and observing them when moving. A witness, however, was not permitted to give the opinion as to the speed of a motorcycle, absent a foundation showing that he had had frequent opportunity to observe them. *Larsen v. Vigliarolo Bros., Inc.*, 77 A.D.2d 562 (2nd Dept. 1980).

   New York has a peculiar rule relative to a lay opinion on **sanity.** In most jurisdictions lay witness may state opinions on sanity or insanity of persons whose behavior they have observed. In New York, except for subscribing witnesses to wills, a witness may only testify that the actions and words of the person observed appeared rational or irrational. The subscribing witness may give an opinion that the testator was or was not of sound mind.

2. **EXPERT WITNESS RULE - IN GENERAL.**

   **A. NEED v. AID.** By court decision, New York broke from the common law restriction in which an opinion would be received only if the jury could not reach a conclusion or find facts without the assistance of the expert. *Selkowitz v. County of Nassau*, 45 N.Y.2d 97 (1978) *overturning*, *subsilencio*, *Kulak v. Nationwide Mut. Ins. Co.*, 40 N.Y.2d 140 (1976). See also, *Delong v. County of Erie*, 70 N.Y.2d 296 (1983). The Court of Appeals in *People v. Lee*, 96 N.Y.2d 157 (2001) while holding that the trial judge did not abuse her discretion in excluding psychological testimony offered to explain to the jury factors that could
influence and affect the reliability of identification testimony. The court concluded that this kind of testimony could “aid a lay jury in reaching a verdict.” Thus a court may not apply a *per se* rule against such testimony. Contrast with *People v. Mooney*, 76 N.Y.2d 827 (1990). (*)

A District of Columbia trial judge refused to allow Lewis Scooter Libby to use a “memory expert to assist him in his defense that the claims of several government witnesses are based on “misremembered” conversations had with Libby. The court reasoned that jurors do not need an expert to explain that people sometimes are mistaken in their memory of events. The judge did note that in some cases a memory expert might qualify to give testimony. *United States v. Libby*, F.Supp.2d (2006 WL 3095680).

**B. Basis for Opinion - Hearsay.** Although an expert must base an opinion on facts and not speculation or unsupported assumptions, the expert may take into consideration hearsay information "if it is of the kind accepted in the profession as reliable in forming a professional opinion. *People v. Sugden*, 35 N.Y.2d 69 (1974). However, as the 2nd Department said, “It is well settled that, to be admissible, opinion evidence must be based on one of the following: first, personal knowledge of the facts upon which the opinion rests; **second**, where the expert does not have personal knowledge of the facts upon which the opinion rests, the opinion may be based upon facts and material in evidence, real or testimonial; third, material not in evidence provided that the out-of-court material is derived from a witness subject to full cross-examination; and fourth, material not in evidence provided the out-of-court material is accompanied by evidence establishing its reliability” ([*Wagman v. Bradshaw*, 292 A.D.2d 84, 86-87, 739 N.Y.S.2d 421], [*Jemmott v. Lazofsky*, 772 N.Y.S. 840 (2004)]. Plaintiff’s expert was improperly permitted to give an opinion relative to plaintiff’s back injuries based upon an MRI film that was not admitted into evidence and which was prepared by another person who did not testify at the trial.

In *People v. Goldstein*, 6 N.Y.3d 119 (2005) the Court held that statements made by third persons to the People’s psychiatrists were hearsay and should not have been stated to the jury. The Court declined to decide whether FRE R. 703 was the same as the New York rule because the Court found the statements to violate the Defendant’s 6th Amendment Right of Confrontation under the *Crawford* rule (*infra*). However, it would appear that 3rd person statements relied upon by an expert may not be admissible unless the opponent is able to cross-examine the maker.

In *Howard v. Walker*, 406 F.3d 114 (2006) the 2nd Circuit held that an opinion by an expert attributing the cause of a heart attack and death of a 89-year-old woman to fear induced by Howard’s burglary violated the Confrontation Clause. The opinion was based primarily on confessions made by two co-conspirators. The
confessions were not admissible against the defendant under *Bruton v. United States*, 391 U.S. 123 (1968). The Court applied pre-*Crawford* Confrontation analysis as the date of his conviction preceded the *Crawford* case. Applying *Ohio v. Roberts*, 448 U.S. 56 (1980) finding that an accomplice’s confession is “presumptively unreliable” (*Lee v. Illinois*, 476 U.S. 530 (1986) and therefore held that where the expert’s opinion was based upon inadmissible unreliable evidence it was itself inadmissible. Although an expert can base an opinion on inadmissible evidence if the kind reasonably relied upon by experts in the field in forming their opinions (F.R.E., R. 703) that principle must yield to the Confrontation Clause if the evidence is unreliable. The Court declined to rule that an expert’s opinion based on *Bruton*-infected always violates the 6th Amendment but said that in this case Howard was prevented from cross-examining the expert as to the bases of the opinion or of contradicting the expert with expert testimony of his own because the Court ruled that if he did so, the prosecution would be permitted to produce the accomplices’ confessions to the jury.

NOTE: Federal Rules of Evidence, Rule 703 provides *inter alia* that an expert may take into account hearsay evidence in arriving at an opinion if it is of the “type reasonably relied upon by experts in the particular field in forming opinions** * *.” Until 2000 many federal judges permitted jurors to hear this information. That rule was amended to provide, “Facts or data that are otherwise inadmissible shall not be disclosed to the jury ** * * unless the judge determines that the probative value of this hearsay “substantially outweighs (its) prejudicial effect.” New York courts have discretion to permit the jury to receive this hearsay in order to evaluate the basis of the opinion. In *People v. Wlasiuk*, supra, the 3rd Department warned that such data was only admissible if a proper foundation was laid to show that it is reliable as a basis for the expert opinion in the expert’s field and even then it may not be the “principle basis” for the opinion on an ultimate issue in the case—it can only form a link in the chain of data which led the expert to the opinion. In *Wlasiuk*, the body of defendant’s wife was found on the bottom of a lake near a car she was allegedly driving. Defendant contended that she died when she swerved her car to avoid hitting a deer. A report prepared by the Michigan State police (called the STAR report) which concerned a study of submerged motor vehicles was used by the principle investigator to explain his reconstruction of the death. The investigator recited the STAR report findings and a half-hour video tape was shown to the jury. That tape illustrated the STAR report and the investigator’s conclusions that the death was inconsistent with drowning in an automobile accident. The jury was instructed that the tape was only admissible as a basis for an understanding of the investigator’s testimony. The 3rd Department concluded that the investigator served essentially as a “conduit for the testimony of the (STAR) report authors” by dictating its findings and testifying that defendant’s claim of the cause of death was inconsistent with the report’s conclusion.
C. **Form of Opinion - Hypothetical Question.** A hypothetical question is not required as a predicate for an opinion. The expert may state the facts upon which she bases her opinion whether they are facts within her first hand knowledge, facts proved by other witnesses, or even unproved hearsay facts [See & B above.] CPLR §4515.

D. **Stating the Underlying Facts as a Condition for the Opinion.** An expert is not required to first set forth the facts upon which he bases the opinion. The judge, however, may require that the facts be first stated when they have not yet been proved in the record. *People v. Jones*, 73 N.Y.2d 430 (1989).


F. **Opinions on an Ultimate Issue.** The cases are not consistent. However, the better rule is that it is no objection that the question calls for an opinion on an ultimate issue in the case. Experts will have nothing of value on certain "ultimate issues." The proper test is whether the opinion will assist the trier of fact or does the ultimate issue fall into the range of ordinary training, intelligence and experience.

G. **Scientific Books or Reports - Hearsay Opinions.** Unlike the Federal Rules of Evidence [Rule 803(18)] scientific books or writings are hearsay and may not be received for the truth of the matters asserted in them.

H. **Qualification of Medical Expert.** A physician need not be a specialist in a particular field in order to qualify as a medical expert provided he has had sufficient training and experience that is related to the subject matter of his opinion. *Brodensiek v. Schwartz*, 292 A.D.2d 411 (2d Dept. 2002). (*)

I. **Trial Court Discretion.** “The admissibility and limits of expert testimony lie primarily in the sound discretion of the trial court.” Exclusion of psychiatric evidence of defendant’s mental condition to support his state of mind as it bore on his justification defense was within that sound discretion. *People v. Williams*, 97 N.Y.2d 735 (2002) (mem.) (*)

J. In a buy and bust narcotics case the trial judge had discretion to receive expert testimony to explain the absence of prerecorded buy money and the sellers’ respective roles in street-level drug sales. *People v. Gonzalez*, 96 N.Y.2d 76 (2002).
K. Expert engineer in a slip and fall case was not shown to be qualified when he did not visit the scene until three years after the accident. *Amaya v. Denihan Ownership Co., LL.C.*, 30 A.D.3d 327 (1st Dept. 2006)

3. **New or Novel Scientific Evidence.** New York adheres to the *Frye* rule, the Court of Appeals having rejected the federal *Daubert* rule. An opinion based upon new or novel scientific theories is not admissible until it has been generally accepted in the scientific community from which it comes. Using the *Frye* rule, the Court of Appeals has rejected lie detector evidence, hypnotically refreshed memory of identification and an expert's efforts to testify to the factors leading to cross-cultural misidentification. On the other hand, rape trauma syndrome and DNA analysis has passed muster under the *Frye* rule.

**NEW:** See *People v. Angelo*, 88 N.Y.2d 217 [A psychiatrist may not base an opinion in part on the results of a polygraph examination as it is unreliable.] *Nonnon v. City of New York*, 819 N.Y.S.2d 705 (1st Dept. 2006) contains a concise review of the meaning of novel scientific evidence required before the *Frye* rule comes into play. The majority held that neither epidemiologist nor toxicologist testimony offered to establish causation between exposure to toxic substances in an illegal landfill and plaintiffs’ illnesses constituted novel scientific testimony.

See *People v. Lee*, 96 N.Y.2d 157. where the Court established the sound discretionary rule for admissibility of expert testimony on eye-witness identification. The *Lee* Court held that expert psychological testimony regarding the reliability of eyewitness identification is not per se inadmissible but it must satisfy the *Frye Test*. In *People v. LeGrand*, 2007 WL 895054 (Ct.App. 2007) the Court of Appeals reaffirmed *Lee* but held that the trial judge’s order precluding a defense expert witness’s proposed testimony on factors affecting eye witness testimony where there was no corroborating evidence was an abuse of discretion. The Court held that factors affecting identification including correlation between witness confidence and accuracy of identification, the effect of post-event information on accuracy and confidence malleability have all received overwhelming acceptance by psychologists in the field. However, the court did hold that a fourth factor proposed by the expert – “weapon focus” - did not meet the *Frye* test. The crime (murder) occurred in 1991 and the defendant was not identified until 1998. There were four eye witnesses to the shooting of a cab driver but only one gave positive identification testimony at the trial. The case was reversed for a new trial.

A police officer experienced in drug operations may be qualified to given an opinion on the operating methods employed by street drug sellers and may explain terminology used by sellers. E.g., Expert testimony was proper where the defendant was arrested immediately following a buy by an undercover officer but had not drugs nor marked money in her possession, the expert’s explanation of why drugs and money are not always found and his testimony as to the meaning of words used by the undercover agent and the people involved in the transaction such as “nickel” or “nick” refers to a quantity of drugs sold for $5. The judge must give and did give cautionary jury instructions that
the testimony was not being offered as proof that defendant was engaged in the sale of narcotics. Without this testimony the average juror might misconstrue the evidence. *People v. Brown*, 97 N.Y.2d 500 (2002).

**Daubert v. Frye.** The First Department applied the *Frye* finding no error in excluding expert testimony that Viagra causes heart attacks. The court, however, referred to various factors appropriate in a *Daubert* analysis in reviewing the trial judge’s decision. *Selig v. Pfizer, Inc.*, 290 A.D., 319, app. den., 98 N.Y.2d 603 (2002). For a recent case reviewing the growing use of the *Daubert rule see People v. Legrand*, 2002 WL 31056078 (N.Y. Sup. Ct. 2002).

The Third Department in a case involving a HGN field sobriety test, reaffirmed the accepted principle that once a scientific theory has gained general acceptance under the *Frye* rule, the only duty for the trial judge is to require that a proper foundation is laid to show that the accepted techniques were followed. *People v. Gollup*, 302 A.D.2nd 681 (3rd Dept. 2003).

The 2nd Department held that a trial judge in a medical malpractice action restrictively applied the *Frye* rule when he held inadmissible evidence that an excessive dose of Zocor caused the onset of polymyositis because there was no medical literature expressly reporting a causal connection. Although he correctly ruled that the medical opinion was a novel one, he ignored the fact that a “synthesis of various studies or cases reasonably permit(ted) the conclusion reached by the plaintiff’s experts.” Plaintiff’s experts could cite only a single reference from a journal documenting the history of a patient who had developed polymyositis induced by a Zocor medication. The experts adequately supported their theory of a causal connection between an excessive dose of Zocor and polymyositis with generally accepted scientific principles and with existing data. *Zito v. Zabarsky*, 28 A.D.2d 42 (2006)

**NEW:** The Court of Appeals held that the *Frye* rule was improperly applied to preclude plaintiff’s expert testimony in the face of a motion for summary judgment but not affirmed the Appellate Division holding that the opinions on causation failed to meet foundation requirements. Plaintiff sued Mobil alleging that exposure to defendant’s gasoline containing benzene was the proximate cause of his acute myelogenous leukemia. Plaintiff’s expert opinions failed to demonstrate that benzene as a component of gasoline caused plaintiff’s disease although the experts opinions were not based on new or novel scientific theories and thus not barred by the *Frye* rule. *Parker v. Mobil Oil Corp.*, 7 N.Y.3d 434 (2006).

**Expert Testimony on Eye Witness Identification**

Where identification is contested the trial judge has the discretion to receive expert testimony on the psychological factors that affect identification including memory and perception. The expert may not express an opinion on the credibility of any witness nor

I. IMPEACHMENT - EXTRINSIC EVIDENCE - COLLATERAL MATTERS RULE

1. GENERAL PRINCIPLES.--The traditional methods of impeachment in New York are: 1) bias, interest motive; 2) impaired mental capacity of powers of perception; 3) prior inconsistent statements; 4) witness's character trait of untruthfulness; 5) prior acts of misconduct that relate to truthfulness or which are vicious, immoral or criminal for which no conviction has been obtained; and 6) prior convictions.

Contradictory facts also tend to impeach the witness. The traditional methods of impeachment are not the exclusive method of attacking credibility. Anything that arguably impacts on credibility may at least be the subject of cross-examination.

*Illustration:* A criminal defendant/witness may be cross-examined on his use of aliases. *People v. Walker*, 83 N.Y.2d 455 (1994).

On the other hand, the judge should weigh credibility evidence against considerations of confusion, undue consumption of time, etc. *Outley v. City of New York*, 837 F.2d 587 (2nd Cir. 1988) (The "litigiousness" of the plaintiff was insufficiently probative of truthfulness to justify cross-examination and FRE, Rule 403 was applied.)

It was improper and constituted reversible error for a prosecutor to elicit testimony on the sodomy victim’s religious affiliation as well as to comment on and contrast the defendant’s apparent lack of religious affiliation. *People v. Benedetto*, 294 A.D.2d 958 (4th Dept. 2002).

2. Collateral Matters Rule. The cross-examiner is bound by the answers of a witness on collateral matters. Matters are collateral which do not advance the issues of the case applying principles of relevancy or which concern unimportant matters bearing on credibility. The reason for the rule is to ensure that the jury is not confused with irrelevant evidence, to conserve time and costs and to prevent needless multiplication of issues.

*Contradictory facts* are **not** collateral if they would be relevant on any issue in the case. But contradictory facts that apply only to credibility may be collateral if unimportant. Bias facts are important and may be proved with extrinsic evidence.
**Illustrative cases:** In an action for false imprisonment, unreasonable seizure and assault the arresting officers testified they thought plaintiff was drunk because he was walking erratically and that they had never previously seen him. Solely in order to impeach the officers’ testimony plaintiff called witnesses who sought to testify that plaintiff was sober at the time of his arrest and that he frequently walked in the village. The 3rd Department held that this evidence was collateral and properly excluded. *Landsman v. Village of Hancock*, 745 N.Y.S.2d 258 (2002).

II. **BIAS, HOSTILITY & INTEREST FACTS**

1. **Bias Facts.** Bias consists of evidence showing the witness favors or disfavors a party. Bias in favor of a party may be shown by evidence of family, business or close social relationship with the calling party.

   Evidence that a witness has settled a cause of action with the calling party is relevant.

   Hostility may be shown by cross-examination or with extrinsic evidence.

2. **Foundation—Rule of Fairness.** In New York a party may produce extrinsic evidence of acts or declarations of a witness that shows bias, hostility or interest without first calling the witness' attention to the matter on cross-examination. This is a minority rule as many other jurisdictions follow the rule of fairness and require that the witness first be asked about the bias fact before extrinsic evidence may be produced.

3. **Illustration.** Evidence that plaintiff was a member of a group espousing vicious ideological hatred for police was admissible in a civil action against City growing out of an injury suffered when a police officer shot him to impeach the plaintiff. *Barnes v. City of New York*, 745 N.Y.S.2nd 20 (1st Dept. 2002).

4. **Limiting Cross-Examination into Bias.** A trial judge had discretion to prevent a defendant from cross-examining a witness to the murder as to whether she told police he was the killer because after he had accused her of killing the victim. The witness’s bias was otherwise fully explored. *People v. Corby*, 6 N.Y.3d 231 (2005). The court said that to permit the question would have created a substantial danger of undue prejudice and could mislead the jury. It would have put before the jury the defendant’s out of court statement without giving the prosecution an opportunity to cross-examine him on that statement.

III. **PRIOR INCONSISTENT STATEMENTS**

1. **Foundation—4 Step Rule of Fairness.** Once a foundation has been laid a party may show that an opponent's witness has made oral or written statements inconsistent with his trial testimony.
New York follows the **four step Rule.** A witness must first be asked if
   (1) he made the statement, setting forth the substance of it; and specifying
   (2) **where** it was made;
   (3) **when** it was made; and
   (4) **who** was present.

This is a trap for the unwary lawyer because if the cross-examiner misses
one of the four steps he will not be permitted to introduce proof that the statement
was made.

If the witness denies making the statement or will not fully admit to it, the
statement may be proved in the usual manner [calling any witness who heard it or
proving the document in which it is contained].

If the witness claims not to remember making the statement, he may be
impeached in the same manner as if he denied making the statement.

2. **Party Witness.** The party witness may be impeached with prior inconsistent statements
   without first asking the party about the statement. This is so because a party's statements
   inconsistent with the position taken by the party at trial constitute **admissions** and may be
   independently proved.

3. **Written Inconsistent Statements.** New York follows the **Queens** rule. Before a written
   statement may be produced to impeach a witness, it must first be shown to the witness.
The witness may not be asked about the contents of a writing unless, on demand, he is
shown the statement.

   The **Larkin** rule. The contents of a writing shall not be read to the jury or used for
cross-examination until it is in evidence. Thus, if the paper is "unsubscribed" it
must be shown to the witness, marked for identification and proved that it is a
document written by the witness. If the document is subscribed, either the
witness must admit it as his own or the signature proved in ordinary fashion.

3. **Attorney’s Statements in Criminal Pre-trial Hearings.** An attorney’s statements in
   a **Sandoval** hearing may be admissible to impeach a defendant should he testify
   contrary thereto. Counsel told the court that the defendant was present at a cocaine
sale only to purchase but not to sell cocaine. Defendant, however, testified he was
only a bystander. The prosecutor was properly permitted to impeach him based on his
attorney’s statements to the court. **People v. Brown & Burgos-Santos,** 98 N.Y.2d 226,
232-233 (2002). Compare the holding in **Brown** with the holding in **Burgos-Santos** in
which the Court held that a withdrawn plea of alibi may not be used to impeach a
defendant who testified that although at the scene of the shooting he accidentally shot
the victim. **Supra** at 233-234.
4. **Impeachment by Omission.** Trial attorneys know that attempts to impeach a witness who adds a fact not previously stated in sworn testimony is very difficult. The foundation that must be laid is to show that the witness was asked a question that called for the fact now added and that the witness considered the omitted fact important. Judges are not going to hold a witness responsible for the failure of the trial lawyer in not asking a question that called for the fact. This difficulty was seen again in *People v. Broadhead*, 2007 WL 14640 (1st Dept. 2007) where the court held that “the trial judge court properly exercised its discretion in precluding defendant from impeaching a witness with his failure to mention, in his grand jury testimony, a verbal threat made by defendant during the incident, about which the witness testified for the first time on cross-examination at trial. The omitted fact was not a proper prior inconsistent statement, because the grand jury questioning did not call for this information, and because the omission of this additional detail from the witness's grand jury testimony was not unnatural.”

IV. **CHARACTER IMPEACHMENT.**

A. **In general.** Character evidence is admissible to prove that a witness--any witness, including a party witness--did not tell the truth.

After any witness has testified, his character trait of untruthfulness may be attacked.

The attack must come first - that is, a party calling a witness may not offer evidence of the witness' good character trait of truthfulness until and unless the opponent first attacks the witness' character trait of truthfulness. [As will be noted in the outline discussing rehabilitation, the attack on character may come in any form--by the cross-examiner expressly or implicitly calling the witness a liar; by evidence of a conviction or by questions calling for the witness to admit he had committed acts of misconduct.]

B. **Form of Evidence.** Only community reputation evidence may be offered; opinion testimony is not allowed. The only character trait evidence permitted is the character trait of truth and veracity.

*Illustration: In a criminal homicide action, the defendant testifies on his own behalf, claiming an alibi. He calls no character witnesses. In the prosecution case-in-rebuttal, the district attorney may produce character witnesses who are limited to the character trait of truth and veracity. They may not testify to defendant's character trait of violence since the defendant did not choose to put that character trait into evidence.*

Character witnesses must meet the same conditions as are required for any other kind of character evidence. The witnesses need not have lived in the witness' community but must be familiar with that community and the witness' reputation. The witness *may not* describe specific instances of untruthful conduct.
V. CHARACTER IMPEACHMENT - CHARACTER WITNESSES - PRIOR ACTS OF MISCONDUCT

1. Character Evidence [Continued]. One of the dangers of calling character witnesses is that they may be impeached in two ways:

   (1) Subject to one exception noted in §2 below, they may be impeached like any other witness.

   (2) They may have their claim of knowledge community reputation tested by being asked if they have heard of specific instances of misconduct that relate to the character trait to which their testimony related. Thus, if a character witness testified that the defendant in a homicide action had a community reputation of non-violence, the witness could be asked the following question:

   Q. Had you heard that one year before the homicide the defendant assaulted a police officer with a tire iron here in River City?

   If the character witness had testified to another witness' good community reputation for truth and veracity [which assumes the witness character trait of truth and veracity had first been attacked], that witness could be asked the following question:

   Q. Had you heard that one month before this homicide the defendant had lied on a radio broadcast claiming that his company had no unpaid loans?

2. "Key Witness" rule. In New York only a "key witness"--one who testifies to matters of substance--not just to character, may be impeached with an attack on the witness' character trait of truth and veracity. People v. Pavao, 59 N.Y.2d 282 (1983). The character witness could be attacked by other means, however. E.g., he could be shown to have committed acts of misconduct, to have been convicted of a crime, to be biased, etc.

2. Character Evidence - Prior Acts of Misconduct - In General. New York is a "wide open" jurisdiction. Any witness, including the defendant/witness in a criminal action, may be asked about acts of misconduct the witness allegedly committed. The acts of misconduct may, but do not have to, relate to truth and veracity. Three kinds of acts of misconduct qualify:

   A) Acts that relate logically to truth telling.
      Illustration: Cheating on a regent’s examination; putting false information in an employment application.

   B) Immoral or vicious acts
      Illustration: Assisting in an abortion; supplying a teenager
with liquor; gambling, etc.

C) Acts if resulting in a conviction would have been a felony or a misdemeanor.

The justification for this kind of cross-examination rests on the assumption that if a witness has previously held his self interests ahead of his duty to obey society's rules, then the jury should know about it because he may be doing the same thing here by testifying falsely to advance his own self interests. The nature and extent of cross-examination rests with the sound discretion of the judge.

3. **Collateral Matters Rule.** A witness may be asked about prior acts of misconduct but if the witness will not admit committing the act, they **may not** be proved with extrinsic evidence. The cross-examiner may "press" the witness to admit the truth of the prior act of misconduct but once the effort concludes, the examiner is bound by the result and may not prove the act with extrinsic evidence.

4. **Good Faith Rule.** The questioner must have a good faith belief that the acts occurred.

5. **Effect of an Acquittal.** An acquittal or an equivalent disposition [e.g., dismissal for lack of evidence] bars the use of the act of misconduct to impeach. [**NOTE:** Contrast this rule with the Federal Rule--an acquittal does not preclude use of the underlying act if it is otherwise relevant in a trial--as, for example, to prove motive, plan, knowledge, absence of mistake, etc under FRE, R. 404(b). Dowling v. United States, 493 U.S. 342 (1990).] A defendant seeking to confront a prosecution witness bears the burden of showing that the witness had not been acquitted. or had his case dismissed on the merits. *People v. Gant,* 291 A.D.2d 203 (4th Dept); *Leave to Appeal Denied,* 98 N.Y.2d 675. (*)

6.(a) **Form of Questioning.** The cross-examiner may only ask about the underlying acts of misconduct. The witness may not be asked if he was **indicted or arrested** for an act, for indictments and arrests are mere accusations. *People v. Sigl,* 508 N.Y.S.2d 740 (4th Dept. 1986).

6.(b) **Juvenile Delinquency or Youthful Offender Adjudications.** The cross-examiner may ask about the underlying acts giving rise to the adjudication but may **not** ask about the adjudications themselves for they are privileged.

7. **Balancing the Acts of Misconduct Against Harm to the Criminal Defendant/Witness--the Sandoval/Duffy Rule.** In a criminal action, the defendant may request **in limine** hearing a ruling as to which, if any, of defendant's immoral, vicious or criminal acts may be used by the cross-examiner should the defendant testify on his own behalf. The standard is whether the defendant would be substantially unfairly harmed by the questions in relation to the value the acts would have on his credibility. Only the criminal defendant--no other party or witness has the right to this hearing. See *People v. Sandoval,* 34 N.Y.2d 371 (1974) and *People v. Duffy,* 36 N.Y.2d 258 (1975).
In a rape case the trial judge has discretion to permit cross-examination into prior convictions involving sex crimes and may limit the number of convictions and the scope of cross-examination which may include the nature of the crimes. Where the judge exercised this discretion limiting the crimes and permitting inquiry into the nature of the crimes but not the underlying acts there was no error. *People v. Hayes*, 97 N.Y. 203 (2002).

In a rape, burglary and assault case, the trial judge committed no error in permitting the prosecution to cross-examine defendant, should he testify, as to the existence and nature but not the underlying facts of four prior convictions that included assault, sexual abuse and kidnapping. The Third Department reversed holding that when the crimes charged were similar in nature to the prior crimes cross-examination had to be limited to the existence of the prior crimes. The Court of Appeals reversed saying that the trial judge had discretion whether to admit only the existence of the crimes or to admit the nature of the crimes or even to admit proof of the underlying facts provided the judge weighed “appropriate concerns and limited both the number of convictions and the scope of permissible cross-examination” which he did herein. *People v. Hayes*, 97 N.Y.2d 203 (2002).

**NOTE:** A defendant who asks for a *Sandoval* ruling to challenge the prosecutor's use of convictions bears the burden of setting forth the convictions to be challenged. However, by statute, it is the prosecution, upon request by the defendant, who must come forward with any prior acts of misconduct not amounting to a conviction. See CPL § 240.43.

8. **Application of the 5th Amendment Privilege.**

   **A. Witnesses other than the Defendant in a Criminal Proceeding.** By testifying, a witness does not lose his 5th Amendment privilege not to incriminate himself as to pending criminal charges. The witness, however, must assert the privilege or be deemed to have waived it. *People v. Johnson*, 228 N.Y. 332 (1920)

   **B. Defendant/Witness in a Criminal Proceeding.** The defendant witness has the same privilege as ordinary witnesses. However, he need not assert the privilege to bar cross-examination into separate charges that are still pending at the time of the trial in which he seeks to testify. The prosecutor is precluded from cross-examining the defendant about those charges. *People v. Betts*, 70 N.Y.2d 289 (1987). If the unrelated misconduct is not the subject of pending charges and criminal prosecution is still possible, the defendant must invoke the privilege or it will be deemed waiver. A defendant who had pleaded guilty to an unrelated but still pending charge, could be questioned about that charge as he would suffer no incrimination. *People v. Brady*, 97 N.Y. 233 (2002).

VII. **IMPEACHMENT WITH CONVICTIONS**
1. **In General.** A witness may be shown to have been previously convicted of a crime [felony or misdemeanor] for purposes of casting doubt on the witness' credibility. The matter is controlled by statute. CPLR §4513 governs civil actions and CPL §60.40 applies to criminal actions. A jury verdict upon which a judgment has not yet been entered is not a conviction for purposes of this method of impeachment. However, a conviction may be proved although the judge has suspended the imposition of a sentence.

2. **Juvenile, Wayward Minor and Youthful Offender Adjudications.** These adjudications are not convictions of a crime and may not be shown for purposes of attacking credibility.

3. **Foundation. Civil Actions.** CPLR §4513 provides that a conviction may be proved "either by cross-examination, or by the record." There is no requirement that the witness be first asked about the conviction before it is proved, though it is the custom to first ask.

4. **Foundation. Criminal Actions.** CPL §60.40(1) provides in substance that if a witness is asked if he was previously convicted and denies the conviction or equivocates, the conviction may be proved.

5. **Convictions are NOT Subject to the Collateral Matters Rule.** Unlike prior acts of misconduct, convictions may be proved if the witness denies being convicted or answers in an equivocal manner.

6. **Proving the Convictions.** A conviction may be proved in only two ways: 1) if the witness admits it on cross-examination or 2) by the record. A certified copy of the judgment of conviction constitutes presumptive evidence of the facts stated therein. CPL §60.60(1). Therefore, a witness' out-of-court admission that he has been convicted, even if admissible under the hearsay rules may not be offered to prove the conviction.

7. **Underlying Acts.** Contrary to the rules in many jurisdictions, the witness may be asked about the criminal acts that resulted in the conviction. This follows from the rules governing prior acts of misconduct. Since in New York a witness may be asked about acts of misconduct not amount to convictions there would be little logic in not permitting the cross-examiner to go into the acts that did result in convictions. *People v. Sorge*, 301 N.Y. 198 (1950).

8. **Arrests, Indictments, Information or Felony Complaints.** A witness may not be asked about arrests or pleadings charging a crime since these are not convictions and are only the hearsay opinion of others that a crime occurred.

9. **Balancing the Conviction Against Unfair Prejudice.** A defendant in a
criminal action [and no other witness in any action] may ask the judge for a preliminary ruling whether his convictions may be used against him if he testifies. This procedure is known as the Sandoval after the case which established it. *People v. Sandoval*, 34 N.Y.2d 371 (1974).

A. On motion of the defendant the trial judge must weigh the unfair prejudice that would occur on proof of a conviction with the relevance on credibility. The judge should consider the "effect on the validity of the fact finding process if the defendant does not testify out of fear of the impact of the impeachment testimony for reasons other than its [legitimate] effect on his credibility." *People v. Sandoval*, supra, at 378.

B. Discretion. The judge's ruling is a matter of discretion that will be reversed on appeal only the judge abuses that discretion. The law of the case rule does not apply to *Sandoval* evidentiary rulings and the trial judge may permit the prosecution to introduce or use convictions ruled out in a pre-trial hearing. *People v. Evans*, 94 N.Y.2d 499 (2002). See *People v. McCleod*, 279 A.D.2d 372 (1st Dept. 2001) and *People v. Russin*, 277 A.D.2d 880 (4th Dept. 2000).

C. Standard. The judge should not bar proof of a conviction unless she finds that the danger of unfair prejudice substantially outweighs the value on credibility. The judge will consider the lapse of time between the conviction and the present trial, whether the defendant has "demonstrated [a] determination deliberately to further self-interest at the expense of society," the nature of the offense and its relationship to the present charge; whether the crime is occasioned by addiction or uncontrollable habit; and any other factors that could cause the jury to improperly use the conviction as evidence of a character defect on the likelihood that the defendant committed the crime charged.

A guilty plea constitutes the completion of a prior charge for purposes of impeachment. The charge is no longer pending and the defendant has waived his Fifth Amendment rights by making the plea. *People v. Brady*, 97 N.Y.2d 233 (2002) (*)

D. Non-Waiver. In contrast with the federal rule, a defendant by making the Sandoval does not waive his right to appeal from an adverse ruling by not testifying. *People v. Williams*, 56 N.Y.2d 236 (1982).

E. Application of the Sandoval Rule to Co-defendants. The Sandoval rule has no application to co-defendants who may not be
precluded from cross-examining into any and all of the co-
defendant/witness' criminal conviction record. There is some authority,
however, that a trial judge may place some limits on cross-examination by
co-defendants.

VII. Physical or Mental Defect.

1. In General. The jury weighs a witness' testimony based on the ability of the witness
to perceive, store, recall and relate. Any defect that substantially affects the witness' testiominal capacity may be shown to effect credibility.

2. Extrinsic Evidence and Non-Applicability of the Collateral Matters Rule. A
defect of capacity may be shown either on cross-examination or by resort to extrinsic
evidence. The Collateral Matters rule has no application to defects of capacity.

3. The Rule in People v. Williams. The Court of Appeals applied the Frye rule and
refused to permit a defendant to produce psychiatric testimony that narcotic addicts are
unworthy of belief. A principle witness for the People admitted to having been a heroin
addict. He testified, however, that he had not taken the drugs on the day of the crime,
that he had not used any narcotic substance for four months before the trial and that he
was no longer addicted to drugs. The defense called an expert and sought to have him
testify that heroin addicts are unworthy of belief due to their personality defect. This
evidence was excluded and the Court of Appeals affirmed. Extrinsic evidence of drug
use at the time of a perceived event, or thereafter, on the issue of a witness' capacity to
store, recall or relate testimony would be admissible. However, expert testimony that
"narcotics addicts of the same type as a witness are unworthy of belief" is inadmissible
absent a showing that this opinion is the "consensus of medical and scientific opinion."
People v. Williams, 6 N.Y.2d 18, 26 (1959).

Williams also tells us that while evidence of illegal narcotics use is admissible with
extrinsic evidence provide it affects the witness' testimonial capacity, evidence that a
witness violated the law by using narcotics is properly only the subject of cross-
examination and is strictly subject to the collateral matters rule.

VIII. Impeaching One's Own Witness

1. The Voucher Rule. New York has retained in part the common-law voucher rule.
Except with certain inconsistent statements and by contradictory evidence, a party may
not impeach a witness called by that party.

2. Exceptions to the Voucher Rule.

A) Contradictory Facts. A party is not bound by the statements of
his/her own witness and may produce contradictory evidence.
B) **Prior Inconsistent Statements - Civil Actions.** A party may impeach his/her own witness by proving that the witness made an inconsistent statement provided that the statement was either

1) in writing and signed by the witness; or

2) was made under oath.

[CPLR §4514] The witness need only have "disappointed" the calling party, he need not have disproved the calling party's case. Contrast this rule with the stricter rule governing criminal cases.

C) **Prior Inconsistent Statements - Criminal Actions.** In criminal actions a party may impeach his/her own witness only with an inconsistent written and subscribed statement or a statement made under oath, provided the witness' direct testimony was

1) on a material issue; and

2) tended to disprove the party's case.

[CPL. §60.35(1)] A witness who merely denies having knowledge of the event or fails to testify as strongly as desired may not be impeached.

Illustration. Defendant called W-1 and W-2 and based on sworn and signed statements given to police detectives, expected each to testify that it was X and not Defendant who shot the victim.

1) W-1, however, testifies that he cannot be sure that it was X who did the shooting, although he "thinks" it was X.

2) W-2, however, testifies that it was defendant and not defendant who shot the victim. Witness W-1 has merely disappointed defendant and may not be impeached with his signed and sworn statement. Witness W-2, however, has testified to a material fact and has disproved the defendant's position. W-2 may not impeach with his signed and sworn statement.

Failure to meet the requirements of CPL 60.35 precluded impeachment by defendant of his own witness and his failure to make a proper specific objection deprived him of a review of his claim of a Confrontation Clause violation. *People v. Stewart*, 745 N.Y.S.2d 151 (1st Dept. 2002). (*)

D) **Effect of Prior Inconsistent Statements - Hearsay.** Statements
admitted to impeach one's own witness are admissible only to impeach and not for the truth of the facts asserted unless they qualify independently as exceptions to the hearsay rule.

1) **The Letendre rule in Civil Actions.** As previously noted, the possibility exists in civil actions that a statement admitted to impeach one's own witness may be received for the truth of its contents provided

   a) that it was trustworthy; and

   b) there is compelling need.

   *Letendre v. Hartford Acc. & Ind.*, 21 N.Y.2d 518 (1968). Keep in mind, however, that the Court said it was not creating a new exception to the hearsay rules with its holding.

2) **Criminal Actions - Hearsay.** The *Letendre* has no application to criminal actions. Inconsistent statements are admissible only to impeach.

E) **Using an Inconsistent Statement to Refresh Memory.** If the document does not qualify for impeachment, the contents may not be read or otherwise given to the jury in the guise of refreshing memory.

F) **Hostile Witnesses.** No matter how hostile a witness may turn out to be, the calling party may not impeach him if the writing does not conform to the requirements of statute.

G) **Adverse Party Witness [Civil Actions].**

   1) **Impeachment with a Prior Inconsistent Statement.** If the adverse party is called as a witness any prior inconsistent statement may be used to impeach him, even if oral and not made under oath.

   2) **Character Impeachment.** Where the adverse party has become one's own witness, he/she may not be impeached by an attack on his/her character. Thus, the *voucher* still has some limited effect.

3. **Compulsory Witnesses.** The rule prohibiting a party from impeaching his own witnesses does not apply to a witness the party is required by law to call. Thus, an attesting witness to a will may be impeached by any party.

4. **Witnesses Called by the Judge.** Witnesses called by the trial judge may be impeached by either party [though that may not always be a tactically good thing to do.] NOTE: A judge has the power to call a witness “to clarify or to avoid misleading the trier of fact.” In an important decision discussing the role of a trial
judge in calling a witness as a court witness the Court of Appeals found a breach of discretion where in a criminal possession of narcotics case the judge called a witness under the following circumstances. Defendant contended that he was framed by the arresting officers who he said planted drugs and a gun on him. He testified and said that before the officers arrived he had been searched by members of an Emergency Service Unit and that had he been in possession of the contraband they would have found it. The narcotics officers testified that they waited outside the apartment and that they understood that the ESU officers did not usually search persons before arresting them. After defendant testified an ESU office was made available to him but he chose not to call him. The judge then called the officer as a “court witness” who said that while he could not recall the event in question, ESU officers did not always search persons before handcuffing them. The Court of Appeals said that it is “the function of a the judge to protect the record at trial, not to make it.” In this case by calling the witness without notice to the parties and without explanation, the Court created a “significant probability” that the testimony would affect the outcome of the case and deprived the defendant “of the ability to request that the trier of facts draw a negative inference from the People’s failure to produce the witness” who was aligned with the prosecution. *People v. Arnold, 98 N.Y.2d 63 (2002)* (*)

5. **Anticipating Impeachment.** A party anticipating impeachment may bring out the impeaching facts before turning the witness over for cross-examination. The purpose is not to impeach, but to avoid the fact finding believing that the calling party was trying to hide an impeaching fact.

**IX. REHABILITATION**

1. **General Principle.** An impeached witness may be rehabilitated.
   
   A. **Rehabilitating a Witness with Character Evidence.** When a witness' character trait of truth and veracity has been attacked by any means the calling party may call character witnesses to testify to the prior witness' good community reputation for truth and veracity [NOTE: Remember, in New York Character Evidence may be proved only by community reputation.]

   B. **Nature of the Attack Warranting Rehabilitation.**

      1) **Convictions.** A witness impeached by proof of a conviction may be rehabilitated with proof of his good community reputation for truth and veracity.

      2) **Prior Acts of Misconduct.** A witness questioned about alleged prior acts of misconduct may be rehabilitated with community reputation witnesses.
Community Reputation of Untruthfulness. A witness whose credibility has been attacked by proof that he has a community reputation for being untruthful may have other witnesses testify that his community reputation for truth and veracity is good.

Other Attacks on Character. If a cross-examiner expressly or impliedly charges a witness with lying, he may be rehabilitated with community reputation witnesses.

Prior Inconsistent Statements. Merely showing that a witness has made an inconsistent statement does not render evidence of good character for truthfulness admissible in rebuttal. However, if the cross-examiner implies or asserts that the witness is lying, character evidence may be produced in rebuttal.

Bias, Interest, Motive. Proof that a witness has a motive for favoring the falling party or is hostile to the opposing party does not render evidence of good character for truthfulness admissible in rebuttal.

Physical or Mental Defect. Ordinarily proof that a witness has a mental or physical defect affecting his ability to perceive, store, recall or relate facts does not justify using evidence of good character in rebuttal. However, because of the prejudice many people have against persons with mental disease or defect, the trial judge should have the discretion to permit rebuttal character evidence.

Prior Consistent Statements.

1. In General. Prior consistent statements are not admissible for the sole purpose of bolstering a witness' credibility. This is true even if a witness was shown to have made prior inconsistent statements. The inconsistency is not removed merely because the witness has also made consistent statements.

2. When Relevant. If a cross-examiner implies or asserts that a witness had a motive for falsely testifying, the calling party may produce prior consistent statements made at a time that the motive did not exist. People v. Baker, 23 N.Y.2d 120 (1968).

A. Motive of Recent Fabrication. If the cross-examiner implies or expresses a charge that the witness' trial testimony is a recent fabrication, a statement made before, but not after, the inconsistent statement is admissible to disprove the charge of recent fabrication.
B. Other Motives. Other motives may be charged or implied. If so, prior consistent statements made before, but not after the motive arose, are admissible to disprove the motive.

Illustration. W-1 testified that his defendant brother had a weapon when he and two others robbed a store and shot persons therein. On cross-examination the cross-examiner representing the brother asked the following questions:

Q1: On July 1, Year-1, didn't you tell our investigator that your brother did not have the gun--that one of the other defendants was carrying it?

Q2: I see you are wearing new clothes. Did the prosecutor give them to you in return for testifying falsely?

Q3: Did you make up this story today at trial?

In the case of Q#1, the prosecutor may not prove any consistent statement as no motive has been implied or asserted.

In the case of Q# 2, a statement made to the arresting officers consistent with his trial testimony should be admissible in order to disprove the motive assigned [testifying in return for new clothes].

In the case of Q# 3, any statement consistent with his trial testimony made before July 1, Year-1 would be properly admissible to disprove the motive of recent fabrication.

3. How Proved? Any person who heard the prior consistent statement including the witness who made it may testify to it.

4. Relationship to Hearsay. The Federal Rules treat prior consistent statements as non-hearsay and receive them for the truth when properly admitted to disprove an assigned motive. FRE, R. 801(d)(1)(B). Most common law jurisdictions treat them as hearsay but admit them as exceptions to the hearsay rule. New York, however, apparently receives prior consistent statements only to disprove the assigned motive and not for the truth of the matters asserted therein. See People v. Seit, 86 N.Y.2d 92 (1995).