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FAMILY LAW SECTION  
2019 SUMMER MEETING***

# **EVIDENTIARY TOOLS**

## **EVIDENTIARY FOUNDATIONS**

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## PART 1

# EVIDENTIARY TOOLS

## I. PRIOR INCONSISTENT STATEMENT

### **A. STATUTE - CPLR RULE 4514**

“In addition to impeachment in the manner prescribed by common law, any party may introduce proof that any witness has made a prior statement inconsistent with his testimony if the statement was made in writing subscribed by him or was made under oath.”

### **B. ELEMENTS OF PRIOR INCONSISTENT STATEMENT**

1. The prior inconsistent statement may be either written or oral. *Lederer v. Lederer*, 108 App.Div.343, affd. 184 NY 542.

2. An adverse witness may be impeached by showing that on some other occasion the witness has made statements which are inconsistent with the witness's testimony. The inconsistency need not be direct and positive, but it is sufficient that the testimony and the prior statements "tend to prove differing facts." *Larkin v. Nassau Electric R.R. Co.*, 205 NY 267, 269, 98 NE 465 [1912])

3. Where a witness is permitted to testify as to opinion, a prior inconsistent statement of opinion may be used to impeach the witness. *Brooks v. Rochester Railway Co.*, 156 NY 244, 50 NE 945 (1898)

### **C. PRIOR INCONSISTENT STATEMENT AGAINST A PARTY (ADMISSION)**

1. Proper for plaintiff to impeach defendant, whom plaintiff called as a witness, with prior consistent statements made at examination before trial and at other trials (pursuant to CPLR 4514), but error to permit plaintiff to impeach defendant with a prior criminal conviction and by attaching his qualifications. *Skerencak v. Fischman*, 214 AD2d 1020, 626 NYS2d 337 [4<sup>th</sup> Dept. 1995]).

2. Where witness sought to be discredited with a prior inconsistent statement is a party, the laying of a foundation is unnecessary, as the party's statements are treated as admissions and, as such, are received as primary evidence against him or her. (*Viera v. NYC Transit Auth.*, 221 AD2d 625, 634 NYS2d 168 [2d Dept. 1995]).

## **D. FOUNDATION – NON-PARTY WITNESS**

1. “[...]here must be a proper foundation laid for the introduction of prior inconsistent statements of a witness. In order to prevent surprise and give the witness the first opportunity to explain any apparent inconsistency between his testimony at trial and his previous statements, he must first be questioned as to the time, place and substance of the prior statement.” (*Peo. v. Duncan*, 46 NY2d 74, 412 NYS2d 833 [1978])

## **E. FOUNDATIONAL REQUIREMENTS**

1. The witness must be shown the prior statement, if in writing, or its contents must be disclosed to the witness as a basis for cross-examination. It should be marked for identification, shown to the witness to acknowledge authorship, or such authentication otherwise established if the witness does not acknowledge, and it must be received in evidence before its contents may be used as a basis for cross-examination. *Larkin v. Nassau Electric R.R. Co.* 205 NY 267, 269, 98 NE 465 (1912).

2. If the prior inconsistent statement is oral, the witness must be asked whether he/she made the statement, the time and place where it was made, to whom it was made, and the words or substance of the statement. *Larkin v. Nassau Electric R.R. Co.*, 205 NY 267, 269, 98 NE 465 (1912); *People v. Weldon*, 111 NY 569, 19 NE 279 (1888).

3. *People v. Latef*, 176 AD2d 505, 574 NYS2d 700 (1st Dept. 1991) (witness may not be impeached with prior inconsistent statement without first being afforded opportunity to deny or explain it); *People v. Wise*, 176 AD2d 595, 575 NYS2d 39, 40 (1st Dept. 1991) (A party wishing to impeach with purportedly inconsistent prior statement "must show that the witness was specifically asked about, and his attention specifically directed, to the fact at issue").

4. Party Litigant as Witness - The foundational elements discussed above are not required where the witness being impeached is a party litigant because such statement would be independently admissible as admissions by a party. *Blossom v. Barrett*, 37 NY 434 (1868).

## **F. EVIDENCE IN CHIEF? - TRILOGY OF CASES**

1. *Letendre v. Hartford Acc. & Indem. Co.*, 21 NY2d 518, 289 NYS2d 183 (1968) - At the trial of an action by plaintiff employer against defendant insurance company on a fidelity policy insuring said employer against loss caused by fraud or dishonesty of a managerial employee who was a witness at

the trial and who testified that he committed no defalcation, the written admissions of defalcation which had been obtained from said employee by the claims agent of defendant insurance company were produced by the employer and were properly received as evidence of the facts stated and admitted therein, and not merely as an attack on the witness' credibility.

2. "The underpinning for the rule excluding hearsay is that the purported utterer of the quoted statement cannot be subjected to cross-examination for purposes of casting full light on the information contained therein (see *Coleman v Southwick*, 9 Johns 45, 50). However, since the utterer of the original statement which is the source of the hearsay testimony complained of, Dr. Thompson, testified on the subject matter of the hearsay, as did those presenting the hearsay testimony, Janet's father and mother and the party raising the hearsay objection, Parke, Davis, had a full opportunity to cross-examine and confront all those witnesses at the trial, the hearsay rule should not be applied to bar the testimony." *Vincent v. Thompson*, 50 AD2d 211, 377 NYS2d 118 (1975)

3. cf. *Nucci v. Proper*, 95 NY2d 597, 721 NYS2d 593 (2001) – Due to insufficient indicia of reliability, prior inconsistent statement not receivable as evidence in chief.

## **G. COLLATERAL OR NOT COLLATERAL**

1. Whether extrinsic proof of the prior inconsistent statement may be adduced depends upon the substance of the statement. If it bears upon a material issue in the case, then it is not collateral and extrinsic proof is not permitted. *People v. McCormick*, 303 NY 403, 103 NE2d 529 (1952).

2. Assuming the substance of the prior statement is not collateral, extrinsic evidence of it may be received, but only after the witness being impeached has been confronted with the statement and afforded an opportunity to deny or explain it, and the adverse party has been given an opportunity to examine the witness with respect thereto. *People v. Wise*, 46 NY2d 321, 413 NYS2d 334, on remand, 67 AD2d 737, 413 NYS2d 279 (1979)

## **H. DENIAL OF STATEMENT**

1. If the witness denies having made the statement, or does not remember having made it, he may then be contradicted by any person who heard him make it or by documentary evidence. *Hanlon v. Ehrich*, 178 NY 474 (1904)

## **I. IMPEACHMENT BY OMISSION OF STATEMENT**

### 1. General Rule

a. A witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time. *Peo. v. Bornholdt*, 33 NY2d 75, 350 NYS2d 369 (1973)

### 2. Exceptions

a. Where it is shown that at the prior time the witnesses attention was called to the matter and the witness was specifically asked about the facts embraced in the question propounded at trial. *Peo. v. Bornholdt, supra*.

b. When the circumstances surrounding the prior statement make it unnatural to omit certain information. *Peo. v. Savage*, 50 NY2d 673, 431 NYS2d 382 (1980)

## **J. PRIOR CONSISTENT STATEMENT v. BOLSTERING**

### 1. Reason for Rule

a. “As we observed in *People v Smith* (22 NY3d 462, 465 [2013]), “[t]he term ‘bolstering’ is used to describe the presentation in evidence of a prior consistent statement—that is, a statement that a testifying witness has previously made out-of-court that is in substance the same as his or her in court testimony.” While such statements are generally precluded by the hearsay rule absent an applicable exception, prior consistent statements are notably less prejudicial to the opposing party than other forms of hearsay, since by definition the maker of the statement has said the same thing in court as out of it, and so credibility can be tested through cross-examination (*id.* at 465-466). As a result, “in many cases, the admission of purely redundant hearsay creates no greater evil than waste of time” (*id.* at 466). Still, there exists a risk that a prior consistent statement “may, by simple force of repetition, give to a jury an exaggerated idea of the probative force of a party's case” (*id.*).

### 2. Non-hearsay Purpose Permitted

a. New York courts have routinely recognized that “nonspecific testimony about [a] child-victim's reports of sexual abuse [does] not constitute improper bolstering [when] offered for the relevant, non-hearsay purpose of explaining the investigative process and completing the narrative of events leading to the defendant's arrest” (*People v Rosario*, 100 AD3d 660, 661 [2d

Dept 2012]; *see also People v Gregory*, 78 AD3d 1246, 1246 [3d Dept 2010] [a police officer's testimony about the victim's comments did not "improperly bolster the victim's version of events (when) admitted not for its truth but for the narrow purpose of explaining an officer's actions and the sequence of events in an investigation, and the testimony is accompanied by an appropriate limiting instruction"]. Here, the objected to testimony fulfilled these legitimate nonhearsay purposes. *People v. Ludwig*, 24 NY3d 221, 230, 997 NYS2d 351 (2014)

#### **K. REHABILITATION BY SHOWING PRIOR CONSISTENT STATEMENT**

1. A party may not bolster the testimony of his witness through use of a prior consistent statement unless the witness' testimony has been attacked as a recent fabrication. *Peo. v. Smith*, 136 AD2d 935, 524 NYS2d 901 (4th Dept., 1988); *see also, Smith v. Emkay Fifth Avenue, Inc.* 172 AD2d 656, 568 NYS2d 453, 457 (2d Dept. 1991) (trial court properly precluded plaintiff from bolstering her testimony by use of prior consistent statement.

2. "An impeached witness cannot be rehabilitated by his or her antecedent consistent statements unless the cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication..."); *People v. Buchanon*, 176 AD2d 1001, 574 NYS2d 860 (3d Dept. 1991) (credibility of witness may not be corroborated or bolstered by evidence or prior consistent statements where testimony of witness has not been assailed as a recent fabrication, whether such prior consistent statements be written or oral).

3. In personal injury action, where the issue was whether the infant plaintiff's accident occurred because she fell from the monkey bars, as opposed to an orange ladder, and the defense was that the infant was not only mistaken but was coached to tell a false Story (and thus a recent fabrication), error to preclude plaintiff from introducing an entry in the emergency room record where the infant plaintiff told the emergency room physician that she fell from the monkey bars (a prior consistent statement). Additionally, the infant's statement fell within another exception to the hearsay rule, i.e., the statement was germane to the infant plaintiff's medical treatment on the date of the incident. *Nelson v. Friends of Associated Beth Rivka Sch. For Girls*, 119 AD3d 536, 987 NYS2d 907 (2d Dept. 2014)

## **II. ADVERSE PARTY AS WITNESS**

### **A. GENERAL RULE**

A party who calls the adverse party as a witness should not be bound by witness' answers and should be permitted to lead and cross-examine, because he is obviously a hostile witness. *Mtr. of Arlene W. v. Robert D.*, 36 AD2d 455, 456, 324 NYS2d 333 (4th Dept. 1971); see also, *Cornwell v. Cleveland*, 44 AD2d 891, 355 NYS2d 679 (4th Dept. 1974)."

### **B. NATURE OF CROSS EXAMINATION**

1. "...when an adverse party is called as a witness, it may be assumed that such adverse party is a hostile witness, and, in the discretion of the court, direct examination may assume the nature of cross-examination by the use of leading questions. However, a party may not impeach the credibility of a witness whom he calls (see *Becker v. Koch*, 104 NY 394) unless the witness made a contradictory statement either under oath or in writing (see CPLR 4514)." *Jordan v Parrinello*, 144 AD2d 540, 534 NYS2d 686 (2d Dept. 1988)The general rule prohibiting a party from impeaching his or her own witness does not preclude a hostile witness from being impeached by prior statements made either under oath or in writing. *Fox v. Tedesco*, 15 AD3d 538, 789 NYS2d 742 (2d Dept. 2005); *Ferri v. Ferri*, 60 AD3d 625, 878 NYS2d 67(2d Dept. 2009)

### **C. GENERAL DISCRETION OF COURT**

1. While an adverse party who is called as a witness may be viewed as a hostile witness and direct examination may assume the nature of cross-examination by the use of leading questions (see, *Becker v Koch*, 104 NY 394, 400-401), whether to permit such questions over objection is a matter which rests in the discretion of the trial court (see, *Jordan v Parrinello*, 144 AD2d 540, 541; Prince, Richardson on Evidence § 6-228, at 374 [Farrell 11th ed]).

2. The record discloses that respondent was neither reluctant nor evasive in answering questions posed during direct examination, including several questions regarding the children and guns. When the objections to the leading questions were sustained, petitioner's counsel made no effort to elicit the information through questions which were not leading and petitioner does not claim that such questions were not feasible or that their use would have been frustrated by respondent's hostility as an adverse party. In these circumstances, and considering the lack of evidence to support petitioner's application for a change in custody, we see no reversible error in Family Court's ruling." *Ostrander v. Ostrander*, 280 A.D.2d 793, 720 N.Y.S.2d 635 (2001)

#### **D. EXPERT OPINION BY ADVERSE PARTY**

1. A party in a civil suit may be called as a witness by his adversary and, as a general proposition, questioned as to matters relevant to the issues in dispute. A plaintiff in a medical malpractice case can call the defendant-doctor as his/her witness as to both “fact” and “opinion”. *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 NY2d 20, 255 NYS2d 65 (1964)

### **III. EXCLUSION OF WITNESSES**

#### **A. GENERAL POLICY IN FAVOR OF EXCLUSION**

a. The court is empowered, as a matter of discretion, to exclude witnesses from the courtroom while other witnesses are testifying to safeguard against witness collusion. Although the determination of whether a non-party witness should be excluded from the courtroom is normally left to the sound discretion of the trial court, the "practice of excluding witnesses from the courtroom except while each is testifying is to be strongly recommended." (*Levine v. Levine*, 83 AD2d 606, 441 NYS2d 299 (2d Dept., 1981))(In action to set aside separation agreement, not abuse of discretion to refuse to grant plaintiff's request to exclude the attorney who drafted agreement for both sides);

b. In *Peo. v. Cooke*, 292 NY185, 190 (1944), the Court of Appeals stated that “[I]t is heard for us to understand...why such a motion (to exclude witnesses) should not be granted as of course”.

#### **B. EXCEPTION – WITNESS’S PRESENCE ESSENTIAL TO CLIENT’S CAUSE**

a. The witness at issue was an employee of the defendant and the representative it had designated to assist in the defense of this action. Under these circumstances, and in the absence of extenuating circumstances, the witness was entitled to remain in the courtroom throughout the trial. *Perry v. Kone, Inc.*, 147 AD3d 1091, 49 NYS3d 696 (2d Dept. 2017)

b. The same reasons for exclusion do not apply to expert witnesses. It has been pointed out that “the presence in the courtroom of an expert witness who does not testify to the facts of the case but rather gives his opinion based upon the testimony of others hardly seems suspect and will in most cases be beneficial, for he will be more likely to base his expert opinion on

a more accurate understanding of the testimony as it evolves before the jury.  
*People v. Santana*, 80 NY2d 92, 587 NYS2d 570 (1992)<sup>1</sup>

#### **IV. LAW OF THE CASE**

A. “The doctrine of law of the case “is a rule of practice, an articulation of sound policy that, when an issue is once judicially determined, that should be the end of the matter as far as Judges and courts of co-ordinate jurisdiction are concerned” (*Martin v City of Cohoes*, 37 NY2d 162, 165, see *Pollack v Pollack*, 290 AD2d 548; *Thomas v Dietrick*, 284 AD2d 325). Thus, the decision of the judge who first rules in a case binds all court’s of co-ordinate jurisdiction, regardless of whether a formal order was entered (see *Matter of Levinson*, 11 AD3d 826, lv denied NY3d [Jan. 18, 2005]; *Spahn v Griffith*, 101 AD2d 1011; *Matter of Silverberg v Dillon*, 73 AD2d 838).” *Messinger v. Messinger*, 16 AD3d 562, 792 NYS2d 162 (2d Dept. 2005)

B. *Hothan v. The Metropolitan Suburban Bus*, NYLJ, 11/21/02, p.24 col.3, S.Ct., Nassau Co., Winslow, J.: “Further, since Noble and Ingleston were decided, the Court of Appeals, in *People v. Evans*, 94 NY2d 499 (2000), has held that "law of the case " is inapplicable to discretionary evidentiary rulings. The court observed that "law of the case" is not a "rigid rule of limitation" but a "judicially crafted policy that 'expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power.' (Messinger v. Anderson, 225 US 436, 444...) As such, law of the case is necessarily 'amorphous' in that it 'directs a court's discretion,' but does not restrict its authority (see *Arizona v. California*, 460 US, at 618...)” *People v. Evans*, supra, at 503. Further, the Court of Appeals stated that "law of the case...does not contemplate that every trial ruling is binding on retrial... If that were so, a judge conducting a retrial would be corseted." *Id.*, 504. Note that "unduly confined" may be a more apt and contemporary expression.”

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<sup>1</sup> / Court noted that under the Federal Rules of Evidence, while a fact witness under the Federal Rules must be excluded on the request of a party, an expert witness is generally exempted from the exclusion requirement as “a person whose presence is shown by a party to be essential to the presentation of the party's cause” (Federal Rules Evid, rule 615 [3])

## **V. REFRESHING WITNESS'S RECOLLECTION**

### **A. WHAT CAN BE USED**

1. Any writing or object may be used to refresh the recollection of a witness while testifying irrespective of its source, accuracy, authorship, or time of making. *McCarthy v. Meaney*, 183 NY 190 (1905)

2. Where plaintiff reviewed notes for the express purpose of preparing for his testimony at trial, and although plaintiff never used the words "refresh my recollection" relative to the notes, it was clear that the sole object and ultimate goal of reading the notes immediately prior to trial was to refresh his memory, and thus defendant was entitled to have the diary containing the notes made available to him for inspection and use upon cross-examination. *Chabica v. Schneider*, 213 AD2d 579, 624 NYS2d 271 (2d Dept., 1995)

3. The refreshing recollection doctrine applies where a witness reviews a document prior to testifying at a deposition for refreshing recollection purposes if the document was reviewed for the purpose of refreshing recollection and the testimony is based, at least in part, on that document. Merely looking at a document prior to a deposition would not necessarily trigger disclosure. *Fernekes v. Catskill Regional Med Ctr.*, 75 AD3d 959, 906 NYS2d 167 (3d Dept. 2010)

### **B. USE OF INADMISSIBLE EVIDENCE**

1. 911 tape used to refresh witness' recollection – court found nothing improper with the use of a sound recording as the refreshing recollection device. The fact that the tape itself was inadmissible did not preclude its use as a refreshing recollection device. Other cases have held that where a writing itself is inadmissible, it can still be used as a refreshing recollection device. The reasoning is that it is not the writing or sound recording being offered into evidence, but it is merely used as a tool to refresh recollection. *Seaberg v. North Shore Lincoln-Mercury*, 85 AD3d 1148, 925 NYS2d 669 (2d Dept. 2011)

### **C. EXHAUSTION OF MEMORY**

1. The witness's independent recollection must first be exhausted as a precondition to use of memory stimulant. (*Peo. v. Reger*, 13 AD2d 63, 213 NYS2d 298 [1<sup>st</sup> Dept. 1961])

2. "When a witness, describing an incident more than a year in the past, says that it 'could have lasted a minute or so', and adds 'I don't know', the

inference that her recollection could benefit from being refreshed is a compelling one". All *Peo. v. Oddone*, 22 NY3d 369, 980 NYS2d 912 (2013)

#### **D. DISTINCTION WITH PAST RECOLLECTION RECORDED**

1. *Howard v. McDonough*, 77 NY 592, 593 (1879) outlined the New York rule and delineated the important distinction between the present recollection refreshed and past recollection recorded:

a. A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed, and when his memory has thus been refreshed, he must testify to facts from his own knowledge.

b. When a witness has so far forgotten the facts that he cannot recall them, even after looking at a memorandum of them, and he testifies that he once knew them and made a memorandum of them at the time or soon after they transpired, which he intended to make correctly, and when he believes to be correct, such memorandum, in his own handwriting, may be received as evidence of the facts therein contained, although the witness has no present recollection of them.

#### **E. RIGHT OF OPPOSING PARTY**

1. Once the witness has used a writing or object to refresh present recollection, the opposing party has the right to inspect it; to use it on cross-examination, and to introduce it into evidence. *People v. Gezzo*, 307 NY 385 (1954); *People v. Reger*, 13 AD2d 63, 213 NYS2d 298 (1st Dept. 1961). Although the decisional law is somewhat unclear, it appears that, at least in civil cases, the same right vests in the opposing party where the witness has used a writing or object to refresh recollection before testifying. See, Richardson on Evidence, § 467.

#### **F. PRIVILEGE**

1. The attorney work product privilege is not waived when a privileged document is used to refresh the recollection of a witness prior to testimony. (*Beach v. Touradji Capital Mgt.*, 99 AD3d 167, 949 NYS2d 666 (1<sup>st</sup> Dept. 2012)

## **VI. PAST RECOLLECTION RECORDED**

### **A. ELEMENTS**

1. “The rule of past recollection recorded may be simply stated. When a witness is unable to testify concerning facts recited by or through him in a memorandum, the memorandum is admissible as evidence of the facts contained therein if he observed the matter recorded, it was made contemporaneously with the occurrence of the facts recited and the witness is able to swear that he believed the memorandum correct at the time made.” (*Peo. v. Caprio*, 25 AD2d 145, 150, 268 NYS2d 70 [1966], *affd.* 18 NY2d 617; *Peo. v. Raja*, 77 AD2d 322, 433 NYS2d 200 [2d Dept., 1980]).

2. “[t]he requirements for admission of a memorandum of a past recollection are generally stated to be that the witness observed the matter recorded, the recollection was fairly fresh when recorded or adopted, the witness can presently testify that the record correctly represented his [or her] knowledge and recollection when made, and the witness lacks sufficient present recollection of the recorded information” (*People v. Taylor*, 80 N.Y.2d 1, 8 [1992]; *see Morse v. Colombo*, 31 A.D.3d 916, 917 [2006] ). *Zupan v. Price Chopper Operating Co.*, 2015 N.Y. Slip Op. 07893, 2015 WL 6510408 (3d Dept. 2015)

3. Family Court properly excluded the mother’s journal from evidence. Despite attempts to admit it as a past recollection recorded, her own attorney earlier objected to its disclosure as a document prepared for litigation, and the document included hearsay, the mother admitted that some entries were not made contemporaneously with the events in questions, and she had the opportunity to refresh her recollection from it as often as she wished during the hearing. *Smith v. Miller*, 4 AD3d 697, 772 NYS2d 742 (3d Dept. 2004)

### **B. FOUNDATIONAL REQUISITES**

1. The witness lacks sufficient present recollection of the recorded information.

*a. Iannielli v. Consolidated Edison Company, et al.*, 75 AD2d 223, 428 NYS2d 473 (1980) - Memorandum improperly received as past recollection recorded where maker of memorandum had no independent recollection of the making of same and the only guarantee of correctness offered was his testimony as to his usual habit in making such memoranda.

*b.* Where plaintiff was capable of recalling and testifying about the events of the night in question without difficulty, his notes do not qualify for

the past recollection recorded exception to the hearsay rule and were properly excluded. (*Landsman v. Village of Hancock*, 296 AD2d 728, 745 NYS2d 258 [3d Dept. 2002])

2. The witness made a note or memorandum about the matter recorded which the witness believes was accurate at the time made.

a. Error to permit into evidence an audiotape of a prior sworn statement of a witness as a past recollection recorded where the witness could not attest to the accuracy of the statement when made. [*Peo. v. Turner*, 210 AD2d 445, 620 NYS2d 434 [2d Dept., 1994]]

3. The note or memorandum was made at or about the time of the matter observed.

### **C. EVIDENTIARY EFFECT**

1. “When such a memorandum is admitted, it is not independent evidence of the facts contained therein, but is supplementary to the testimony of the witness. The witness’s testimony and the writing’s content are taken together and treated in combination as if the witness had testified to the contents of the writing based on present knowledge.” (*Peo. v. Taylor*, 80 NY2d 1, 9, 586 NYS2d 545 [1992])

2. Not error for plaintiff to read from her diary during direct examination (*Murphy v. Murphy*, 109 AD2d 965, 486 NYS2d 457 [3d Dept. 1985]).

## **VII. VOLUMINOUS RECORD RULE**

### **A. GENERAL**

1. Exception to Best Evidence Rule

2. Allows the use of summaries where the originals are so numerous so they cannot reasonably be examined in court.

### **B. REQUIREMENTS**

1. Voluminous records

2. Originals must be admissible for the summaries based on the originals to be admissible

3. Summaries may not include information not contained in or computed from the originals

4. Originals or duplicates of voluminous records must be made available to the other side for examination or copying. *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974)

### **C. EXAMPLES**

1. Computer printouts were admissible under the "voluminous writing" exception to the best evidence rule. *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974)

2. Summaries or balances of accounts may be produced to prove aggregate profits or receipts without the need to produce those documents which set forth the underlying dates. Business summaries have been deemed to be independent from the writings or documents upon which they are drawn. *R & I Electronics, Inc. v. Neuman*, 81 AD2d 832, 438 NYS2d 832 (2d Dept. 1981)

3. Error to refuse to permit use of charts which summarized accountant's voluminous work-papers where the latter were in evidence. (*Herbert H. Post & Co. v. Bitterman*, 219 AD2d 427, 649 NYS2d 21 (2d Dept. 1996).

4. Interplay with Business Record Rule - *Peo. v. Weinberg*, 183 AD2d 932, 586 NSY2d 132 (2d Dept. 1992)

## **VIII. COLLATERAL EVIDENCE RULE**

### **A. THE RULE**

1. The collateral evidence rule limits the ability of the cross-examiner to contradict the witness by introduction of extrinsic evidence. It holds that:

a. "the party who is cross-examining a witness cannot introduce extrinsic documentary evidence or call other witnesses to contradict a witness' answers concerning collateral matters solely for the purpose of impeaching that witness' credibility. (citations omitted) This rule is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness's answers. The resulting length of the trial would by far outweigh the limited probative

value of such evidence." (*Peo. v. Pavao*, 59 NY2d 282, 288, 464 NYS2d 458 [1983])

2. Even where a particular subject is proper impeachment upon cross-examination, it is collateral unless it is relevant to some issue in the case other than credibility or is independently admissible in order to impeach the witness. Such collateral matter, while proper cross-examination because relevant to the witness's credibility, may not be used to impeach the witness by extrinsic evidence. *Badr v. Hogan*, 75 NY2d 629, 634, 555 NYS2d 249 (1990); *People v. Schwartzman*, 24 NY2d 241, 245, 299 NYS2d 817 (1969); *Peo. v. Jackson*, 165 AD2d 724, 564 NYS2d 259 (1st Dept. 1990); *Peo. v. Israel*, 161 AD2d 730, 732, 555 NYS2d 865 (2d Dept. 1990).

3. Where defense counsel on cross examination asked plaintiff whether she had failed an employment-related drug test, a collateral issue relevant only to plaintiff's credibility, and plaintiff testified that the test result was a "false positive" that was proven false upon retesting, it was error to permit defense counsel to refer to the lack of evidence supporting plaintiff's assertion and introduce the drug test result in evidence in an attempt to impeach plaintiff's credibility. *Dunn v. Garrett*, 138 AD3d 1387, 31 NYS3d 326 (4<sup>th</sup> Dept. 2016)

## **B. WHAT IS COLLATERAL**

1. Court properly precluded plaintiff from using the verified answer of the defendant to impeach her credibility with respect to a collateral matter which had no relevance to any issue in the case. *Perkins v. Murphy*, 7 AD3d 500, 775 NYS2d 591 (2d Dept. 2004)

2. While the collateral evidence rule is said to rest upon auxiliary policy considerations of preventing undue confusion of issues and unfair surprise by extrinsic testimony, when evidence directly challenges the truth of what a witness has said in matters crucial to or material to the issues on trial, by no process of reason can it be held to be collateral. *Peo. v. Hill*, 52 AD2d 609, 383 NYS2d 101 (2d Dept. 1976)

3. Where the subject matter bears upon witness's credibility because it shows that the witness had acted deceitfully on a prior unrelated occasion, it is collateral and, if the witness denies the conduct, the questioner is bound by the witness's answer and may not refute it with independent proof. See also, *Peo. v. Pavao*, 59 NY2d 282, 288, 464 NYS2d 458 (1983).

4. Family Court's improvident exercise of discretion in permitting the introduction of extrinsic evidence to contradict babysitter's testimony regarding matters that had no direct bearing on any issue in child custody modification

case other than credibility was harmless error, as there was a sound and substantial basis in the record for the Family Court's determination without consideration of the improperly admitted evidence. *Gorniok v Zeledon-Mussio*, 82 AD3d 767, 918 NYS2d 516 (2d Dept. 2011)

5. Caveat - However, a negative response by the witness does not preclude further questioning of the witness on the point, "for, it if did, the witness would have it within his power to render futile most cross-examination." *People v. Sorge*, 301 NY 198, 201 [1950].

### **C. NOT COLLATERAL**

1. Subjects of impeachment which are not collateral and with respect to which independent or extrinsic evidence may be produced are:

a. Parole officer's rebuttal testimony flatly contradicting the alibi testimony offered at trial – *Peo. v. Cade*, 73 NY2d 904, 905, 539 NYS2d 287 [1989].

b. The witness's bias or hostility - *Badr v. Hogan*, 75 NY2d 629, 635, 555 NYS2d 249 [1990].

c. The witness's impaired ability to perceive - *Badr v. Hogan*, 75 NY2d 629, 635, 555 NYS2d 249 [1990]

### **D. INTERPLAY OF COLLATERAL EVIDENCE RULE AND CROSS EXAMINATION OF PRIOR BAD ACTS**

1. *Young v. Lacy*, 120 AD3d 1561, 993 NYS2d 222 (4<sup>th</sup> Dept. 2014) – In personal injury action, error for trial court to refuse to let defendant's attorney question plaintiff as to why she filed tax returns as head of household when she was married and living with her Husband at the time, and the number of dependents she claimed, as the questions raised the possibility of tax fraud which has some tendency to show moral turpitude and thus relevant on the credibility issue. However, defendant's attorney would have been bound by plaintiff's answers and could not resort to extrinsic evidence or other witnesses to refute plaintiff's answers because of the collateral evidence rule.

## **IX. OFFER OF PROOF**

A. *Porter v. Porter*, NYLJ, 12/12/2001, p. 22 col.2 (S.Ct., Richmond Co., Sunshine, J.) : "Offer of proof" is not a term of art but its' generally accepted meaning ... is to summarize the substance or content of the evidence." *People v.*

*Williams*, 81 NY2d 303, 314, 598 NYS2d 167 (1993) (offer of proof requirement of CPL 60.42[5]). Accepting offers of proof are "a busy court's attempt to keep the respective parties focused upon a succinct presentation of evidence relevant to the issues to be decided." *Douglas v. Douglas*, 281 AD2d 709, 722 NYS2d 87 (3rd Dept. 2001)."

B. Offers of proof create a solid record for appellate review of the evidentiary exclusion. See *Devito v. Katsch*, 157 AD2d 413, 556 NYS 2d 649 (2nd Dept. 1990). The court may exercise its discretion in refusing to hear testimony that it believes to be irrelevant. *Solomon v. Solomon*, 276 AD 2d 547, 714 NYS2d 304 (2nd Dept. 2000).

1. "It is a cardinal and well settled principle that offers of proof must be made clearly and unambiguously" (*People v. Williams, supra*, at 23, 187 N.Y.S.2d 750, 159 N.E.2d 549). Where there is a bona fide objection to the offer of certain evidence, the proponent of such evidence must take advantage of the opportunity to make an offer of proof in order to demonstrate the relevance of the disputed evidence (see e.g., *People v. Lyons*, 115 A.D.2d 766, 496 N.Y.S.2d 556; *People v. Zambrano*, 114 A.D.2d 872, 494 N.Y.S.2d 904, *lv. denied* 67 N.Y.2d 659, 499 N.Y.S.2d 1056, 490 N.E.2d 573; *People v. Brown*, 68 A.D.2d 503, 512, 417 N.Y.S.2d 966; Fisch, *New York Evidence* § 22 [2d ed 1977] )"  
*People v Billups*, 132 AD2d 612, 518 NYS2d 9 (2d Dept 1987)

## 2. Purposes of Offer of Proof

- a. Convince court to change ruling
- b. Preserve alleged error for appeal
- c. Shorten trial – cumulative testimony

# **X. PROOF BY ADMISSIONS**

## **A. ADMISSION BY PARTY - GENERAL**

1. Any statement or act by a party, which is contrary to that party's position at trial, may be received as an admission when offered by the opposing party. *Reed v. McCord*, 160 NY 330 (1899). Admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever, or to whomsoever made. *Peo. v. O'Connor*, 21 AD3d 1364, 802 NYS2d 810 (4th Dept., 2005).

## 2. Statement of Opinion

a. An admission need not be an averment of fact but may also be a statement of opinion, though the party against whom the admission is received is entitled to explain that he or she had no factual basis for the opinion expressed. *Garsten v. MacMurray*, 133 AD2d 442, 519 NYS2d 563 (2d Dept., 1982).

## 3. Absence of Personal Knowledge

a. Absence of knowledge on the part of the declarant does not preclude the statement's admissibility under the admission's exception. *Reed v. McCord*, 160 NY 330 (1899); *Brusca v. El Al Israel Airlines*, 75 AD2d 798, 427 NYS2d 505 (2d Dept. 1980)

4. Admissions are received not merely as bearing upon the credibility of the party who made it but as evidence of the facts contained in the admission. *Gangi v. Fradus*, 227 NY 452 (1920)

## **B. FORMAL V. INFORMAL ADMISSIONS**

1. Formal judicial admissions take the place of evidence and are concessions, for the purposes of the litigation, of the truth of a fact alleged by an adversary. Informal judicial admissions are facts incidentally admitted during the trial, and are a party's factual statement inconsistent with a position the party later takes. These are not conclusive, being merely evidence of the fact or facts admitted. *Wheeler v. Citizens Telecommunications*, 18 AD3d 1002, 795 NYS2d 370 (3d Dept., 2005).

## **C. FORMAL JUDICIAL ADMISSIONS**

### 1. Admission in answer, admission in response to notice to admit

a. An admission in an original answer does not lose its effect as an admission of fact when the answer is amended to deny the initial admission. Rather, the initial formal judicial admission is converted into an informal judicial admission, which may be offered as prima facie evidence of the fact admitted. Thus, the plaintiff may offer the initial admissions as prima facie evidence, although the defendants will be entitled to offer evidence of the circumstances surrounding the original admissions and the amendment. (*Kwiecinski v. Chung Hwang*, 65 AD3d 1443, 885 NYS2d 783 [3d Dept. 2009])

b. *Zegarowicz v Ripatti*, 67 AD3d 672, 674-675, 888 NYS2d 554 [2d Dept 2009] - Facts admitted by a party's pleadings constitute formal judicial

admissions (*see Falkowski v 81 & 3 of Watertown.*, 288 AD2d 890, 891 [2001]; Prince, Richardson on Evidence § 8-215, at 523-524 [Farrell 11th ed]).

2. Formal judicial admissions are conclusive of the facts admitted in the action in which they are made (*see Coffin v Grand Rapids Hydraulic Co.*, 136 NY 655 [1893])

#### **D. INFORMAL JUDICIAL ADMISSIONS**

1. Informal judicial admissions are facts incidentally admitted during the trial, and are a party's factual statement inconsistent with a position the party later takes. These are not conclusive, being merely evidence of the fact or facts admitted. *Wheeler v. Citizens Telecommunications*, 18 AD3d 1002, 795 NYS2d 370 (3d Dept., 2005).

2. Indefinite Words – Where plaintiff testified at her deposition that she “thought” she moved to New Jersey on a certain date, and her affidavit on venue motion stated she moved after she commenced the action, her deposition testimony, albeit phrased with “I think”, was an admission against her. The phrase “I think” is an expression of belief, and under Federal Rules of Evidence rule 801(d)(2)(B), a party's admission is “a statement of which the party has manifested an adoption or *belief* in its truth (emphasis added)” *Addo v. Melnick*, 61 AD3d 453, 877 NYS2d 261 (1<sup>st</sup> Dept. 2009)

3. Statements contained in a verified complaint or made by a party as a witness, or contained in a deposition, a bill of particulars or an affidavit constitute informal judicial admissions and are generally admissible pursuant to an exception to the hearsay rule. While not conclusive, they are evidence of the fact or facts admitted. *Gorniok v Zeledon-Mussio*, 82 AD3d 767, 918 NYS2d 516 (2d Dept. 2011)

#### **E. ADMISSION BY PARTY – ELEMENTS**

1. The witness heard a declarant make a statement.
2. The witness identifies the declarant as the present party-opponent.
3. The statement is inconsistent with the position the party-opponent is taking at trial.

#### **F. ADOPTIVE ADMISSION**

1. A third party, not a party to the action, says or writes a statement and a party to the action manifests assent to the statement expressly, impliedly, or by silence.

a. Generally, an adoptive admission is allowed when a party acknowledges and assents to something already uttered by another person, which thus becomes effectively the party's own admission. *Peo. v. Campney*, 94 NY2d 307, 704 NYS2d 916 (1999); *Peo. v. King*, --AD3d--, 2019 NY Slip Op 03813 (2d Dept.)

2. Foundation elements:

a. A declarant (third party) made a statement.

b. The statement was made in the presence of a party.

c. The party heard and understood the statement. (The declarant's statement is thus offered for a nonhearsay purpose, i.e., to show its effect on the state of mind of the party.)

d. The party made a statement that expressed agreement with the declarant's statement.

**G. SILENCE AS ADMISSION**

1. Silence in the face of a statement made by another person may be construed as acquiescence and adoption of the statement as an admission where one would be likely to protest the statement if it were untrue. *Cohen v. Toole*, 184 App.Div. 70 (1st Dept., 1918).

**H. VICARIOUS ADMISSION (STATEMENTS BY AGENT OF PARTY)**

1. NY's "Speaking Authority" Requirement

a. The statement of an agent is admissible as an admission against the principal only if the agent is authorized to speak for the principal and the making of the statement falls within the scope of the agent's authority. *Loschiavo v. Port Authority of New York*, 58 NY2d 1040, 462 NYS2d 440 (1983); *Kelly v. Diesel Constr. Div. of Carl A. Morse Inc.*, 35 NY2d 1, 358 NYS2d 685 (1974).

b. The court erred in admitting the alleged statement made by defendant's ticket booth clerk to plaintiff that she had reported the defective condition six times prior to plaintiff's trip and fall. The evidence does not show that the statement was made within the clerk's authority as a speaking agent on behalf of defendant. *Gordzica v. NYCTA*, 103 AD3d 598, 960 NYS2d 103 (1st Dept. 2013)

c. No evidence that the building superintendent was authorized to speak on defendant's behalf with respect to the building's employment practices and hiring and firing of employees. *Boyce v. Spitzer*, 82 AD3d 491, 918 NYS2d 111 (1<sup>st</sup> Dept. 2011)

d. A declaration made by an agent without authority to speak for the principal, even where the agent was authorized to act in the manner to which his declaration relates, does not fall within the "speaking agent" exception to the rule against hearsay and is not an admission that can be received in evidence against the principal. *Simpson v. NYC Transit Auth.*, 283 AD2d 419, 724 NYS2d 196 (2d Dept 2001); *Tkach v. Golub Corp.*, 265 AD2d 632, 696 NYS2d 289 (3d Dept., 1999); *Nordhauser v. NYC Health & Hospitals Corporation*, 176 AD2d 787, 575 NYS2d 117 (2d Dept., 1991).

## 2. Speaking Authority Recognized

a. Where an agent's responsibilities including making statements on his principal's behalf, the agent's statements within the scope of his authority are receivable against the principal. *Spett v. President Monroe Bldg. & Mfg. Corp.*, 19 NY2d 203, 278 NYS2d 826; *Loschiavo v. Port Auth. of N.Y.*, 58 NY2d 1040, 462 NYS2d 440 (1983).

## 3. Implied Speaking Authority

a. Agent-employee was in full charge of the business. *Stecher Lithographic Co., v. Inman*, 174 NY 124 (1903)

b. Agent-employee was superintendent of the job site or facility. *Brusca v. El Al Israel Airlines*, 75 AD2d 798, 427 NYS2d 505 (2d Dept. 1980)

c. Where an employee is given full and extensive managerial responsibility over his employer's entire enterprise or a separate store of the business enterprise, implied authority to speak may be present. *Spett v. Monroe Bldg. & Mfg.*, 19 NY2d 203, 278 NYS2d 826 (1967)

## 4. Federal Rules of Evidence rule 801(d)(2)(D)

a. Exception to hearsay rule where statements of a party's agent or employee is made in the scope of his or her relationship, even if the agent or employee does not have any authority to speak on behalf of the party.

5. Statement of agent or employee, even without speaking authority, can be admissible if it falls within some other hearsay exception.

a. Excited utterance. *Tyrell v. Wal-Mart Stores*, 97 NY2d 650, 737 NYS2d 43 (2001) (plaintiff failed to establish that unidentified employee was authorized to make alleged statement or that statement fell within excited utterance exception to hearsay rule).

b. Verbal act. *Giardino v. Beranbaum*, 279 AD2d 282, 720 NYS2d 3 (1<sup>st</sup> Dept. 2001) (Agent's statement not hearsay and is admissible against principal without regard to speaking authority rule, as statement received not for truth but on issue of notice to listener.)

## **I. FOUNDATION ELEMENTS**

1. The declarant was an agent of the party-opponent-principal.
2. The party-opponent authorized the declarant to make the particular statements.
3. The statement is inconsistent with a position the party-opponent is taking at trial or the statement is logically relevant to an issue the proponent has a right to prove at trial.

## **J. ADMISSIONS BY COUNSEL**

1. Statements made by an attorney while acting in his or her capacity as an attorney, are, like statements made by any other agent authorized to speak for the principal, admissible against a party. (*Bellino v. Bellino Construction Co., Inc.*, 75 AD2d 630, 427 NYS2d 303 [2d Dept., 1980]); *Tai Wing Hong Importers v. King Realty*, 208 AD2d 710, 617 NYS2d 793 (2d Dept., 1994) (Admissions by counsel are admissible against a party, provided that the statements are made by the attorney while acting in his capacity.)

a. Statement in letter from plaintiffs' attorney was admission by plaintiffs' agent receivable against plaintiffs for truth of the matter asserted therein. *DiCamillo v. City of N.Y.*, 245 AD2d 332, 665 NYS2d 97 (2d Dept. 1997)

b. Confession made by parties' attorney in an examination before trial held binding. *Burdick v. Horowitz*, 56 AD2d 882, 392 NYS2d 666 (2d Dept. 1977)

2. cf. *1014 Fifth Ave. Realty Corp. v. Manhattan Realty Co.*, 67 NY2d 718, 499 NYS2d 936 (1986) - A concession contained in a brief on a motion for summary judgment is not a formal judicial admission binding the party making it to the very result he is arguing against.

## **K. ADMISSION BY OPENING STATEMENT AND STATEMENT OF PROPOSED DISPOSITION**

1. Plaintiff in action for divorce and ancillary relief established, prima facie, her entitlement to equitable distribution of subject parcel of real property, where defendant admitted in his Statement of Proposed Disposition that he acquired some ownership interest in property during marriage and confirmed timing of his acquisition in opening statements during which defense counsel asserted that, during marriage, defendant purchased property, though partially with money received from another source; that unequivocal, factual assertion made during opening statements constituted judicial admission, and it was thereby established that at least portion of defendant's interest in property was presumptively marital property, shifting burden to defendant to rebut that presumption. *Kosturek v. Kosturek*, 107 A.D.3d 762, 968 N.Y.S.2d 97 (2013)

## **L. ADMISSIONS BY EXPERT**

1. A statement by an expert that is put forward by a party in litigation constitutes an informal judicial admission that is admissible against, although not binding upon, the party that submitted it. (*Djetounmani v. Transit Inc.*, 50 AD3d 944, 857 NYS2d 601 [2d Dept. 2008])

2. Because the appraisal annexed as an exhibit to the amended verified complaint was prepared on behalf of defendants, by their agent authorized to make such a statement, it was a party admission (see *Georges v American Export Lines*, 77 AD2d 26, 33 [1st Dept. 1980]; *Brusca v El Al Israel Airlines*, 75 AD2d 798, 800 [2d Dept. 1980]).*Rosasco v. Cella*, 124 AD3d 447, 448, 1 NYS3d 71 (1s Dept. 2015)

## **M. WEBSITE**

1. *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 M3d 925, 774 NYS2d 916 (Civ. Ct., Qns. Co., 2004) - Information posted on corporate party's website constitute admissions, and are encompassed by the admissions exception to the hearsay rule. See, *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 8 M3d 33, 798 NYS2d 309 (App Term) (Trial judge made independent Internet investigation to see if defendant was transacting business in NY. "Even assuming the court was taking judicial notice of the facts, there was no showing that the web sites consulted were of undisputed reliability, and the parties had no opportunity to be heard as to the propriety of taking judicial notice in the particular instance (see, Prince, Richardson on Evidence §20202 [Farrell 11<sup>th</sup> ed]).

2. cf. *Morales v. City of New York*, 18 M3d 686, 849 NYS2d 406 (S.Ct., 2007) - “this Court is not aware that any New York appellate court has passed definitively upon the admissibility as evidence of public records printed from even a New York government website.”

3. cf. Federal Rules of Evidence §902(5) - website operated by a government agency is self-authenticating.

## **XI. PRIVILEGE AGAINST SELF-INCRIMINATION**

### **A. STATUTORY PROVISION**

CPLR § 4501. “A competent witness shall not be excused from answering a relevant question, on the ground only that the answer may tend to establish that he owes a debt or is otherwise subject to a civil suit. This section does not require a witness to give an answer which will tend to accuse himself of a crime or to expose him to a penalty or forfeiture, nor does it vary any other rule respecting the examination of a witness.”

See also, New York Constitution, Article 1, § 6; *Malloy v. Hogan*, 378 US 1, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964).

### **B. NATURE AND SCOPE OF PRIVILEGE**

1. Civil litigant has no right to refuse to take the stand. *McDermott v. Manhattan Eye, Ear & Throat Hospital*, 15 NY2d 20, 255 NYS2d 65 (1964).

2. Privilege must be invoked on question by question basis, not categorically. *Slater*, 78 Misc.2d 13, 355 NYS2d 943 (Sup.Ct., Queens Co., 1974).

3. Inquiry as to basis upon invocation to determine whether witness has “reasonable cause to apprehend danger from a direct answer.” *State v. Carey Resources, Inc.*, 97 AD2d 508, 467 NYS2d 876 (2d Dept. 1983). Party cannot avail himself of privilege against self-incrimination where his exposure to prosecution is barred by the statute of limitations or double jeopardy. (*Brahm v. Hatch*, 169 AD2d 263, 572 NYS2d 395 [3d Dept. 1991])

## C. EFFECT OF EXERCISE IN CIVIL CASE

### 1. Adverse Inference

a. *Kay v. Kay*, 37 NY2d 632, 376 NYS2d 443 (1975) - In a civil case, as opposed to a criminal case, the court can make an adverse inference when a party witness pleads his Fifth Amendment privilege. (See, also, *Marine Midland Bank v. Russo*, 50 NY2d 31, 427 NYS2d 961 [1980]. *Carey v. Foster*, 164 AD2d 930, 559 NYS2d 589 [2d Dept., 1990]; *Steiner v. De Buono*, 239 AD2d 708, 657 NYS2d 485 [3d Dept., 1997])

b. Defendant could invoke the privilege, but that did not relieve him of his burden to present adequate evidence of his financial inability to comply with the court order so as to avoid civil contempt liability. *El-Dehdan v. El-Dehdan*, 26 NY3d 19 (2015)

c. Adverse inference from invocation of privilege proper. *Palin v. Palin*, 213 AD2d 707, 624 NYS2d 630 (2d Dept. 1995).

d. In contested custody case, trial court did not err in drawing unfavorable inference from wife's assertion of Fifth Amendment privilege, but not from husband's similar assertion, as wife invoked privilege some fourteen times on topic related to her ability to act in custodial capacity and tendency to place wife's own interests above those of children, while husband invoked right only once, regarding incident not reflective of his ability as a father. *Dolezal v. Dolezal*, 218 AD2d 682, 630 NYS2d 550 (2d Dept., 1995)

e. *Nolan v. Nolan*, 107 AD2d 190, 486 NYS2d 415 (3d Dept. 1985) - Trial court properly inferred marital misconduct on wife's part where she availed herself of her Fifth Amendment right against self-incrimination when questioned regarding an alleged adulterous relationship. (See also, *Fritz v. Fritz*, 88 AD2d 778, 451 NYS2d 519 [4th Dept., 1982])

f. An adverse inference may not be drawn against a non-party witness when he/she invokes privilege against self-incrimination. (*Peo. v. Thomas*, 51 NY2d 466, 434 NYS2d 971 [1980]; *State v. Markowitz*, 273 AD2d 637 [3d Dept. 2000])

2. Dismissal of Plaintiff's Case – *Levine v. Bornstein*, 13 Misc.2d 161, 174 NYS2d 574 (Sup.Ct., Kings Co., 1958), aff'd 7 AD2d 995, 183 NYS2d 868 (2d Dept. 1959), aff'd 6 NY2d 892, 190 NYS2d 702 (1959).

3. Pendency of Criminal Case - *Dey v. Dey*, NYLJ, 9/27/11, S.Ct., Suffolk Co., Bivona, J. – Plaintiff-husband’s motion for protective order to suspend his deposition because of the pendency of criminal charges against him granted to the extent that the deposition could not be taken by videotape but could otherwise proceed. Observations of the plaintiff on videotape (pauses, delays, etc.), if used as evidence in a federal criminal trial, might very well violate the due process rights of the plaintiff as a defendant in a criminal action. Such gestures, taken out of context, might very well rise to the level of constitutional violations of his state and federal protected constitutional rights.

#### **D. CORPORATE RECORDS**

1. A corporation has no Fifth Amendment privilege and a custodian of corporate records may not refuse to produce them even though they may incriminate him personally. (*Grand Jury v. Kuriansky*, 69 NY2d 232, 513 NYS2d 359 [1987]) Nonetheless, the person producing the books and records held in the representative capacity cannot be compelled to give oral testimony concerning them if his answers may incriminate him. (*State v. Carey Resources, Inc.*, 97 AD2d 508, 467 NYS2d 876 [2d Dept., 1983]).

2. Corporate records and documents. Custodian of corporate records may not refuse to produce them on Fifth Amendment grounds, even if the records would incriminate custodian personally. *Curico v. U.S.*, 354 US 118, 77 S.Ct. 1145; see also, *Frank v. Frank*, NYLJ, 5/11/84, p.17 col.1, S.Ct., Nassau Co., Burstein, J.

3. A partner in a law firm, even a small law firm, cannot rely on the Fifth Amendment privilege against compelled self-incrimination to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if these records might incriminate him personally. (*Mtr. of Nassau County Grand Jury Subpoena*, 4 NY3d 665, 797 NYS2d 790 [2005]). See, *U.S. v. Bellis*, 417 U.S. 85 (1974) (A law partner could not rely on the Fifth Amendment privilege “to avoid producing the records of a collective entity which [were] in his possession in a representative capacity, even if these records might incriminate him personally.”)

4. The Fifth Amendment may not be asserted with respect to records required to be kept by law. (*Peo. v. Doe*, 59 NY2d 655, 463 NYS2d 405 [1983])

#### **E. FACTUAL PREDICATE**

1. *Flushing Nat. Bank v. Transamerica Ins.*, 135 AD2d 486, 521 NYS2d 727 (2d Dept., 1987) - In invoking the Fifth Amendment privilege, where the danger of incrimination is not readily apparent, the witness may be required to

establish a factual predicate for the invocation of the privilege. (*State v. Carey Resources, Inc.*, 97 AD2d 508, 467 NYS2d 876 [2d Dept., 1983]).

2. A witness may not shield himself or be excused from answering pertinent inquiries by the mere assertion that his answers might tend to incriminate him. It is always for the court to determine whether there is substance to such claim of the witness. *In re Cappeau*, 198 AD 357, 190 NYS 452 (1<sup>st</sup> Dept. 1921)

3. A witness is his own judge as to whether his answer to question would tend to incriminate him, unless court is convinced that there is no substance to witness' claim of self-incrimination and that his refusal to answer is mere device or pretext to shield some third person. *People, on Complaint of McKinney, v. Richter*, 182 M. 96, 43 NYS.2d 114 (N.Y. Magis. Ct. 1943)

4. *Astor, In re*, 62 AD3d 867, 879 NYS2d 560 (1<sup>st</sup> Dept. 2009) - A blanket refusal to answer questions based upon the Fifth Amendment privilege against self-incrimination cannot be sustained absent unique circumstances, and the privilege may only be asserted where there is reasonable cause to apprehend danger from a direct answer. When the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate, and make a particularized objection to each discovery request.

## **F. WAIVER OF FIFTH AMENDMENT PRIVILEGE**

1. N.Y. Position - Any disclosure relative to the subject matter does not operate as a waiver, but only when the witness gives testimony that is actually incriminating (*Steinbrecher v. Wapnick*, 24 NY2d 354, 300 NYS2d 555 [1969])

a. If testifies to part of an incriminating event, can be compelled to testify to the whole of the event (*Rogers v. U.S.*, 340 U.S. 367 [1951])

b. *Taber v. Herlihy*, 174 AD2d 777, 570 NYS2d 723 (3d Dept., 1991) -- Petitioner's claim that her Fifth Amendment rights were violated upon cross-examination was unfounded where on direct examination, she voluntarily testified to the smoking of marijuana on occasion, thereby waiving her Fifth Amendment rights with respect to that issue.

2. *Yoel v. Yoel*, NYLJ, 1/17/89, p.27 col.6, S.Ct., Suffolk Co., Belley, J. -- Defendant did not waive his Fifth Amendment rights concerning the issue of controlled substances by acknowledging in a prior affidavit, in the face of allegations by plaintiff, that he had, in the past, a "small drug problem", and thus he would not be directed to answer questions concerning an expenditure of funds for drugs at an examination before trial. Not only questions calling for

a direct admission of guilt may be repelled by reliance on the Fifth Amendment, but inquiries which would disclose a necessary link in the chain of evidence to prove a crime or would furnish the source from which evidence of its commission might be obtained are similarly protected. As defendant's prior statement was in defense of plaintiff's claim, he cannot be said to have waived his Fifth Amendment rights.

## **G. SCOPE**

*Castanier v. The Fleming School*, NYLJ, 2/2/8/91, p.25 col.1, S.Ct., N.Y. Co. - The privilege against self-incrimination protects not only answers that would provide direct proof of a crime, but also answers that would furnish links in a chain of evidence and result in prosecution of the party asserting the privilege.

## **H. PROCEDURE**

1. Not in Advance - *Figueroa v. Figueroa*, 160 AD2d 390, 553 NYS2d 753 (1st Dept. 1990) -- The privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded.

### 2. No Blanket Refusal

a. Where a party, called upon opposing party's case, refused to answer any and all questions put to him, and not just questions the answers to which he reasonably believed could incriminate him, witness could be precluded from testifying later. *Agnello v. Corbisiero*, 177 AD2d 445, 576 NYS2d 541 (1<sup>st</sup> Dept. 1991)

b. *Flushing Nat. Bank v. Transamerica Ins.*, 135 AD2d 486, 521 NYS2d 727 (2d Dept. 1987) -The privilege should be raised at the deposition with regard to each question to be asked and with respect to each document required to be produced as "[W]hether the privilege should be sustained is to be governed by 'the implications of the question, in the setting in which it is asked'".

3. *Anonymous v. Anonymous*, NYLJ, 7/3/13, S.Ct., N.Y. Co., Helewitz, Special Referee -- Where wife invoked the Fifth Amendment privilege during an examination before trial of questions relative to cash funds removed from the parties' business, the court noted that while a negative inference may be drawn from one's refusal to answer questions at trial in a civil matter, this may only be done when there is some independent evidence presented which allows the court to make such an inference. Moreover, imposition of the civil sanction may not be based solely upon the wife's assertion of the Fifth Amendment and a

party's refusal to answer does not automatically lead to an adverse determination but is rather only one of multiple factors to be considered. The court noted that the wife's invocation of the Fifth Amendment privilege was not only reasonable in the circumstances but since she already admitted that her financial statements previously provided to the court were inaccurate, no adverse inference was necessary. The wife only invoked the privilege with respect to certain tax returns because of potential criminal liability for failing to report income to the IRS. The court noted the husband invoked the same privilege in the course of the proceedings for the same reason. Both parties affirmed that they lied on all of their financial documents until they were able to take advantage of an Offshore Voluntary Disclosure Initiative dealing with the admission of hidden income outside of United States, and paying the taxes and interest, in order to avoid criminal charges.

## **XII. OPINION TESTIMONY BY LAY WITNESSES**

### **A. GENERAL RULE**

1. Lay witness must confine his testimony to a report of the facts, and may testify in the form of inferences or opinions only when from the nature of the subject matter no better or more specific evidence can be obtained. Lay witnesses usually restricted to relating what they perceived, e.g. saw, heard, touched, smelled, tasted. By contrast, a witness qualified as an expert with respect to a particular issue is permitted to testify as to his or her opinion. *Morehouse v. Mathews*, 2 NY 514, 515-516 (1849).

2. *Kravitz v. Long Island Jewish-Hillside Medical Ctr.*, 113 AD2d 577, 497 NYS2d 51 (2<sup>nd</sup> Dept. 1985) – “for at least the last century, lay persons have been permitted to give opinion evidence only when the subject matter of the testimony was such that it would be impossible to accurately describe the facts without stating an opinion or impression (see, Richardson, Evidence §363, 366 [10<sup>th</sup> ed, Prince]; Fisch, New York Evidence §361 [2<sup>nd</sup> Ed]).”

3. See, *Razzaque v. Krakow Taxi, Inc.*, 238 AD2d 161, 656 NYS2d 208 (1st Dept. 1997): Error to permit plaintiff to testify as to the nature, extent, and effect of his injuries, as such matters require support from expert medical witness.

### **B. DRUG EFFECTS**

1. Lower court properly excluded testimony by defendant's wife as to effects of Prozac on defendant. *People v. Gatewood*, 91 NY2d 905, 668 NYS2d 1000 (1998)

### **C. DISABILITY; MEDICAL CONDITION**

1. “Considering all of the evidence..., *including the testimony of the plaintiff concerning her disability*, we conclude that ...maintenance should continue for a period of 10 rather than 6 years. *Rindos v. Rindos*, 264 AD2d 722, 694 NYS2d 735 (2d Dept. 1999 (emphasis supplied))

2. Individual seeking spousal maintenance is entitled to submit general testimony regarding a medical condition, where the effect of that condition on the person's ability to work is readily apparent without the necessity of expert testimony. A decision of the Social Security Administration may serve as some evidence of a disability, but it is not prima facie evidence thereof. *Knope v. Knope*, 103 AD3d 1256, 959 NYS2d 784 (4<sup>th</sup> Dept. 2013)

3. While the trial court improperly admitted into evidence and relied upon a determination of the Social Security Administration as to the wife's disability, there was other sufficient admissible evidence which supported the finding that the wife was totally disabled. *Grasso v. Grasso*, 47 AD3d 762, 851 NYS2d 213 (2d Dept. 2008)

### **D. IDENTIFICATION**

1. Lay witness not permitted to testify that the substance was marijuana. *People v. Kenny*, 30 NY2d 154, 331 NYS2d 392 (1972)

### **E. EXAMPLES OF OPINION TESTIMONY BY LAY WITNESSES**

1. Emotional state of People - *Pearce v. Stace*, 207 NY 506 (1913); See, *Falkides*, 40 AD2d 1074, 339 NYS2d 235 (4<sup>th</sup> Dept., 1972) (While a layman cannot testify that a person is of unsound mind, irrational or emotionally disturbed, he can describe the acts of a person and state whether those acts impressed him as being irrational. (See also, *Gomboy v. Mitchell*, 57 AD2d 916, 395 NYS2d 55 [2d Dept., 1977])

2. Estimated speed of an automobile (*People v. Heyser*, 2 NY2d 390, 161 NYS2d 36 [1957]; *Guthrie v. Overmyer*, 19 AD3d 169, 797 NYS2d 203 [4<sup>th</sup> Dept. 2005]).

#### 3. Intoxication

a. Whether a person appeared to be intoxicated, feeble or ill (*Lyndaker v. Reynolds*, 300 AD2d 1012, 752 NYS2d 509 [4<sup>th</sup> Dept. 2003]; *Rawls v. American Mut. Life Ins. Co.*, 27 NY 282 [1863]; *Allen v. Glens Falls Ins. Co.*, 5 AD2d 1020, 173 NYS2d 316).

b. Lay witness may testify that person appeared intoxicated or sober based upon observation and experience. *People v. Leonard S.*, 8 NY2d 60, 201 NYS2d 509 (1960); see also, *People v. Kenny*, 30 NY2d 154, 331 NYS2d 392 (1972) - lay witness may not give opinion that substance was marijuana.

c. "A lay witness is competent to testify that a person appears to be intoxicated when such testimony is based on personal observation and consists of a description of the person's conduct and speech (see, *Ryan v Big Z Corp.*, 210 AD2d 649, 651)." (*Rivera v. City of New York*, 253 AD2d 597, 677 NYS2d 537 [1<sup>st</sup> Dept. 1998])

## **F. VALUATION – EXCEPTION**

1. "New York courts ... have permitted qualified lay witnesses to present their opinions as to the value of property ... before and after the act complained of" (Fisch, New York Evidence § 372, at 255 [2d ed]). While a lay witness testifying as to value must have some acquaintance with the particular property at issue, as well as knowledge of its market value, that does not mean that he must therefore qualify as an expert (see, Fisch, New York Evidence § 372, at 256 [2d ed]; 58 NY Jur 2d, Evidence and Witnesses, §§626, 693, at 259-260, 343-344). Therefore, plaintiff may be able to prove damages through the use of lay opinion testimony provided such witnesses are found competent to testify. *Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)

2. Because property valuation is not strictly a subject for expert testimony, opinion testimony by a lay witness is competent to establish the value of the property if the witness is acquainted with the value of similar property. *Peo. v. Sheehy*, 274 AD2d 844, 711 NYS2d 856 (3d Dept. 2000)

### 3. Owner of Property

a. Additionally, it has been recognized that the owner of property can testify as to its value regardless of any showing of special knowledge as to the property's value (see, Fisch, New York Evidence § 372, at 89 [2d ed, 1988-1989 Supp]; 58 NY Jur 2d, Evidence and Witnesses, §705, at 355)." (*Tulin v. Bostic*, 152 AD2d 887, 544 NYS2d 88 (3d Dept. 1989)); *Levine*, 37 AD3d 553, 830 NYS2d 250 (2d Dept. 2007) (Supreme Court properly credited defendant husband's value with regard to certain items because he was familiar with those items and plaintiff wife could not refute his testimony.)

b. "On questions of value, a witness must often be permitted to testify to an opinion as to value, but the witness must be shown to be competent to speak upon the subject. He must have dealt in, or have some

knowledge of the article concerning which he speaks...". *Teerpenning v. Corn Exchange Ins. Co.*, 43 NY 282 (1871)

c. The general rule requiring that a proper foundation be laid to show the witness has knowledge upon a subject before the witness can testify as to the market value does not apply where the witness is the owner as the owner of property is presumed to be familiar with its value by reason of inquiries, comparisons, purchases and sales; owner's testimony regarding the purchase price of the property may be probative on the issue of value so long as the property is of the sort not subject to prompt depreciation or obsolescence, e.g., jewelry. *Peo. v. Womble*, 111 AD2d 283, 489 NYS2d 521 (2d Dept. 1985)

### **XIII. READING FROM DEPOSITION OF WITNESS**

#### **A. CPLR 3117 – GENERAL**

1. CPLR 3117(a)(1) - All or part of a deposition may be used by any party to contradict or impeach the testimony of the deponent as a witness.

2. CPLR 3117(a)(2) - All of part of a deposition of a party may be used for any purpose (including evidence in chief of the facts in the deposition testimony) by any party having an adverse interest to the deponent.

3. Trial judge has the discretion to determine when the deposition may be read.

#### **B. CPLR 3117(A)(3) - UNAVAILABILITY SITUATIONS**

1. Deposition of any person (including own party) may be used by any party for any purpose if:

- a. Witness is dead;
- b. Witness is at a greater distance than 100 miles from the place of trial or is out of the state (unless collusively out of state);
- c. Witness is unable to attend or testify because of age, sickness, infirmity or imprisonment;
- d. Party offering the deposition has been unable to procure the attendance of the witness by diligent efforts; or
- e. On motion or notice, the use is justified due to special circumstances in the interests of justice.

### **C. READING ONLY PART OF A DEPOSITION**

1. If a party reads only part of the deposition testimony, the other party may read in other parts that are of importance to them and which reflect on the matter read in by the first party.

a. The court has broad discretion over controlling this procedure. (*Reape v. City of New York*, 228 AD2d 659, 645 NYS2d 499 [2d Dept. 1996])

b. See *Villa v. Vetuskey*, 50 AD2d 1093, 376 NYS2d 359 (4<sup>th</sup> Dept. 1975) – A party seeking to cross-read his own deposition should await his own case to do so and is not ordinarily permitted to do so on the heels of adversary’s reading of his deposition in the middle of the adversary’s case.

2. CPLR 3117(b) thus permits a party to read in relevant portions of his own deposition only after an adverse party has made use of it.

### **D. OBJECTION**

1. The failure to raise a substantial evidentiary objection to a question at a deposition session is not a waiver of the objection. (CPLR 3115(a),(d))

### **E. INCONSISTENT DEPOSITION TESTIMONY OF A PARTY**

1. A party is not bound by the contents of his deposition testimony and may introduce evidence at trial inconsistent with such testimony.

2. Converse is not permitted, i.e., a party may not use his own deposition testimony to impeach his trial testimony. (See, *Mravlja v. Hoke*, 22 AD2d 848, 254 NYS2d 162 [3d Dept. 1964])

### **F. USE OF PARTY’S DEPOSITION**

1. The deposition of a party may be used for any purpose by adverse party. CPLR 3117(a)(2)

2. If only part of a deposition is read at trial by a party, the other party may read any other part of the deposition which fairness requires ought to be considered in connection with the part which was read. CPLR 3117(b).

3. A party does not make the adverse party his/her own witness by reading the adverse party's deposition, or part thereof, at trial. CPLR 3117(d); *Carr v. U.S. Mattress Corp.*, 166 AD2d 172, 564 NYS2d 67 (1st Dept., 1990).

a. See, *Yeargans*, 24 AD2d 280, 265 NYS2d 562 (1<sup>st</sup> Dept. 1965) – “It was also prejudicial error to exclude the motor vehicle report offered by the defendant when the report tended to contradict the version of the accident given by the defendant in a deposition before trial. CPLR 3117(d) specifically provides “at the trial, any party may rebut any relevant evidence contained in a deposition, whether introduced by him or by any other party.” It may be noted that the deposition was first used by the plaintiff in his case in chief and was not used to contradict or impeach the defendant deponent who had not yet testified. (See CPLR 3117, subd. [d].)”

b. Not error in refusing to allow introduction of defendant’s deposition testimony at trial as evidence in chief as defendant, by voluntarily leaving the state and refusing to return for trial, procured her own absence and thus failed to satisfy CPLR 3117(a)(3)(ii). *Dailey v. Keith*, 1 NY3d 586, 774 NYS2d 105 (2004)

## **G. DEPOSITION CORRECTIONS**

1. Deposition corrections submitted in conformity with the requirements of CPLR 3116 (a) “could not properly be considered” where the witness “failed to offer an adequate reason for materially altering the substance of his deposition testimony.” *Ashford v. Tannenhauser*, 108 AD3d 7365 (2d Dept. 2013). In addition, an affidavit contradicting deposition testimony “appear[s] to raise the feigned issues of fact to avoid the consequences of the prior testimony and, thus, was insufficient to defeat summary judgment.” *Kadisich v. Grumpy Jack’s Inc.*, 122 AD3d 788 (2d Dept. 2013)]

## **XIV. USE OF PRIOR CONVICTION FOR IMPEACHMENT PURPOSES IN A CIVIL CASE**

### **A. CPLR 4513**

1. “A person who has been convicted of a *crime* is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to any any relevant question, or by the record. The party cross-examining is not concluded by such answer.”

2. Extrinsic proof other than the judgment of conviction is not permitted. (See, *Peo. v. Cardillo*, 207 NY 70 [1912])

## **B. CONVICTIONS – SANDOVAL IN CIVIL CASE**

1. *Tripp v. Williams*, 39 M3d 318, 959 NYS2d 412 (Supreme Court, Kings Co., 2013, Battaglia, J.) -- In a personal injury action involving the collapse of a masonry wall, plaintiff was precluded from impeaching defendant with evidence of his 25-year-old convictions of certain sex crimes, apparently committed against minors. CPLR 4513 does not deprive a trial court of all discretion in controlling the use of a criminal conviction for impeachment. The potential for the unfairness in the admission of prior crimes may be as great for a civil litigant, who has no control over the use of a criminal conviction and has no right not to testify, as for a criminal defendant. Here, due to the long passage of time since the convictions and the lack of evidence that the crimes involve forcible conduct, the probative value of the convictions was outweighed by the potential for prejudice to the defendant. The principles articulated in *Peo. v. Sandoval*, 34 NY2d 371, are applicable to civil, as well as criminal, actions.

2. Factors to consider: the probative value of the conviction on the issue of honesty, the importance of credibility to material issues in the case, the age of the conviction, and its potentially inflammatory nature.

## **C. IMPEACHMENT PERMITTED**

1. In personal injury action, the use of the prior criminal convictions to impeach the credibility of the plaintiff in this civil case was permissible notwithstanding that there was an issue with respect to his sobriety at the time of the accident which gave rise to this action. *Scotto v Daddario*, 235 AD2d 470, 652 NYS2d 311 [2d Dept. 1997]

2. “A civil litigant is granted broad authority to use the criminal convictions of a witness to impeach the credibility of that witness and a court may, in its discretion, permit the use of a prior conviction of driving while intoxicated to impeach the credibility of a party who testifies at trial (*see Sauer v. Diaz*, 300 A.D.2d 1136, 1137, 753 N.Y.S.2d 631)”. *Morgan v Natl. City Bank*, 32 AD3d 1264, 822 NYS2d 201 (4th Dept. 2006)

## **XV. CROSS EXAMINATION OF BAD ACTS**

A. A witness may be cross-examined on prior specific criminal, vicious or immoral conduct, provided that the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility, and a good faith basis for inquiring is established. *Peo. v. Smith*, 27 NY3d 652, 36 NYS3d 861 (2016)

B. “Unlike material facts in dispute, or matters such as a witness’s bias, hostility, or impaired ability to perceive which may be proved independently for impeachment, plaintiffs allege prior misconduct had no direct bearing on any issue in the case other than credibility. If proven, it would show only that plaintiff had acted deceitfully on a prior *unrelated* occasion. The matter was, therefore, collateral and, under the settled rule, could not be pursued by the cross examiner with extrinsic evidence to refute plaintiff’s denial”. (Citation omitted). *Badr v. Hogan*, 75 NY2d 629 (1990)

### **C. PERJURY**

1. “We reject plaintiff’s contention that Supreme Court erred in allowing cross-examination of her expert regarding an out of state conviction of contempt. That conviction was based upon lies told by the expert to a judge during the course of the expert’s trial testimony. Although the conviction was in 1983, “[c]ommission of perjury or other acts of individual dishonesty, or untrustworthiness . . . will usually have a very material relevance, whenever committed’ ” (*Donahue v Quikrete Cos.* [appeal No. 2], 19 AD3d 1008, 1009 [2005], quoting *People v Sandoval*, 34 NY2d 371, 377 [1974]). *Towne v. Burns*, 125 AD3d 1471, 3 NYS3d 844 (4<sup>th</sup> Dept. 2015)

### **D. DOMESTIC VIOLENCE**

1. Prior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the aggression and bad acts are focused on one particular person, demonstrating the defendant’s intent and motive. *People v. Pham*, 118 AD3d 1159, 987 NYS2d 687 (3d Dept. 2014)

2. Civil judgments cannot be characterized as bad or immoral ... acts involving moral turpitude that would allow them to be used to question the defendant’s credibility” *Quiroz v. Zottola*, 129 AD3d 698, 698, 11 NYS3d 194, 196 (NY App. Div. 2015)

## **XVI. BUSINESS RECORD RULE**

### **A. THE STATUTE**

1. CPLR 4518(a): "Any writing or record, whether in the form of an entry in a book or otherwise, made as memorandum or record of any act, transaction, occurrence or event, shall be admissible in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such

business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind."

2. The primary purpose of CPLR 4518 is to permit the admission of a record made in the regular course of business, without having to call as a witness every person who had made the record. *Spoar v. Fudjack*, 24 AD2d 731, 263 NYS2d 340 (4th Dept. 1965). A business record is admissible although the person who prepared the record is available to testify. *Clark v. N.Y.C. Transit Auth.*, 174 AD2d 268, 580 NYS2d 221 (1st Dept. 1992)

3. Generally, the foundation for the admissibility of an organization's business records must be established by an employee of the organization itself, i.e., someone who is familiar with the organization's routine practices in making such records. (*Peo.v. Bonhomme*, 85 AD3d 939, 925 NYS2d 157 (2d Dept. 2011)

## **B. FOUNDATIONAL REQUIREMENTS**

1. The records or writings were made in the regular course of business

a. "Essentially, that it reflect a routine, regularly conducted business activity, and that it be needed and relied on in the performance of functions of the business" *Peo. v. Kennedy*, 68 NY2d 569, 510 NYS2d 853 (1986).

b. Unsworn statement in cover letter of attorney for gas company that "records are maintained . . . in the regular course of business" did not establish requisite evidentiary foundation for their admission under business records exception to hearsay rule. *Little v. Livingston Mut. Ins. Co.*, 21 AD3d 1265, 801 NYS2d 460 (4th Dept. 2005).

c. Where parties' agreement required Husband to pay certain dental work provided to the wife, the unsworn letter from the dentist stating payment in a certain sum did not have the indicia of reliability associated with a receipt or business record, as it was not created contemporaneously with the purported payments and there was no showing that it was created in the ordinary course of business. *Gambacorta v. Gambacorta*, 45 AD3d 839, 846 NYS2d 362 (2d Dept. 2007).

2. It was the regular course of business to make such entries (business duty) and the maker of the record must either himself have personal knowledge and a duty to record, or must have received the data from others with personal knowledge and under a duty to transmit the information.

a. Business record exception to hearsay rule not applicable to noncertified and unauthenticated copy of school attendance record, submitted in PINS proceeding in absence of evidence disclosing routine followed by school personnel in recording attendance and generating particular document. *Mtr. of Jodel "KK"*, 189 AD2d 63, 595 NYS2d 835 (3d Dept. 1993).

3. The entries were made at or within a reasonable time after the event occurred

a. Records must be "made at or near the time" of the event or opinion being recorded; "essentially, that recollection be fairly accurate and the habit or routine of making the entries assured." *Peo. v. Kennedy*, 68 NY2d 569, 510 NYS2d 853 (1986).

b. A report written by a social worker one year after a conversation reported therein was not made within a reasonable time and does not qualify for admission into evidence as a business entry. *Lichtenstein v. Montefiore Hosp.*, 56 AD2d 281, 392 NYS2d 18 (1st Dept. 1977).

c. "The statutory requirement that the business record be prepared within a reasonable time after the occurrence, i.e., while the memory of the event was still fresh enough to be fairly reliable, should not be too rigidly applied" and did not prevent introduction of an accident report prepared 15 days after the event. *Toll v. State of New York*, 32 AD2d 47, 299 NYS2d 589 (3d Dept. 1969).

### **C. MULTI-TIERED HEARSAY**

1. Where the maker of the document has recorded information imparted by others and of which the maker has no actual knowledge, an additional tier of hearsay is present which poses a potential bar to admissibility.

2. Where petitioner was accused of improperly disclosing to a parent the identity of a person who made a child neglect complaint against the parent, which charge was supported in part by the memorandum of another caseworker of a conversation that caseworker had with the parent, the memorandum was not admissible as a business record exception because the parent was under no business duty to report to the caseworker. *Eggleston v. Richardson*, 88 AD2d 750, 451 NYS2d 470 (4th Dept. 1982).

3. For the file to be admissible as a business record, both of the following criteria must be met (*Matter of Leon RR*, 48 NY2d 117, 421 NYS2d 863 [1979])

a. The proponent of the record must demonstrate that it was "within" the scope of the entrant's business duty to record the act, transaction or occurrence sought to be admitted"; and

(1) In child neglect proceeding, certain portions of a report prepared in Georgia pursuant to the Interstate Compact on the Placement of Children constituted hearsay and it was error to admit those portions of the report as it was not established that the reporting party was under a business duty to report the information. *Dakota S., In re*, 43 AD3d 1414, 842 NYS2d 665 (4th Dept. 2007).

(2) Narrative portion of child protective service investigation summary not admissible under the business record exception to the hearsay rule as the source of the information contained in such narrative portion was unknown and thus determination could not be made as to whether the source of the information was under a business duty to report such information. *Penny K. v. Alesha T.*, 39 AD3d 1232, 834 NYS2d 760 (4th Dept. 2007).

b. Each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception. Thus, not only must the entrant be under a business duty to record the event, but the informant must be under a contemporaneous business duty to report the occurrence to the entrant.

(1) Family members' comments within a psychologist's report not admissible in a Family Court proceeding, as they had no business obligation to provide information to the psychologist. *Mtr. of Loren B. v. Heather A.*, 13 AD3d 998, 788 NYS2d 215 (3d Dept. 2004).

(2) "Generally, however, the trend has been to prohibit the admission of a business record or a statement within such a record where the declarant is outside the business enterprise because the statement lacks the inherent trustworthiness or indicia of reliability to except it from the general prohibition against admitting an out-of-court statement asserted for the truth of the statement." *Hochhauser v. Electric Ins. Co.*, 46 AD3d 174, 844 NYS2d 374 (2d Dept., 2007). [A contractual duty of an insured per the insurance policy to cooperate with the insurer was not a sufficient basis upon which to admit a statement made to the insurer's investigator by the insured, who was not the

claimant, as the statement was not made under circumstances that create a high probability that the statement was truthful.]

4. However, a qualification is extant where the outsider's (e.g., the one without a business duty to impart the information that has been recorded) statement itself qualifies as an exception to the hearsay rule. See, *Toll v. State of New York*, 32 AD2d 47, 299 NYS2d 589 (3d Dept., 1969).

a. But see, *Allen v. Wells*, 256 AD2d 651, 681 NYS2d 166 (3d Dept., 1998): On trial to modify custody, father subpoenaed mother's entire DSS case file, seeking all "indicated" abuse or neglect reports relative to mother's children by different father. Trial court received "entire file", over objection, "for the limited purpose of showing indicated reports." Appellate Division found no error: "We have held that '[i]n those instances in which the entire case file is admitted, 'fundamental fairness' will not be violated when a [party] has an opportunity to examine the file, either prior to or during the trial' (*Matter of Melanie Ruth JJ.*, 76 AD2d 1008, 1009, 429 NYS2d 773, lv. denied 51 NY2d 710, 435 NYS2d 1026, 417 NE2d 96; see, *Matter of Patrick H.* [Patrick I.], 226 AD2d 921, 922, 640 NYS2d 690). Here, the record reveals that following the recess petitioner failed to offer any further proof; however, she was not denied that opportunity. Further, Family Court limited its review of the case file to the indicated reports contained therein. In our view, petitioner suffered no prejudice. Family Court's determination reflects that the information from the DSS file was only one of several factors considered and that it was supported by ample admissible evidence notwithstanding the DSS file and, therefore, any error committed by Family Court was harmless. (citations omitted).

b. see also, "*Baby Girl*" *Q. v. Jewish Child Care Association of New York*, 14 AD3d 392, 787 NYS2d 328 (1st Dept., 2005]) (holding that there was no error where agency's progress notes were admitted into evidence where the bulk of the highlighted portions of the notes were admissible as business records, and the few inadmissible notes were harmless.).

c. In neglect proceeding, Family Court properly admitted the child's case file into evidence as a business record. *Jonathan R., Mtr. of*, 30 AD3d 426, 817 NYS2d 335 (2d Dept., 2006).

5. Frequently, the independent hearsay exception that applies is the *admission by a party exception*. See, e.g., *Kelly v. Wasserman*, 5 NY2d 425, 185 NYS2d 538 (1959) (admission by a party litigant to a social worker who recorded the statement pursuant to a business duty); see also, *Peo. v. Babala*, 154 AD2d 727, 729, 547 NYS2d 683 (3d Dept., 1989).

## **D. WHO LAYS FOUNDATION FOR BUSINESS RECORD**

1. CPLR 4518(a) is silent as to whom, if anyone, must introduce a business record. Such records are customarily offered through a custodian or employee of the business. *Peo. v. Kennedy*, 68 NY2d 569, 510 NYS2d 853 (1986).

a. Foundation witness must have some familiarity with the practices and procedures of the business whose records are being offered. *Faust v. McPherson*, 4 M3d 89, 783 NYS2d 197 (App. Term, 2004).

b. Court erred in admitting certain EZ–Pass records because “[a] proper foundation for [their] admission ... [was not] provided by someone with personal knowledge of the maker's business practices and procedures” (*Palisades Collection, LLC v. Kedik*, 67 A.D.3d 1329, 1330–1331, 890 N.Y.S.2d 230 [internal quotation marks omitted]; see also *KG2, LLC v. Weller*, 105 AD3d 1414, 1415, 966 N.Y.S.2d 298), and there was no indication that the records were certified to comply with CPLR 4518 pursuant to CPLR 3122–a. *Sheridan v. Sheridan*, 129 AD3d 1567, 1567, 12 NYS3d 434, 436 (4th Dept. 2015)

c. The court left open the possibility that an expert from outside the business might establish the necessary foundation. *Peo. v. Kennedy*, at p. 578; but see, *Dayanim v. Unis*, 171 AD2d 579, 567 NYS2d 673, 674 (1st Dept. 1991) (offering party failed to lay foundation for office records of physician which required testimony by a witness with knowledge of the doctor's business practices and procedures).

d. *Brooke Louise H. v. Lutheran Community Services, Inc.*, 158 AD2d 425, 552 NYS2d 3 (1st Dept. 1990) (proper foundation was laid in adoption proceeding for admission of community service agency's case record as a business record by testimony of caseworker with personal knowledge of business practices of agency.)

2. Computer printout of electrical service records was admissible under business records exception even though the person who caused them to be produced was not the person who had fed the original data in to the computer, and fact that printout was produced in response to subpoena did not deprive records of their character as business records. *Briar Hill Apts Co. v. Teperman*, 165 AD2d 519, 568 NYS2d 50 (1st Dept. 1991).

## **E. RECEIPT OF BUSINESS RECORDS OF OTHERS**

1. General Rule – The recipient of business records of others, even if regularly filed with the recipient's records, do not become admissible via

recipients business records because employees of recipient lacked knowledge of the other organizations record making procedure. *Carothers v. Geico Indem. Col.*, 79 AD3d 864, 914 NYS2d 199 (2d Dept. 2010)

a. cf. *Peo. v. Cratsley*, 86 NY2d 81, 629 NYS2d 992 (1995) - Testimony of mentally retarded complainant's program counselor established requisite foundation for admission of IQ test report prepared by psychologist as "business record," in rape prosecution, as counselor was familiar with report through working with complainant, report was of kind prepared in accordance with program requirements, and report was prepared on behalf of program and state agency.

2. 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, such records are nonetheless admissible if the recipient can establish personal knowledge of the maker's business practices and procedures, or that the records provided by the maker were incorporated into the recipient's own records or routinely relied upon the recipient in its business. *McKinney's CPLR 4518(a). Deutsche Bank Nat. Trust Co. v. Monica*, 131 AD3d 737, 15 NYS.3d 863 (3d Dept. 2015)

#### **F. CERTIFICATION OF BUSINESS RECORDS - CPLR RULE 31221 (CPLR 3120)**

1. Rule 3122-a. Certification of business records. (a) Business records produced pursuant to a subpoena duces tecum under rule 3120 shall be accompanied by a certification, sworn in the form of an affidavit and subscribed by the custodian or other qualified witness charged with responsibility of maintaining the records, stating in substance each of the following:

a. The affiant is the duly authorized custodian or other qualified witness and has authority to make the certification;

b. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies thereof are accurate versions of the documents described in the subpoena duces tecum that are in the possession, custody, or control of the person receiving the subpoena;

c. To the best of the affiant's knowledge, after reasonable inquiry, the records or copies produced represent all the documents described in the subpoena duces tecum, or if they do not represent a complete set of the documents subpoenaed, an explanation of which documents are missing and a reason for their absence;

d. The records or copies produced were made by the personnel or staff of the business, or persons acting under their control, in the regular course of business, at the time of the act, transaction, occurrence or event recorded therein, or within a reasonable time thereafter, and that it was the regular course of business to make such records provided; and

e. A certification made in compliance with subdivision (a) is admissible as to the matters set forth therein and as to such matters shall be presumed true. When more than one person has knowledge of the facts, more than one certification may be made.

2. A party intending to offer at a trial or hearing business records authenticated by certification subscribed pursuant to this rule shall, at least thirty days before the trial or hearing, give notice of such intent and specify the place where such records may be inspected at reasonable times. No later than ten days before the trial or hearing, a party upon whom such notice is served may object to the offer of business records by certification stating the grounds for the objection. Such objection may be asserted in any instance and shall not be subject to imposition of any penalty or sanction. Unless objection is made pursuant to this subdivision, or is made at trial based upon evidence which could not have been discovered by the exercise of due diligence prior to the time for objection otherwise required by this subdivision, business records certified in accordance with this rule shall be deemed to have satisfied the requirements of subdivision (a) of rule 4518. Notwithstanding the issuance of such notice or objection to same, a party may subpoena the custodian to appear and testify and require the production of original business records at the trial or hearing.

3. CPLR 3120 amended to eliminate need for a preliminary motion for the discovery of documents, things and land in the possession of a non-party. Such discovery can be obtained simply by service on the non-party of a subpoena duces tecum, with copies to the other parties. There is no need or requirement to schedule a deposition of the non-party.

#### **G. JUDICIAL NOTICE OF FOUNDATION - ADMISSIBILITY IN ABSENCE OF FOUNDATION**

1. The Appellate Division affirmed the trial court's admission into evidence of bank records of husband's European accounts, *notwithstanding absence of authenticating foundation by employee of bank*. Court held that judicial notice can provide foundation for admitting business records which are "...so patently trustworthy as to be self-authenticating...." Although business records are customarily offered through a custodial or employee of the business

organization that created them who can explain the record-keeping of his organization, judicial notice can provide a foundation for admitting the records of a particular business when the records are so patently trustworthy as to be self-authenticating. Court found that "...the bank records were procured by defendant himself (under compulsion of court order) from the banks which supposedly created them, and thus their authenticity cannot be seriously challenged. They appear regular on their face, and in format conform to the type of statements with which banks customarily supply their customers on a monthly basis for the purpose of advising them of deposits, withdrawals, and balances. No reasons are offered by defendant why these records should not be viewed as reliable and trustworthy, other than that they are technically hearsay and that no witness was called to testify that they were made in the regular course of the bank's business at or about the time of the transactions they describe, but, in the circumstances, we do not consider this reason enough to exclude what appears to be perfectly trustworthy evidence (emphasis supplied)." *Elkaim v. Elkaim*, 176 AD2d 116, 574 NYS2d 2 (1st Dept. 1991).

a. cf. *Peo. v. Ramos*, 13 NY3d 914, 895 NYS.2d 294 (2010) - "The trial court erred when it admitted hearsay evidence without a proper foundation (CPLR 4518[a]). Even assuming some documents may be admitted as business records without foundation testimony (see *People v. Kennedy*, 68 N.Y.2d 569, 577 n. 4, 510 N.Y.S.2d 853, 503 N.E.2d 501), the record at issue in this case was not such a document. Nothing on its face indicates that it "was made in the regular course of business and that it was the regular course of business to make it" (CPLR 4518[a])."

2. "The financial statement [of the plaintiff], introduced through the affidavit of Metro's chief financial officer, is a business record...and so clearly so that it can be deemed self-authenticating." *Niagara Frontier Transit Metro System, Inc. v. County of Erie*, 212 AD2d 1027, 623 NYS2d 33 (4th Dept. 1995).

3. Court properly excluded testimony and letters from the N.J. Division of Youth and Family Services regarding an investigation conducted by the agency, where the agency's representative could not provide a sufficient foundation of trustworthiness and reliability. *D.H. v. Kindercare Learning Ctr., Inc.*, 6 AD3d 220, 774 NYS2d 527 (1<sup>st</sup> Dept. 2011)

## **H. FORM OF RECORDS WHICH QUALIFY**

1. Although the best evidence rule applies to business records, precluding admission of secondary evidence in the absence of a proper foundation (*Stevens v. Kirby*, 86 AD2d 391), if the copies themselves are produced in the regular course of business, they may come in under CPLR

4518(a). *Dependable Lists, Inc. v. Malek*, 98 AD2d 679, 469 NYS2d 754 (1<sup>st</sup> Dept. 1983); see also, *Peo. v. Rosa*, 156 AD2d 733, 734, 549 NYS2d 487 (2d Dept., 1989): "It is well settled that in order to admit a photocopy of a business record into evidence, a witness with personal knowledge of record-keeping procedures must testify that the document sought to be admitted was made in the regular course of business, pursuant to the regular procedures of the business, at or near the time the information was obtained or the act occurred."

2. Business record exception is sufficiently broad to admit *computer printouts*. *Ed Guth Realty, Inc. v. Gingold*, 34 NY2d 440, 358 NYS2d 367 (1974); see also, *Briar Hill Apts Co. v. Teperman*, 568 NYS2d 50 (1st Dept. 1991); *Peo. v. Weinberg*, 183 AD2d 932, 586 NYS2d 132 (2d Dept. 1992) (holding that computer tapes made in regular course of business where data is entered into the computer at the time of each transaction qualified as an admissible business record); *F.K. Gailey Co., Inc. v. Wahl*, 262 AD2d 985, 692 NYS2d 563 (4th Dept. 1999) (holding that computer printouts of outstanding amounts due plaintiff was properly admitted as a business record as the data was stored in the regular course of business); *Federal Express v. Federal Jeans*, 14 AD3d 424, 788 NYS2d 113 (1st Dept. 2005) (holding that computer generated records admissible upon showing that information was entered in regular course of business.).

3. Attorney's unsworn letter that certain documents were "records...maintained in the regular course of business" does not establish CPLR 4518 foundation. *Little v. Livingston Mut. Ins.*, 21 AD3d 1265, 801 NYS2d 460 (4th Dept. 2005).

a. Summary of tax liability was properly admitted into evidence as a business record where it was the duty of plaintiff's accounting department to prepare such documents in the regular course of business and the document was prepared in the regular course of business. *Flour City Architectural Metals Corp. v. John Gallin & Son, Inc.*, 127 AD2d 559, 511 NYS2d 362 (2d Dept. 1987).

b. Summary of business records, made by a witness who was not under a business duty to make such a summary, was inadmissible hearsay. *In re Nicole*, 296 AD2d 608, 746 NYS2d 53 (3d Dept. 2002).

## **I. PERMISSIBLE CONTENT; REDACTION OF OBJECTION CONTENT**

1. *Conclusions of the declarant*, which the declarant would not be permitted to state from the witness stand, should be redacted from the record if

it is to be received. *Baker v. Sportservice Corporation*, 175 AD2d 654, 573 NYS2d 799, 800 (4th Dept. 1991).

2. "The business entry statute lifts the barrier of the hearsay objection; it does not overcome any other exclusionary rule which might properly be invoked. *Toll v. State*, 32 AD2d 47, 50, 299 NYS2d 589 (3d Dept. 1969).

#### **J. SELF-SERVING RECORDS AND RECORDS PREPARED SOLELY FOR LITIGATION**

1. Business records are not disqualified for admission under CPLR 4518 simply because they are self-serving and offered by the party who made them, assuming that they otherwise qualify. Their self-serving nature goes to weight rather than admissibility. *Toll v. State*, 32 AD2d 47, 50, 299 NYS2d 589 (3d Dept. 1969).

2. The Special Referee erred in admitting a spreadsheet into evidence as a business record pursuant to CPLR 4518(a), since the document was prepared by plaintiff's counsel for use at the hearing and was not supported by a proper business record foundation *135 E. 57th St., LLC v. 57th St. Day Spa, LLC*, 126 AD3d 471, 472, 2 NYS3d 789 (1<sup>st</sup> Dept. 2015)

#### **K. WEIGHT ACCORDED BUSINESS RECORDS**

1. Once a foundation has been established under the business record rule, either 4518(a) or 4518(c), the records are admissible and prima facie proof of their contents. The burden of proving them false shifts to the other side. *Restrepo v. State*, 146 Misc.2d 349, 550 NYS2d 536, 540 (Ct. of Claims, 1989, Weisberg, J.), citing to *Mtr. of Quinton A.*, 68 AD2d 394, 417 NYS2d 738 (2d Dept. 1979), revd on other grounds 49 NY2d 328 [wherein the question of weight to be accorded business records concerned hospital records admitted pursuant to CPLR 4518(c) which expressly provides that such documents "are prima facie evidence of the facts contained...", language which is not expressly set forth in CPLR 4518(a)].

2. Relative to those records which are admitted pursuant to CPLR 4518(b) or CPLR 4518(c) [see below], the Court of Appeals has held that the reference to "prima facie evidence" therein refers to "evidence which permits but does not require the trier of fact to find in accordance with the 'presumed' fact, even though no contradictory evidence has been presented. *Peo. v. Mertz*, 68 NY2d 136, 148, 506 NYS2d 290 (1986); see also, *Mtr. of Commissioner of Social Services v Philip DeG*, 59 NY2d 137, 463 NYS2d 761 (1983).

#### **L. HEARSAY EXCEPTION FOR CERTAIN PUBLIC RECORDS**

1. CPLR §4520 - hearsay exception for certain records prepared by public officers

2. Requirements (*Miriam Osborn Memorial Home Ass'n. V. Assessor of the City of Rye*, 9 M3d 1019, 800 NYS2d 909 [S.Ct., Westchester Co., 2005, Dickerson, J.]

- a. The public record must be made by a public officer;
- b. It must be in the form of a "certificate" or "affidavit";
- c. The record must be required or authorized by special provision of law;
- d. It must be made in the course of the officer's official duty;
- e. It must be a record of a fact ascertained or an act performed by the officer; and
- f. It must be on file or deposit in a public office of the state.

3. The common law public documents hearsay exception is broader than CPLR §4520 and has not been superceded by the statute. *Consolidated Midland Corp. V. Columbia Pharmaceutical Corp.*, 42 AD2d 601, 345 NSY2d 105 (2d Dept. 1973).

4. A public document can be admissible without the testimony of the official who made it, but it must be authenticated. *Miriam Osborn Memorial Home Ass'n. V. Assessor of the City of Rye*, *supra*.

5. Authentication of certain public records may be accomplished by certification as provided in CPLR §4518.

## **XVII. MEDICAL RECORDS – HEARSAY**

### **A. STATUTE - CPLR 4518(C)**

1. Hospital records admissible and prima facie evidence of the facts contained therein if bears proper certification or authentication per statute - admissible as certified business records.

2. Father was not permitted to introduce medical reports from his psychiatrist on issue of his ability to return to work. A physician's office records, supported by the statutory foundations of CPLR 4518(a), are admissible as business records. However, medical reports, as opposed to day-to-day business entries of a treating physician, are not admissible as business records where they contain the doctor's opinion or expert proof. Moreover, certification of the records does not cure the defect because only hospital records, not physician office records, are admissible by certification. *Bronstein-Becher v. Becher*, 25 AD3d 796, 809 NYS2d 140 (2d Dept., 2006).

3. A certificate of authentication pursuant to CPLR 4518(c) must state that the documents authenticated were produced in the normal course of business, contemporaneous with the events documented. It is the date of recordation, not

the date of authentication, that is relevant. *Peo. v. Kinne*, 71 NY2d 879, 527 NYS2d 754 (1988).

4. *In Re John QQ*, 19 AD3d 754, 796 NYS2d 432 (3d Dept., 2005):

“The medical records from Columbia Memorial Hospital were improperly admitted. While Family Ct. Act § 1046(a)(iv) permits the admissibility of such records to establish proof of abuse or neglect, they may only be admitted ‘if the judge finds that [they were] made in the regular course of the business of any hospital ... and that it was in the regular course of such business to make [them], at the time of the act, ... or within a reasonable time thereafter.’ Prima facie evidence of this foundational proof can be made by a certification from either the head of the hospital or a responsible employee. However, if the certification is ‘by someone other than the head of the hospital ... [it] shall be accompanied by a photocopy of a delegation of authority signed by both the head of the hospital ... and by such other employee’ (Family Ct. Act § 1046[a][iv] ). Here, the requisite delegation of authority to Story, an employee of the medical records department, was lacking.”

5. Documents prepared for litigation lack the indicia of reliability necessary to invoke the business records exception to the hearsay rule. *Peo. v. Rogers*, 8 AD3d 888, 780 NYS2d 393 (3d Dept. 2004).

#### **B. CAVEAT - ONLY ADMISSIBLE TO EXTENT GERMANE TO DIAGNOSIS AND TREATMENT.**

1. Portions of hospital record, that related to manner of accident and that were not germane to diagnosis and treatment, constituted inadmissible hearsay, in lawsuit to recover for personal injuries. *Cuevas v. Alexander's, Inc.*, 23 AD3d 428, 805 NYS2d 605 (2d Dept. 2005)

a. Portion of hospital record that recited that victim was “kicked, slapped, pulled by her hair and had a knife to her neck” was germane to diagnosis and treatment and thus admissible. *Peo. v. Baltimore*, 301 AD2d 610, 754 NYS2d 650 (2d Dept. 2003).

b. Statements by victim in port of sexual abuse counselor were not admissible as they were not certified pursuant to CPLR and went beyond the realm of what was germane to diagnosis and treatment. *Peo. v. Benedetto*, 294 AD2d 958, 744 NYS2d 92 (4th Dept. 2002).

2. Physicians' office record or hospital records are ordinarily admissible to extent they are germane to diagnosis and treatment, including medical opinions; however, the record is inadmissible where source of information on hospital or doctor's record is unknown. *Ginsberg v. North Shore Hosp.*, 213 AD2d 592, 624 NYS2d 257 (2d Dept. 1995); *Echeverria v. City of N.Y.*, 166 AD2d409, 560 NYS2d 473 (2d Dept. 1990)

3. While victim's statements to medical personnel as to how injuries were received were admissible, her statements concerning the identity of the attacker were inadmissible as not being germane to diagnosis or treatment. *Peo. v. Thomas*, 282 AD2d 888, 738 NYS2d 145 (4<sup>th</sup> Dept. 2002)

4. *People v Ortega [Benston]*, 15 NY3d 610, 917 NYS2d 1 [2010] *Domestic Violence*

a. Medical records' description of case as involving "domestic violence" and reference to "safety plan" for victim were relevant to diagnosis and treatment of victim, and thus admissible under business records exception to hearsay rule in prosecution for assault; domestic violence was part of attending physician's diagnosis, domestic assault differed materially from other types of assault in its effect on victim and in resulting treatment, and developing safety plan for victim, including referral to shelter or dispensing information about domestic violence and necessary social services, was important part of victim's treatment.

### **C. X-RAY & OTHER MEDICAL DIAGNOSTIC IMAGING TESTS - CPLR 4532-A**

1. A graphic, numerical, symbolic, or pictorial representations of medical or diagnostic tests of party is admissible without testimony of the technician who created the evidence if the following information is inscribed on the representation:

- a. Name of the injured party;
- b. Date on which the information was taken;
- c. The identifying number; and
- d. The name and address of the physician under whose supervision the information was taken.
- e. Inscription not necessary if exhibit is part of otherwise admissible hospital records or if physician who took the information testifies

2. Testimony regarding test result

a. A physician cannot testify to a diagnosis based on a test result that has not been received in evidence.

b. A doctor cannot testify based on an X-ray without producing that X-ray and introducing it into evidence. *Hambusch v. NYC Transit Authority*, 63 NY2d 723, 480 NYS2d 195 (1984).

c. Where MRI films not in evidence and there was no indication that they were unavailable, a written MRI report prepared by non-testifying health professional was inadmissible hearsay. *Wagman v. Bradshaw*, 292 AD2d 84, 739 NYS2d 421 (2d Dept. 2002).

3. Physician who did not physically examine the plaintiff could not testify to a diagnosis of plaintiff's back injury based on films that were not in evidence. *Nuzzo v. Castellano*, 254 AD2d 265, 678 NYS2d 118 (2d Dept. 1998).

#### 4. Business duty

a. "Family Court also erred by admitting the psychologist's report into evidence. Two psychologists worked together to create the report, yet only one testified. The testifying psychologist was not the one who interviewed other family members, whose comments were included in the report. Additionally, the report not only included the polygraph examiner's official results, but also his informal opinion as to the father's truthfulness regarding certain topics. Because the report relied on hearsay statements from individuals who had no business obligation to provide information to the psychologist, it was inadmissible as a business record (see *Matter of Shane MM. v Family & Children Servs.*, 280 AD2d 699, 701 [2001])." *Loren B. V. Heather A.*, 13 AD3d 998, 788 NYS2d 215 (3d Dept., 2004).

### **D. OTHER RECORDS**

1. CPLR 4518(a) - Computer Business Records - "An electronic record...used or stored as...a memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record."

a. "The court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record."

b. "All...circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility.

c. No tangible backup (i.e., floppy disk, hard drive) need be submitted with the electronically produced record.

2. CPLR 4518 (c) affords expedited admission of certain business records which are enumerated in CPLR 2306 and CPLR 2307:

3. Books, papers or other things subpoenaed from a library. CPLR 2307(a). Library may comply with a subpoena duces tecum by delivering to the court certified copies of the books, papers or other things.

4. Books, papers or other things subpoenaed from a department or bureau of a municipal corporation or of the state. CPLR 2307(a). Government entity may comply with a subpoena duces tecum by delivering to the court certified copies of the books, papers or other things.

5. Blood genetic marker and DNA tests (CPLR 4518(d) & (e); *Mtr. of Gregory F.W. and Sharon A.W.*, NYLJ, 9/30/94, p.34 col.5, F.Ct., Monroe Co.; *Rosa B. v. Jose C.*, 204 AD2d 795, 611 NYS2d 704 (3d Dept., 1994).

## **XVIII. FAILURE TO CALL WITNESSES OR PRODUCE EVIDENCE - ADVERSE INFERENCES**

### **A. RULE - GENERAL**

1. An unfavorable inference may be drawn when a party fails to produce evidence which is within his or her control and which he or she is naturally expected to produce (*Reichman v. Warehouse One, Inc.*, 173 AD2d 250, 252 [1st Dept., 1991]; *Gruntz v. Deepdate General Hospital*, 163 AD2d 564, 566 [2d Dept., 1990]); See, *Noce v. Kaufman*, 2 NY2d 347, 161 NYS2d 1 [1957] -- "where an adversary withholds evidence in his possession or control that would be likely to support his version of the case, the strongest inference may be drawn against him which the opposing evidence on the record permits."

### **B. PRECONDITIONS**

1. The preconditions for this [missing witness] charge, applicable to both criminal and civil trials, may be set out as follows:

- a. the witness's knowledge is material to the trial;
- b. the witness is expected to give noncumulative testimony;
- c. the witness is under the "control" of the party against whom the charge is sought, so that the witness would be expected to testify in that party's favor; and
- d. the witness is available to that party (*Devito v. Feliciano*, 22 NY3d 159, 165-66, 978 NYS2d 717 (2013))

2. Error to grant missing witness charge where defendants failed to establish that the missing witness was under the plaintiff's control and would have been expected to provide noncumulative testimony on a material issue in dispute. *Buttice v. Dyer*, 1 AD3d 552, 767 NYS2d 784 (2d Dept. 2003)

### **C. POWER TO PRODUCE**

1. The witness must be one within the power of the party to produce and on whom the party would naturally be expected to call (see, *Ausch v. St. Paul Fire & Marine Ins. Co.*, 125 AD2d 43, 511 NYS2d 919 (2d Dept. 1987) -- Relatives are generally considered under the control of a party for the purpose of determining whether unfavorable inference may be drawn against party who fails to produce evidence within his control on which he is naturally expected to produce.

#### **D. EFFECT OF VERBAL EVIDENCE**

1. Failure of a party to produce evidence which would conclusively determine the fact in dispute may give rise to a conclusive inference, i.e., a presumption of law, that the fact is not as he claims it to be or is as claimed by the other side; as where a party fails to produce a chattel or a writing which is in his possession and would, if produced, show the fact indisputably...But in the case of a failure to produce mere oral evidence, the rule necessarily falls short of this, oral evidence is not indisputable and conclusive, but depends on 'slippery memory' and honesty. The rule in respect to failure of a party to produce oral evidence is that such failure is a fact to be considered in determining how much weight, if any, should be given to the evidence which he has produced... (*Reehil v. Fraas*, 129 AD2d 563, 114 NYS2d 17 [2d Dept. 1908])

#### **E. MATERIALITY**

1. The failure of a party to call a witness under his control who is shown to be in a position to give material evidence may result in an inference that the testimony of such a witness would be unfavorable to such a party, and the trial court may so instruct the jury. *Trotta v. Koch*, 110 AD2d 631, 487 NYS2d 371 (2d Dept., 1985)

2. "While an unfavorable inference may ordinarily arise where a doctor has examined the plaintiff and is not called to testify, where, as here, the testimony would not have constituted material evidence, the inference may not be drawn". *Kushner v. Mollin*, 181 AD2d 866, 581 NYS2d 836 (2d Dept., 1992)

3. Dismissal of separation action based on cruel and inhuman treatment - "These incidents of harassment all allegedly took place in the presence (or within earshot) of witnesses, patients or working staff employed by plaintiff. Nevertheless, not a single witness was called by plaintiff to corroborate any of these allegations." *Lind v. Lind*, 89 AD2d 518, 452 NYS2d 204 (1st Dept., 1982)

4. Divorce granted to husband on ground of cruel and inhuman treatment. Court commented on wife's failure to call members of her family as

witnesses to describe a particular occurrence involving disputed assault claims between the wife's family and the husband, militates against her version of the event. *Cataudella v. Cataudella*, 74 AD2d 893, 425 NYS2d 863 (2d Dept., 1980)

#### **F. EXCEPTION – CUMULATIVE TESTIMONY**

1. *Spiegel v. Spiegel*, 68 AD3d 881, 875 NYS2d 488 (2d Dept. 2009) - Support Magistrate properly declined to draw an adverse inference against the mother for her failure to produce her current child care worker to testify, as testimony from that witness would have been cumulative.

2. *Lauro v. City of New York*, 67 AD3d 744, 746, 889 NYS2d 215 [2d Dept 2009] -- “ [W]hen a doctor who examines an injured plaintiff on the defendant's behalf does not testify at trial, an inference generally arises that the testimony of such witness would be unfavorable to the defendant. The defendant may defeat this inference by demonstrating that the testimony would be merely cumulative, the witness was unavailable or not under the defendant's control, or the witness would address matters not in dispute’ ” (*Hanlon v Campisi*, 49 AD3d 603, 604 [2008], quoting *Brooks v Judlau Contr., Inc.*, 39 AD3d 447, 449 [2007], *revd* 11 NY3d 204 [2008]).

3. When a missing witness charge is requested in a civil case, the uncalled witness's testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favoring the party controlling the witness. It may not be considered cumulative simply because it would repeat or be consistent with an opposing party's evidence. *Devito v. Feliciano*, 22 NY3d 159, 161-62, 978 NYS2d 717 (2013)

### **XIX. CLEAR AND CONVINCING EVIDENCE**

**A. DEFINITION** - Clear and convincing evidence is evidence that satisfies the fact-finder that it is highly probable that what is claimed actually happened. (*Peo. v. Mingo*, 49 AD3d 148, 850 NYS2d 151 [2d Dept. 2008])

#### **B. EXAMPLES**

1. To punish a party for civil contempt (*Galones v. Galanos*, 46 AD3d 507, 846 NYS2d 654 [2d Dept. 2007])

2. “[a]dmissibility of tape-recorded conversation requires proof of the accuracy or authenticity of the tape by ‘clear and convincing evidence’ establishing ‘that the offered evidence is genuine and that there has been no

tampering with it (*Peo. v. Ely*, 69 8 NY2d 520, 527 [1986]); *Peo. v. Jackson*, 43 AD3d 488, 841 NYS2d 157 [3d Dept. 2007])

a. Establishing mental illness (*Mtr. of Nichola B.*, 103 AD3d 480, 959 NYS2d 479 [1<sup>st</sup> Dept. 2013])

# **PART 11**

## **EVIDENCE FOUNDATIONS - AUTHENTICATION**

### **I. MEANING OF AUTHENTICATION**

#### **A. GENERAL**

1. The proponent of evidence must prove authenticity as a condition to the admission of evidence by the laying of a proper foundation.

2. Proving authenticity involves proving that the proffered evidence (writing, tape, model, summary, etc.) is what the proponent claims it to be.

3. Laying the proper foundation does not assure admissibility as the document, object or testimony may be barred by means of some other evidentiary rule (e.g., hearsay).

#### **B. STEPS TO INTRODUCE DOCUMENT IN EVIDENCE**

1. Mark the document for identification
2. Proponent hands the document given to the witness
3. Proponent asks the witness to identify the document
4. Proponent lays the proper foundation for the exhibit's introduction
5. Move the admission

### **II. NEW STATUTORY PROVISIONS**

#### **A. CPLR 4540-A: (EFFECTIVE JANUARY 1, 2019)- AUTHENTICATION BY PRODUCTION**

Material produced by a party in response to a demand pursuant to article thirty-one of this chapter for material authored or otherwise created by such party shall be presumed authentic when offered into evidence by an adverse party. Such presumption may be rebutted by a preponderance of evidence proving such material is

not authentic, and shall not preclude any other objection to admissibility.

1. Incorporates the “doctrine of authentication by production”, which recognizes that documents are authenticated when produced by the party against whom they are offered.

2. The new provision covers not only documents in written form but also digital records, as well as photographs and tangible items.

3. The requirement that the material is “authored or otherwise created” by the producing party.

a. This means that a party’s production of material created by a third party as, e.g., an email received by the producing party in the ordinary course of business and kept in its files, would not qualify for the statute’s presumption. Then, common-law rules of authentication would be necessary to establish its authentication.

4. The statute does not apply when the producing party offers into evidence the material the party produced in response to a demand.

#### 5. Rebuttable presumption

a. For example, the parties response to discovery may require that party to produce an unauthentic item, such as a forged document, in the party’s files, and production under these circumstances would not be deemed a concession of authentication.

b. To rebut the presumption, the producing party has to establish the material produced “is not authentic”. This can be done by evidence of forgery, fraud or some other defect in the materials purported authenticity.

### **B. CPLR 4511 (C) – WEB MAPPING**

Every court shall take judicial notice of an image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an internet mapping tool, when requested by a party to the action, subject to a rebuttable presumption that such image, map, location, distance, calculation, or other information fairly and accurately depicts the evidence presented. The presumption established by this subdivision shall be rebutted by credible and reliable evidence that

the image, map, location, distance, calculation, or other information taken from a web mapping service, a global satellite imaging site, or an Internet mapping tool does not fairly and accurately portray that which it is being offered to prove.

1. If there is no objection to the proffer, or if the presumption is not otherwise rebutted, the court is mandated to take judicial notice of the digital evidence, and the evidence is thereby admitted.

### **III. CHAIN OF CUSTODY**

A. A chain of custody is employed when the evidence itself is not patently identifiable or is capable of being replaced or altered (e..g, drugs) (*Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 [1979])

B. Mere identification by one familiar with the object, however, suffices when the evidence is nonfungible, unique and not subject to alteration. (*Peo. v. Taylor*, 206 AD2d 904, 616 NYS2d 116 [4<sup>th</sup> Dept. 1994])

### **IV. BEST EVIDENCE RULE**

A. Under an exception to the best evidence rule, secondary evidence of the contents of an unproduced original may be admitted upon threshold factual findings by the trial court that the proponent of the substitute has sufficiently explained the unavailability of the primary evidence and has not procured its loss or destruction in bad faith. Loss of primary evidence under exception to best evidence rule may be established upon showing of a diligent search in location where the document was last known to have been kept, and through testimony of the person who last had custody of the original; the more important the document to resolution of ultimate issue in the case, stricter becomes the requirement of the evidentiary foundation establishing loss for the admission of secondary evidence. *Amica Mut. Ins. Co. v. Kingston Oil Supply Corp.*, 134 AD3d 750, 21 NYS3d 318 (2d Dept. 2015)

B. When seek to prove the *contents* of a writing, recording or photograph, the original of the writing, recording or photograph is required. (*Schozer v. William Penn Life Ins. Co. of New York*, 84 NY2d 639, 620 NYS2d 797 [1994]; *Flynn v. Manhattan & Bronx Surface Transit Operating Authority*, 61 NY2d 769, 473 NYS2d 154 [1984])

1. Does not apply when seek to prove a fact that has an existence independent of a writing, photograph or recording, despite the fact that a writing, photograph or recording evidencing the fact sought to be proved exists.

2. Example - If a photograph is offered to illustrate the witness' testimony, not attempting to prove the contents of the photograph, the best evidence rule does not apply. If, however, the photograph is offered to prove contents of a particular scene, the rule applies.

a. Example - A party seeking to prove payment of a debt may do so by testimony even though a receipt for payment was given. The payment, not the terms of the receipt, is the fact to be proven.

C. Once a sufficient foundation for admission is presented, secondary evidence is subject to an attack by the opposing party not as to admissibility but to the weight to be given the evidence, with the final determination left to the trier of fact. *Kliamovich v Kliamovich*, 85 AD3d 867, 925 NYS2d 591 (2d Dept. 2011)

D. The proponent of the secondary evidence has a heavy burden of establishing, preliminarily to the court's satisfaction, that it is a reliable and accurate portrayal of the original. *76-82 St. Marks, LLC v. Gluck*, 147 AD3d 1011, 48 NYS3d 210 (2d Dept. 2017)

1. *Ferraioli v. Ferraioli*, 295 AD2d 268, 744 NYS2d 34 (1<sup>st</sup> Dept. 2002):

“An original writing must be placed in evidence when a party seeks to establish the contents of such writing (*Schozer v. William Penn Life Insurance Co. of N.Y.*, 84 N.Y.2d 639, 620 N.Y.S.2d 797, 644 N.E.2d 1353). If a writing is collateral to the issue to be proven, the best evidence rule does not require its production (*Grover v. Morris*, 73 N.Y. 473, 480). By the same token, a document is not subject to the best evidence rule although related to an original writing subject to the best evidence rule if it does not vary the terms of the original (*Kelly v. Crawford*, 5 Wall. 785, 72 U.S. 785, 789, 18 L.Ed. 562; VII Wigmore on Evidence 2104 [Chadbourn Rev. 1978] ). A post-nuptial agreement which provides for specific equitable distribution and which meets certain statutory requirements is valid and enforceable (*Domestic Relations Law* 236[B][3]; *Matisoff v. Dobi*, 90 N.Y.2d 127, 132, 659 N.Y.S.2d 209, 681 N.E.2d 376). Plaintiff's statement of net worth did not vary the terms of the post-nuptial agreement. Defendant had not made any claim that plaintiff had failed to disclose or had concealed income or resources in

connection with the post-nuptial agreement. Indeed, the trial court found plaintiff's statement of net worth only relevant to defendant's affirmative defense of duress. That defense, however, was unrelated to plaintiff's statement of net worth since it was premised on plaintiff's threat to "commence an ugly transatlantic divorce action, forcing defendant to return to New York to litigate unless defendant gave into" plaintiff's demands as incorporated into the post-nuptial agreement. While the terms of the post-nuptial agreement were relevant to this affirmative defense, the appended statement of net worth was incidental and collateral to defendant's claim of duress. The post-nuptial agreement should have been admitted into evidence."

#### **E. MEANING OF "ORIGINAL"**

1. First produced and operative document
2. Duplicate originals (*Sarashon v. Kamaiky*, 193 NY 203, 86 NE 20 (1908) (Where a document is executed in counterpart, each part is regarded as an original))

#### **F. CARBON COPIES**

1. On such multi-copy forms, all duplicates are admissible as originals without the necessity of producing or accounting for the absence of other counterparts. *People v. Kolp*, 49 AD2d 139, 373 NYS2d 681 (3d Dept. 1975)

#### **G. CPLR 4539**

1. Accurate Reproductions in Regular Course of Business - "If any business, institution, or member of a profession or calling, in the regular course of business or activity has made, kept or recorded any writing, entry, print or representation and in the regular course of business has recorded, copied, or reproduced it by any process which accurately reproduces forms a durable medium for reproducing the original, such reproduction, when satisfactorily identified, is as admissible in evidence as the original, whether the original is in existence or not. (See, *Peo. v. May*, 162 AD2d 977, 557 NYS2d 238 [4th Dept. 1990])

#### **H. SECONDARY EVIDENCE**

1. For secondary evidence to be admissible, the proponent must establish that the original writing has been in existence, that it is genuine (if authenticity is questioned), and that a proper excuse exists for its

nonproduction (*Glatter v. Borten*, 233 AD2d 166, 649 NYS2d 677 [1<sup>st</sup> Dept. 1966])I. Reasons for Non-production of Original

1. The original is lost - *Harmon v. Matthews*, 27 NYS2d 656 (S.Ct., 1941) - A reasonable search was exhausted; testimony of last custodian usually required.

a. If loss or destruction was result of fraudulent design, parol evidence not admissible.

b. Loss of the original may be established upon a showing of diligent search in the location where the document was last known to have been kept and through the testimony of the person who last had custody of the original. *Schozer v. William Penn Life Ins. Co.*, 84 NY2d 639, 620 NYS2d 797 (1994)

2. The document is outside the court's jurisdiction and cannot be obtained; or

3. The document is in the possession or control of the adverse party who, upon due notice, has failed to produce it (Serve notice to produce)

a. *Lapidus v. NYC Chapter of NYS Assn. for Retarded Children, Inc.*, 118 AD2d 122, 504 NYS2d 629 (1st Dept. 1986) -- "That plaintiff could not produce the written employment contract upon which he relies is not fatal to his claim. Since the record contains sworn testimony showing the existence of such a document and that it was in the possession of the Association, which was duly served with a notice to produce and has failed to do so, plaintiff may offer secondary evidence establishing its contents".

4. Other bona fides reasons

a. see, *LaRue v. Crandall*, 254 AD2d 633, 679 NYS2d 204 (3d Dept. 1998) - Not error in receiving photocopy of letter from father to mother in evidence where mother testified she had left original at home because she thought copy would suffice and father admitted that he had sent the letter.

b. Where a reasonable excuse is offered for the nonproduction of the original of a separation agreement, a party can rely upon secondary evidence, i.e., a copy of the agreement, to prove the terms of the agreement. (Accepted excuse was that original on file with County Clerk *Story v. Brady*, 114 AD2d 1026, 495 NYS2d 464 (2d Dept. 1986)

c. Use of document which contained figures taken from other documents not produced at trial was violation of best evidence rule, absent explanation for failure to produce original documents. *National States Elec. v. LFO Construction Corp.*, 203 AD2d 49, 609 NYS2d 900 (1st Dept. 1994)

## **J. OVERRIDING POLICY**

1. The more important the document to the final outcome of the case, the stricter the requirement that an evidentiary foundation be established demonstrating the loss. (*Poslock v. Teachers' Ret. Board*, 209 AD2d 87, 624 NYS2d 574 [1st Dept. 1995; *Abildgaard v. Van Den Brulle*, NYLJ, 12/1/14, Civil Ct., NY Co., D'Auguste, J.]

2. Not error for court to apply the best evidence rule to preclude the copy of a letter and file in a malpractice action from being admitted into evidence at trial, since plaintiff failed to meet the strict requirement of proving an evidentiary foundation establishing loss and lack of improper motive for the nonproduction of the originals. *Proner v. Julien & Schlesinger, P.C.*, 214 AD2d 460, 625 NYS2d 207 (1st Dept. 1995)

## **V. AUDIOTAPES**

### **A. STANDARD**

1. *Peo. v. Ely*, 68 NY2d 510, 510 NYS2d 518 (1986) - clear and convincing evidence that the offered evidence is genuine and that there has been no tampering.

a. Absent such proof, the witness's concession that the voice on the tapes is his or hers and that he or she recalls making some of the statements on the tape does not exclude the possibility of alteration and that, therefore, does not sufficiently establish authenticity to make the tapes admissible. *Williams v. Rolf*, 144 AD3d 1409, 42 NYS3d 381 (3d Dept. 2016).

### **B. CHAIN OF CUSTODY NOT REQUIRED**

1. "The inherent difficulty with fungible goods simply is not present when evidence of a conversation is sought to be introduced, for the conversation itself is unique and the participants are available to attest to its accuracy. Thus, a chain of custody is not required for the introduction of tape recordings such as those present here." (*Peo. v. McGee*, 49 NY2d 48, 424 NYS2d 157 [1979])

a. Although not a requirement is an alternate method - requires evidence regarding the making of the tapes and identification of the speakers, and that within reasonable limits those who have handled the tape from the time of its making to the production in court; identify it and testify to its custody and unaltered state. *Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 (1986)

### **C. MEANS OF AUTHENTICATION**

1. *Peo. v. Ely*, 68 NY2d 520, 510 NYS2d 532 - Testimony of participant to a conversation that it is complete and accurate reproduction of the conversation and has not been altered (*Tepper v. Tannenbaum*, 65 AD2d 359, 411 NYS2d 588 [1st Dept. 1978] ).

a. Court erred in admitting tape recording where proponent failed to establish by “clear and convincing proof” that the offered evidence is genuine and that there has been no tampering with it. (*Cross v. Davis*, 269 AD2d 837, 703 NYS2d 789 [4<sup>th</sup> Dept. 2002])

2. *Harry R. v. Esther R.*, 134 M2d 404, 510 NYS2d 792 (Fam. Ct., Bx. Co., 1986) – One does not have to be an expert to use simple tape recorder and where father testified that recording device was operable, he was capable of using it and that recording was authentic, unedited and audible, and he identified speakers, thereby a sufficient foundation having been laid. Testimony of a witness to the conversation or to its recording, such as the machine operator, to the same effect

### **D. GRUCCI CASE**

1. *Grucci v Grucci*, 20 NY3d 893, 957 NYS2d 652 [2012]: The husband was accused of violating an order of protection and was indicted by a grand jury. After being acquitted, he brought an action to recover damages for malicious prosecution arising out of plaintiff's arrest on charges of criminal contempt following his alleged violation of an order of protection directing plaintiff to stay away from defendant. The husband sought, through the testimony of his brother, to play for the jury in audiotape of a telephone conversation in which the wife purportedly made it clear to the brother that after she went to the police, she was not in fact afraid of the husband. Court of Appeals held that it was not reversible error for the trial judge to have excluded from evidence, as inadmissible hearsay, statements made by defendant to a witness during a telephone conversation. Although plaintiff argued that defendant's alleged statements were being offered to prove her state of mind (i.e., malice) rather than for their truth, plaintiff wanted the witness to testify that defendant had told him that she was not afraid of plaintiff and that she had expressed an alternative motive for going to the police in order to show that defendant had lied to the authorities. However, for that tactic to work, plaintiff would have had to ask the jury to believe that defendant's alleged statements to the witness were, in fact, true. While defendant's statements were admissible as admissions of a party-opponent, plaintiff never made that argument to the judge. Additionally, the omission of that testimony was not so

crucial with respect to the issue of whether defendant initiated the prosecution as to require a new trial.

The Court of Appeals noted that the predicate for admission of tape recordings in evidence is clear and convincing proof that the tapes are genuine and that they have not been altered. There was no attempt to offer proof about who recorded the conversation, how it was recorded (e.g., the equipment used) or the chain of custody during the nearly nine years that elapsed between the date of the alleged conversation and the trial. Accordingly, given the facts and circumstances of this case, the judge did not abuse his discretion by requiring more than the witness's representation that the tape was "fair and accurate" to establish a sufficient predicate before playing the tape for the jury.

#### **E. FOUNDATION ELEMENTS**

1. The operator of the equipment was qualified
2. The operator recorded a conversation at a certain time and place.
3. The operator used certain equipment to record the conversation.
4. The equipment was in good working order.
5. The operator used proper procedures to record the conversation.
6. The tape was a good reproduction of the conversation.
7. The operator accounts for the tape's custody between the time of taping the time of trial. (Optional)

#### **F. PARTICIPANT AND EXPERT**

1. Testimony of a participant to a conversation together with proof by an expert that upon analysis of the tapes for splices or alterations, there was neither.

#### **G. AUDIBIITY**

1. If a recording is partly inaudible or intelligible, it is nonetheless admissible unless those portion are so substantial as to render the recording as a whole inadmissible; matter of discretion of trial judge. (*Peo. v. Graham*, 57 AD2d 478, 394 NYS2d 982 [4<sup>th</sup> Dept. 1977]). To be admissible, the tape should be at least sufficiently audible so that independent third parties can listen to it and produce a reasonable transcript. (*Peo. v. Lebow*, 29 NY2d 58, 323 NYS2d 829 [1971]).

2. Insubstantial defects in the overall quality of a recording affect its weight, not its admissibility (*Peo. v. Morgan*, 175 AD2d 930, 573 NYS2d 765 [2d Dept. 1991]).

## **H. SURREPTITIOUS RECORDING**

1. Error to hold that defendant was precluded from using any audio tapes at trial to impeach witnesses on the ground that the defendant secretly recorded conversations he had with the plaintiffs and nonparty witnesses; the tapes are admissible if they are relevant and material and their admission does not violate the rules of evidence. (*Breezy Point Coop. v. Young*, 234 AD2d 409, 651 NYS2d 121 [2d Dept. 1996])

## **VI. PHOTOGRAPHS**

### **A. PURPOSES**

1. An illustration of other testimony; or
2. Substantive evidence of the facts portrayed in the photograph.

### **B. GENERAL FOUNDATION**

1. The photograph is a fair and accurate representation of the place, person, scene or subject portrayed. (*Peo. v. Poblner*, 32 NY2d 356, 354 NYS2d 482 [1973])

2. With respect to photographs, the proper foundation should be established through testimony that the photograph “accurately represent[s] the subject matter depicted”. Rarely is it required that the identity and accuracy of a photograph be proved by the photographer. Rather, since the ultimate object of the authentication requirement is to insure the accuracy of the photograph sought to be admitted into evidence, any person having the requisite knowledge of the facts may verify, or an expert may testify that the photograph has not been altered. *People v. Price*, 29 NY3d 472 (2017)

3. “Short” version - Is this photograph marked as Exhibit “D” a fair and accurate representation of the condition of the bedroom in the marital residence as it existed on April 4, 2009?

### **C. FOUNDATION ELEMENTS**

1. The witness is familiar with the object or scene
2. Any person familiar with the scene or object depicted may verify the photograph. Not necessary to call photographer as witness, so long as someone can testify that the photograph accurately shows what it purports to

show. (*Peo. v. Byrnes*, 33 NY2d 343, 362 NYS2d 913 [1974]; *Kowalski v. Loblaws, Inc.*, 61 AD2d 340, 402 NYS2d 681 [1st Dept. 1978])

3. The witness explains the basis for his or her familiarity with the object or scene

4. The witness recognizes the object or scene in the photograph

5. The photograph is a “fair, “accurate”, “true” or “good” depiction of the object or scene at the relevant time.

D. On motion for summary judgment, triable issue of fact not raised by photographs offered by plaintiff where there was no evidence as to when they were taken or whether conditions reflected in the photographs were substantially the same as those existing on the date of occurrence. (*LaBella v. Willis Seafood*, 296 AD2d 382, 744 NYS2d 504 [2d Dept. 2002])

#### **E. BUSINESS RECORD RULE APPLIED TO PHOTOGRAPHS**

1. In *Corsi v. Town of Bedford*, 58 AD3d 225, 868 NYS2d 258 [2d Dep’t 2008], involving an adverse possession claim, photographs taken by the County were properly admitted into evidence under the business records exception to the hearsay rule (see CPLR 4518[a]). The aerial photographs in issue were made as part of a series of such photographs taken on a regular basis pursuant to a contractual duty, and the “routineness” of the photographs which tends to guarantee truthfulness because of the absence of motivation to falsify was satisfied. (Compare, *Hochhauser v. Electric Ins. Co.*, 46 AD2d 174 (2d Dept. 2007), holding that the contractual duty of an insured (not a claimant) to cooperate, as required by the terms of the insurance policy, was insufficient to permit the insured’s statement into evidence as a business record exception as there was lacking inherent trustworthiness or indicia of reliability.

#### **F. CIRCUMSTANTIAL EVIDENCE TO AUTHENTICATE PHOTOGRAPH**

1. An alternative method involves circumstantial evidence to provide authentication for the admission of a photograph. For example, testimony that the photograph was found with the defendant’s property and that it portrayed individuals known to the arresting officer. (*Peo. v. Dawkins*, 240 AD2d 962 [3d Dept. 1977]; see Martin, “Authenticating Photographs”, NYLJ, 2/13/09, p.3 col.1)

## **VII. VIDEOTAPES**

### **A. GENERAL USE**

1. Day-in-life films
2. Standard of Living
3. Surveillance films

B. *Tran v. New Rochelle Hosp. Med. Ctr.*, 99 NY2d 383, 756 NYS2d 509 (2003) – Plaintiff is entitled to surveillance videos prior to giving a deposition.

### **C. RELEVANCY**

1. *In re Chase*, 264 AD2d 330, 694 NYS2d 363 (1<sup>st</sup> Dept. 1999) – In guardianship proceeding, video taped by a professional production crew that was interviewing Mr. Chase, a Holocaust survivor, for the Steven Spielberg project documenting the Holocaust, where Mr. Chase states that he gave his property to his children, was relevant as the evidence would have substantiated Ms. Chase's testimony that, far from being motivated by a conflict of interest, her actions were consistent with her father's wishes for the management of his finances.

### **D. FOUNDATION**

1. Testimony from the videographer that he took the video, that it correctly reflects what he saw, and that it has not been altered or edited is normally sufficient to authenticate a videotape. When the videographer is not called, testimony, expert or otherwise, may also establish that the videotape truly and accurately represents that was before the camera. 2. *Zegarelli v. Hughes*, 3 NY3d 64, 781 NYS2d 488 (2004)

3. The proponent of videotape evidence "must show that the tape is a true, authentic and accurate representation of the event taped without any distortion or deletion. (*Peo. v. Curcio*, 169 M2d 276, 645 NYS2d 750 [S.Ct., St. Lawrence Co., 1996])

4. A videotape may be authenticated by the testimony of a witness to the recorded events or of an operator or installer or maintain or of the equipment that the videotape accurately represents the subject matter depicted. Testimony, expert or otherwise, may also establish that a videotape truly and accurately represents what was before the camera. Evidence establishing the chain of custody of the videotape may additionally buttress its authenticity and integrity, and even allow for acceptable inferences of reasonable accuracy and freedom from tampering. (*Read v. Ellenville*, 20 AD3d 408, 799 NYS2d 78 [2d Dept. 2005])

## **E. LOST VIDEOTAPE**

1. Best evidence rule precludes a witness from testifying to an altercation he observed on a surveillance videotape in the absence of the tape. (*Peo. v. Jimenez*, 8 M3d 803, 796 NYS2d 232 [S.Ct., Bronx Co., Cirigliano, J., 2005]); cf. *Schozer v. Wm. Penn Life Ins.*, 84 NY2d 639, 620 NYS2d 797 (1994) - Lost x-ray

## **VIII. VOICE IDENTIFICATION - GENERALLY**

### **A. APPLICABLE WHETHER HEARD FIRSTHAND OR THROUGH RECORDING**

1. A person's voice can be identified by a witness having some familiarity with the voice, and the familiarity can be acquired either before or after hearing the voice to be identified.

2. Applicable whether heard firsthand or through recording.

B. Error to preclude plaintiff from testifying about two telephone conversations because plaintiff could not recognize the speaker's voice, as the identity of a party to a telephone conversation may be proven by circumstantial evidence. (*Vinciguerra v. Otis Elevator Co., Inc.*, 254 AD2d 350, 678 NYS2d 670 [2d Dept. 1998])

## **IX. ORAL STATEMENTS - TELEPHONE CALLS**

**A. TELEPHONE DIRECTORY DOCTRINE** - *Peo. v. Lynes*, 49 NY2d 286, 425 NYS2d 295 (1980) - Examples where witness unfamiliar with voice:

1. Placing of a call to a number listed in a directory or other similar responsible index of subscribers,

2. Unforced acknowledgment by the one answering that he or she is the one listed;

3. Some corroborating evidence

4. Substance of conversation furnishes confirmation of caller's identity, as, e.g., when subsequent events indicate that the party whose identity is sought to be established had to have been a conversant in the telephone conversation;

5. When the caller makes reference to facts of which he alone is likely to have knowledge.

## **B. AUTHENTICATION OF RECORDING OF TELEPHONE CONVERSATION**

1. “We also discern no error in County Court's admission of the recordings of the CI's telephone calls to defendant to arrange the drug buys. Detective Brian Robertson testified that the two controlled telephone calls were made in his presence. While Robertson only heard the CI's end of the conversations, he played the tapes back in order to hear the conversations in their entirety. After the original recordings on mini cassette were copied onto audiocassettes by OCTF, Robertson reviewed the audiocassettes and testified that they matched the recordings of the conversations taken on February 11, 2005. Such testimony provided a sufficient foundation for the admission of the recordings (see *People v Ely*, 68 NY2d 520, 527-528 [1986]; *People v McGee*, 49 NY2d 48, 60 [1979]; *People v Tillman*, 57 AD3d 1021, 1024 [2008]; *United States v McIntosh*, 547 F2d 1048 [1977], cert denied 430 US 919 [1977]; *United States v McMillan*, 508 F2d 101, 104-105 [1974], cert denied 421 US 916 [1975]; *Chavira Gonzales v United States*, 314 F2d 750, 752 [1963]). Moreover, the admission of the audiocassettes did not violate the best evidence rule (see *Schozer v William Penn Life Ins. Co. of N.Y.*, 84 NY2d 639, 643 [1994]; *People v Hughes*, 124 AD2d 344, 346 [1986], lv denied 69 NY2d 828 [1987]).” *People v. Lee*, 66 AD3d 1116, 1120, 887 NYS2d 302 [3d Dept. 2009]

## **X. HANDWRITING**

### **A. FOUNDATION - WITNESS FAMILIAR WITH HANDWRITING**

1. Lay witness can identify handwriting with which he is familiar either by seeing the party write, writings acknowledged by the party to be written by him or receiving correspondence from the party in response to his own communication addressed to him (*Gross v. Sormani*, 50 AD2d 531, 189 NYS2d 522 [3d Dept. 1959]; *Peo. v. Corey*, 148 NY 476)

2. Must be based upon familiarity *not* acquired for purposes of litigation (*Peo. v. Molineux*, 168 NY 264, 326: “writings created post litem motam are inadmissible against a party creating them”).

a. Exemplars created after a controversy has arisen for purposes of litigation are inadmissible as they are “created at a time when defendant had a motive to disguise his handwriting. (*Nelson v. Brady*, 268 AD 226, 50 NYS 582 [1<sup>st</sup> Dept. 1944]; *Peo. v. Perry*, NYLJ, 10/27/00)

b. Testimony is barred based on familiarity gained for purposes of litigation. *Hynes v. McDermott*, 82 NY 41, 52-54 (1880)

3. Foundation Elements
  - a. The witness recognized the author's handwriting on the document.
  - b. The witness is familiar with the author's handwriting style.
  - c. The witness has a sufficient basis for familiarity.

## **B. FOUNDATION - TRIER OF FACT DETERMINATION**

1. A genuine specimen (exemplar) placed into evidence and expert or trier of fact compares the document in issue to the exemplar. A trier of fact can make his or her own comparison of handwriting samples in the absence of expert testimony on the subject, *Roman v. Goord*, 272 AD2d 695, 708 NYS2d 904 [3d Dept. 2000]; *Johnson v. Coombe*, 271 AD2d 780, 707 NYS2d 251 [3d Dept. 2000]

2. *American Linen Supply Co. V. M.W.S. Enterprises, Inc.*, 6 AD3d 1079, 776 NYS2d 387 (4<sup>th</sup> Dept. 2004) - Handwriting exemplars of the president of a corporation were relevant and should have been admitted for purpose of comparison to his purported signature on a particular contract since his signing of a 1994 contract was an issue.

3. Hearing Officer conducted his own handwriting analysis after examining the documentation reviewed during the investigation, and we note that he was entitled to make his own comparison without expert testimony. *Christian v. Venettozzi*, 114 AD3d 975, 979 NYS.2d 863 (3d Dept. 2014)

## **C. FOUNDATION - EXPERT TESTIMONY**

1. Expert testimony - comparison of disputed handwriting and exemplars
2. CPLR §4536: "Comparison of a disputed writing with any writing proved to the satisfaction of the court to be the handwriting of the person claimed to have made the disputed writing shall be permitted."

## **D. FOUNDATION ELEMENTS**

1. The proponent authenticates the exemplars.
2. The witness qualified as an expert the document examiner.
3. The witness compares the exemplars and the document in question.
4. Based on the comparison, the witness concludes that the same person who wrote the exemplars wrote the document in question.
5. The witness specifies the basis for his or her opinion, i.e., the similarities between the exemplars and the questioned document.

## **XI. REPLY LETTER DOCTRINE**

### **A. BASED ON ASSUMPTION OF RELIABILITY OF MAIL SERVICE**

1. Reply letters from a corporation, received by due course of mail, purporting to answer prior letters to it, require no authentication. *Todd Protectograph Co. v. Wells Fargo & Co. Express*, 111 M 262, 181 NYS 128 (Sup. Ct., Monroe Co., 1920); see also, *Thayer v. Schley*, 137 AD 166, 121 NYS 1064 (1<sup>st</sup> Dept. 1910)

### **B. FOUNDATION ELEMENTS**

1. The witness prepared the first letter.
2. The witness placed the letter in an envelope, addressed to the author (of the second letter), and properly stamped and mailed the envelope.
3. The witness thereafter received a letter, arriving in the due course of mail.
4. The second letter referred to the first letter or was responsive to it.
5. The second letter bore the name of the author.
6. The witness recognizes the exhibit as the second letter.
7. The witness specifies the basis on which he recognizes the exhibit.

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# PART III

## *ELECTRONIC EVIDENCE*

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### **I. Authentication of ESI - General**

A. *People v. Johnson*, 51 M3d 450, 28 NYS3d 783 (Co. Ct., Sullivan Co., 12/31/15, Labuda, J.)

1. “However, although circumstantial evidence of authenticity may, in some cases, be sufficient to provide an adequate foundation upon which digital evidence may be admitted, circumstantial evidence is an insufficient foundation for admissibility where there is no evidence establishing the security of a website from which purported information has been accessed or that a purported author had exclusive access thereto. *Commonwealth v. Williams*, 456 Mass. 857, 869 [2010]. Indeed, “courts have recognized that authentication of ESI may require greater scrutiny than that required for the authentication of hard copy’ documents ...” (*Lorraine, supra*, 241 F.R.D. at 542–543), and that decisions as to the admissibility of such items “are to be evaluated on a case-by case basis as any other document to determine whether or not there has been an adequate foundational showing of their relevance and authenticity” (*Lorraine, id.*, 241 F.R.D. at 543, quoting *In the Interest of F.P.*, 878 A.2d 91, 96 [Sup.Ct. PA 2005] ). “Indeed, courts increasingly are demanding that proponents of evidence obtained from electronically stored information pay more attention to the foundational requirements than has been customary for introducing evidence not produced from electronic sources.” *Lorraine, supra*, 241 F.R.D. at 543.

### **B. SOME METHODS OF AUTHENTICATION**

1. Authentication by Personal Knowledge
2. Authentication by Comparison to Known Authentic Samples
3. Authentication by Circumstantial Evidence Coupled with Distinctive Characteristics
4. Public Record or Reports as Authentication
5. Self-Authentication

## **II. The “Bible” - Lorraine V. Markel Amer. Ins. Co., 241 F.R.D. 534 [D. Md. 2007]**

**A. LORRAINE** - US Magistrate Judge Paul Grimm - seminal opinion regarding admission of ESI

### **B. 5 EVIDENTIARY HURDLES FOR ESI**

1. Relevancy - is the ESI relevant as determined by FRE Rule 401 (Does it have any tendency to make some fact that is of consequence to litigation more or less probable than it otherwise would be?);

2. Authentication - if relevant, is it authentic as required by Rule 901 (a), i.e., can the proponent show that the ESI is what it purports to be?;

3. Hearsay - if ESI is offered for its substantive truth, is it hearsay and if so, is it covered by any applicable exception?;

4. Best Evidence Rule - is a form of ESI being offered an original or duplicate under the original writing rule, or if not, is there admissible secondary evidence to prove the content of ESI?; and

5. Prejudice - is the probative value of the ESI substantially outweighed by the danger of unfair prejudice or should otherwise be excluded under Rule 403?.

## **III. EVIDENTIARY HURDLE - RELEVANCE**

A. Does the ESI have a tendency to prove or disprove a fact that is of consequence to the trial?

B. FRE 401 – low threshold – cf. with issue of weight and credibility [FRE 104(e)] - requirement to show that social media evidence has the “tendency to make the existence of a fact... more probable or less probable than it would be without the evidence.”

## **IV. EVIDENTIARY HURDLE - AUTHENTICATION**

### **A. GENERALLY**

1. Most significant issue for ESI
2. Non-testimonial evidence- writings, photographs, recordings – must be authenticated, i.e, the evidence is what it is purported to be. (FRE 901(a))
3. FRE 901(b) identifies ten nonexclusive examples of how authentication can be accomplished.
4. Electronically stored information "may require greater scrutiny than that required for the authentication of 'hard copy' documents." (*Lorraine v. Markel Am. Ins. Co.*, 241 F.R.D. 534, 542-43 (D. Md. 2007))

## **B. PERSON WITH KNOWLEDGE**

1. Rule 901 (b) (1) allows for authentication through testimony from a witness with knowledge that the matter is what it is claimed to be. Generally the person who created the evidence can testify to authentication. Alternatively testimony may be provided by a witness who has personal knowledge of how the social media information is typically generated. Then, the witness must provide "factual specificity about the process by which the electronically stored information is created, acquired, maintained, and preserved without alteration or change, or the process by which it is produced if the result of a system or process that does so." (*Lorraine v. Markel Am. Ins.*, 241 F.R.D. 534, 555-56 [D. Md., 2007])

2. Where Plaintiff, at a deposition, was confronted with 13 pages of printouts allegedly from his Facebook account and denied that they were from his account, and then sought to depose the individual who obtained the printouts, Defendant precluded from offering the printouts at trial unless he produced such person for a deposition, as Plaintiff would be left with no other means to prove or disprove the authenticity. *Lantigua v. Goldstein*, 149 AD3d 1057, 53 NYS3d 163 (2d Dept. 2017)

3. E-mails properly admitted where plaintiff testified that the e-mails were a compilation of the many he had received as a result of defendant's directions on their web sites; that he had received them and printed them out on his office computer; and that they are true and accurate copies of what he had received and printed. *Robmom v. Weberman*, 2002 WL 1461890 (S.Ct., Kings Co., 2002, Jones, J.)

4. *U.S. v. Gagliardi*, 506 F3d 140, 151 (2d Cir. 2007) (chat room logs properly authenticated as having been sent by the defendant through testimony from witnesses who had participated in the online conversations.)

## **V. AUTHENTICATION BY DISTINCTIVE CHARACTERISTICS**

A. A document may be authenticated by "[a]pppearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances." Fed.R.Evid. 901(b)(4); *United States v. Smith*, 918 F.2d 1501, 1510 (11th Cir.1990) ("[t]he government may authenticate a document solely through the use of circumstantial evidence, including the document's own distinctive characteristics and the circumstances surrounding its discovery".) See also, *Peo. v. Moyer*, 51 M3d 1216(A), 38 NYS3d 832 (S.Ct., Qns. Co., 2106)

B. E-mails properly authenticated when they included defendant's e-mail address, the reply function automatically dialed defendant's e-mail address as sender, messages contained factual details known to defendant, messages included defendant's nickname, and other metadata. *U.S. v. Siddiqui*, 235 F3d 1318, 1322-23 (11th Cir. 2000) Emails authenticated by distinctive characteristics including e-mail addresses, the defendant's name, and the contents which contain discussions relating to defendant's work. *U.S. v. Safavian*, 435 FSupp.2d 36 (D.D.C. 2006)

### **C. GRIFFIN & TIENDA CASES**

1. *Griffin v. Maryland*, 19 A.3d. 415 (Md. 2011) - In a murder trial, the prosecution's attempt to introduce printouts from a MySpace page to impeach a defense witness, was unsuccessful as the witnesses picture, birth date, and location were not sufficiently distinctive characteristics on a MySpace profile page to authenticate the printout. The trial court had given "short shrift" to concerns that someone other than the punitive author could have accessed the account and failed to acknowledge the possibility of a likelihood that another user could have created the profile in issue.

a. In *Griffin*, The court suggested three (3) types of evidence to satisfy the authenticity requirement: (1) Ask the purported creator if he or she created the profile and added the post in question; (2) A search of the computer of the person who allegedly created the profile, examining the hard drive and internal history to determine if it was that person who originated the profile; or (3) Obtain information directly from the social networking website itself to establish who created and posted the relevant information to the profile.

2. *Tienda v. State*, 2010 Tex. App. Lexis 10031 (2010) - MySpace evidence admitted, the court noting that (1) the evidence was registered to a person with the defendant's *nickname and legal name*; (2) the photographs on the profiles were clearly of the defendant; the profiles referenced the victim's murder and the defendant being arrested and placed on electronic monitoring.

The court noted that "this type of individualization is significant in authenticating a particular profile, page as having been created by the person depicted in it. The more particular would individualize the information, the greater the support for a reasonable juror's finding that the person depicted supplied the information.

3. Taken together, *Griffen* and *Tienda* show that if the characteristics of the communication proffered as evidence are genuinely distinctive, courts are likely to allow circumstantial authentication based upon content and context. Contrariwise, if the characteristics are general, courts may require additional corroborating evidence.

## **VI. AUTHENTICATION - EMAILS**

### **A. GENERAL PROPOSITION**

1. Anyone with personal knowledge of an electronic mail message, including the sender and recipient, can authenticate

2. Policy - *U.S. v. Safavian*, 644 F.Supp.2d 1 (1009) - "As appellant correctly points out, anybody with the right password can gain access to another's e-mail account and send a message ostensibly from that person. However, the same uncertainties exist with traditional written documents. A signature can be forged; a letter can be typed on another's typewriter; distinct letterhead stationery can be copied or stolen.... We see no justification for constructing unique rules of admissibility of electronic communications such as instant messages; they are to be evaluated on a case-by-case basis as any other document to determine whether or not there is then an adequate foundational showing of their relevance and authenticity."

### **B. AUTHENTICATION BY HEADER**

1. Often the headers on any email which include electronic address of the sender are enough to authenticate

2. *U.S. v. Safavian*, 644 F.Supp.2d 1 (2009) – Court authenticated any e-mail based on the header.

## **VII. AUTHENTICATION BY E-MAIL THREAD**

A. Authentication can also be established via an e-mail thread. For example, if e-mail was a reply to someone, the digital conversation could serve as the basis of authentication (*U.S. v. Siddiqui*, 235 F3d 1318 (11<sup>th</sup> Cir. 2000)).

### **Sample Q&A**

**Q. Would you please identify Defendant's exhibit D.**

**A: It is a copy of an e-mail I sent to my employer.**

**Q: When did you send this e-mail?**

**A: September 9, 2012.**

**Q: Under what circumstances did you send this e-mail?**

**A: I was replying to an e-mail my employer sent me earlier in the day.**

**Q: Do you recognize your employees e-mail address?**

**A: Yes**

**Q: What is his e-mail address?**

**A: [Workhard@gmail.com](mailto:Workhard@gmail.com)**

**Q: On the e-mails header does it reflect where this email was sent?**

**A: Yes.**

**Q: Where was it sent?**

**A: [Workhard@gmail.com](mailto:Workhard@gmail.com)**

## **VIII. AUTHENTICATION BY COMPARISON**

**A. FRE 901(B)(3)** - permits authentication by comparison, i.e., a court can authenticate an e-mail by comparing it to the emails previously admitted. (For instance, the jury could compare an email with other emails that have already been produced and authenticated. Email A, which bears the same address as previously-authenticated Email B, can be compared with Email B and authenticated under this rule. (*U.S. v. Safavian*, 435 F.Supp.2d 36 [D.D.C. 2006]))

1. The proponent can then ask the court to take judicial notice of the earlier admitted e-mails.

## **IX. AUTHENTICATION BY DISCOVERY PRODUCTION**

A. The fact that a party opponent produced e-mails during discovery can serve as a basis for authentication of the subject e-mails.

B. The production in response to a request for production is inherently an admission of the authenticity of the documents produced. (*John Paul Mitchell Sys. V. Quality Kind Distribs., Inc.*, 106 F.Supp.2d 462 [S.D.N.Y. 2000])

C. Tip - reason to inventory all documents received during discovery. Specifically, Bates stamp everything received and send a confirmatory letter of what was produced if the producing party did not provide a detailed inventory of the records.

## **X. AUTHENTICATION BY TESTIMONY OF SENDER**

### **A. STEPS**

1. The electronic address placed on the e-mail is that of the claimed recipient.
2. The purpose of the communication (why it was sent)
3. If applicable, establish that the sender receives an earlier e-mail and replied to the earlier e-mail.
4. Establish that the e-mail was actually sent
5. Establish that the recipient acknowledged receipt or took action consistent with an acknowledgment of receipt.

### ***SAMPLE QUESTIONS – TESTIMONY OF SENDER***

**Q: Tell the Court what this document is.**

**A: It is an e-mail I sent my friend Larry.**

**Q: Do you know Larry's e-mail address?**

**A: Yes**

**Q: What is his email address?**

**A. LarrytheGreat@optonline.net**

**Q: Did you send the email to that address?**

**A: Yes.**

**Q: For what purpose did you send the email?**

**A: I wanted to confirm our dinner plans for that evening.**

**Q: Did Larry ever acknowledge the email you sent?**

**A: Yes, he called me an hour after I sent the email to discuss our dinner plans.**

## **XI. AUTHENTICATION BY TESTIMONY OF THE RECIPIENT**

### **A. STEPS**

1. Acknowledge receipt of e-mail.
2. Establish the electronic address of the sender as being the address indicated on the face of the e-mail.
3. Compare earlier e-mails received by the sender.
4. Identify any logos or other identifying information on the e-mail.
5. Establish whether the e-mail received was a reply to one sent earlier by the recipient.
6. Establish any conversations with the sender concerning the communication.
7. Establish any actions taken by the sender consistent with the communication.

### ***SAMPLE QUESTIONS – TESTIMONY OF RECIPIENT***

**Q: Please identify this document.**

**A: It is an e-mail I received from my attorney.**

**Q: What is the e-mail address of the sender?**

**A: Dewey@dch.com**

**Q: Do you recognize any identifying marks on the e-mail?**

**A: Yes, I recognize the logo of the firm where my attorney works and his phone number is on the e-mail.**

**Q: When did you receive this e-mail?**

**A: October 5, 2012.**

**Q: Had you sent your attorney any e-mails earlier in the day on October 5, 2012?**

**A: Yes, and this was a reply to an e-mail I sent that morning.**

**Q: Why did you send your attorney any mail in the morning?**

**A: I was attempting to set up an appointment with him regarding the issue of visitation with my children.**

**Q: Did you have a conversation with your attorney after you received this e-mail?**

**A: Yes, I had a phone conversation with him about 10 minutes after I received the e-mail.**

**Q: What was the topic of the telephone conversation?**

**A: It concerned the issue of visitation with my children.**

## **XII. CLAIM OF ALTERATION**

A. The party opposing the admission of an e-mail may claim it was altered or forged. Absent specific evidence showing alteration, however, the court will not exclude an e-mail merely because of the possibility of an alteration.

B. *U.S. v. Safavian*, 644 F.Supp.2d 1 (1009) - "The possibility of alteration does not and cannot be the basis for excluding e-mails as unidentified or unauthenticated as a matter of course, any more than it can be the rationale for excluding paper documents (and copies of those documents).

## **XIII. REPLY LETTER (E-MAIL) DOCTRINE**

A. If a person sends a letter to another person, and after receiving at the recipient replies, the reply letter provides some evidence of authentication of the initial letter. Under this doctrine, as applied to e-mails, the proponent must show that the author prepared the e-mail, the recipient received it, and the recipient replied to the first e-mail and in the contents of the body referred to the first e-mail. Additionally, the testimony should show that the reply bore the office signature, the sender recognized the exhibit as a second or reply e-mail and the basis on which he recognizes the exhibit

## **XIV. AUTHENTICATION BY CONTENT**

A. A proponent of an e-mail may authenticate the e-mail by showing that only the purported author was likely to know the information reflected in the message.

B. Examples:

1. The substantive content of the message might be information only known to the purported sender;

2. If the recipient used a reply feature to respond, the new message will include the sender's original message. If the sender dispatched that message to only one person, its inclusion in the new message indicates that the new message originated with the original recipient

3. After receipt of the e-mail message, the purported recipient takes action consistent with the content of the message. For example, delivery of the merchandise mentioned in the message. Such conduct can provide circumstantial authentication of the source of the message.

## **XV. AUTHENTICATION - TEXT MESSAGES & IM'S**

### **A. TESTIMONY OF PARTICIPANT**

1. The testimony of a “witness with knowledge that a matter is what it is claimed to be is sufficient” to satisfy the standard for authentication (*Gagliardi*, 506 F3d at 151). Here, there is no dispute that the victim, who received these messages on her phone and who compiled them into a single document, had first-hand knowledge of their contents and was an appropriate witness to authenticate the compilation. Moreover, the victim's testimony was corroborated by a detective who had seen the messages on the victim's phone. *People v. Agudelo*, 96 AD3d 611, 947 NYS2d 96 (1<sup>st</sup> Dept. 2012) leave to appeal denied, 20 NY3d 1095 (2013)

2. A recorded conversation, such as a printed copy of the content of a set of cell phone instant messages, may be authenticated for admission through, among other methods, the testimony of a participant in the conversation that it is a complete and accurate reproduction of the conversation and has not been altered. *In re Colby II*, 145 AD2d 1271, 43 NYS3d 587 (3d Dept. 2016)

a. In neglect trial against mother, sufficient foundation was laid for the authentication, for proper admission of two text messages taken from the mother’s cell phone involving a conversation between the mother and an unknown individual wherein the mother agreed to engage in sex for money; father testified that screen shot of text messages was accurate representation of how text messages appeared on the mother’s phone, and further testified to several identifying factors indicating that the phone belong to the mother and the messages were sent by her, and there were distinctive characteristics of the messages indicating that they were authored by the mother. *Matter of R.D.*, 56 Misc3d 780, 67 NYS3d 86 (Family Court, NY Co., 2017, Goldstein, J.)

3. Each individual text message in a chain requires a separate foundation and basis for admissibility. See, *Peo. V. Rodriguez*, 149 AD3d 464, 50 NYS3d 385 (1<sup>st</sup> Dept. 2017); *Peo. v. Dixon*, 144 AD3d 701, 40 NYS3d 184 (2d Dept. 2016)

### **B. AUTHENTICATION BY TESTIMONY OF SENDER - STEPS**

1. The context of a message – why was sent, its purpose, etc.
2. Establish that the number it was sent to was that of the recipient.
3. Identify a photograph of the actual text that was sent.
4. Describe the process of taking the photograph – who took it, what camera was used, was it an accurate reproduction of the actual text, etc.

5. Identify and offer transcript of the actual text including how the transcript was made – based on the actual text, reviewed by the sender, verified to be an accurate reflection of the actual text.

6. Establish if there was any responsive text received or any verbal acknowledgment by the recipient in relation to the text sent.

### ***SAMPLE QUESTIONS – TESTIMONY OF SENDER***

**Q: Identify the document.**

**A: That is a picture of the text message I forwarded to my employer.**

**Q: What number was the text sent to?**

**A: 123–456–7891**

**Q: Whose numbers that?**

**A: My employer's number.**

**Q: When did you send this text?**

**A: January 10, 2013.**

**Q: What was the purpose of sending the text to your employer?**

**A: I wanted to update her on a sale I had just made.**

**Q: How did you capture the image contained in this exhibit?**

**A: My brother took a picture of my message on his phone and printed it out for me.**

**Q: Does that picture accurately reflect how the text looked when you sent it?**

**A: Yes.**

### **C. AUTHENTICATION BY TESTIMONY OF RECIPIENT – STEPS**

1. Have the witness acknowledge recognition of the number, digital signature or name of the person from whom they received a message.

2. Establish the basis of the witness's knowledge of the sender's number (e.g., history of text messages with that person)

3. The context of the text communication (reply to earlier text or establish the topic that was the subject of the text)

4. If a photograph was used, establish who took the photo, what camera used, that it was an accurate reproduction of the actual text, etc.

5. Identify and offer transcript of the actual text including how the transcript was made – based on the actual text, reviewed by the sender, verified to be accurate reflection of the actual text.

### ***SAMPLE QUESTIONS – TESTIMONY OF RECIPIENT***

**Q: Would you please identify this document?**

**A: It is a transcript from a text exchange between me and my wife.**

**Q: What is a text exchange?**

**A: It's a series of text messages we sent each other as part of an argument we were having.**

**Q: When was the exchange?**

**A: During the evening of April 30.**

**Q: What was the subject of the argument you were having?**

**A: My wife was mad because my girlfriend called her and yelled at her.**

**Q: Did you ever speak to your wife directly about this matter on that date?**

**A: Yes, later in the evening I went home and we further argued about this matter.**

**Q: Tell us how you prepared this transcript?**

**A: I typed the various e-mails in chronological order as they exactly appeared on my phone.**

**Q: Is the transcript that's been marked as Defendant's Exhibit "F" identical to the actual text messages sent on April 30?**

**A: Yes.**

**Q: Did you alter or modify in any way the text messages that appear on the transcript?**

**A: No.**

## **XVI. AUTHENTICATION - WEBSITES AND SOCIAL MEDIA**

A. The foundational requirements for authenticating a screenshot from a social media site like Facebook are the same as for a printout from any other website. Basically, offer foundational testimony that the screenshot was actually on the website, that it accurately depicts what was on the website, and that the content is attributable to the owner. (*Lorraine v. Market Am. Ins. Co.*, 241 F.R.D. 534 (D.Md.2007)). Some courts require the website owner to provide the necessary foundation to authenticate a page from a website. The more liberal courts have held that a printout from a website may be authenticated by a visit to the website. What is required is that the depiction accurately reflects the content of the website and the image of the page on the computer on which the screen shot was made. A screen shot from a recognized corporation, such as a bank or credit card company, generally causes less concern than a personal blog posted where a non-owner can more easily manipulate the content. Information from government websites are deemed self-authenticated if the proponent establishes that the information is current and complete.

### **B. STEPS**

1. Proof that the witness visited the website
2. When the website was visited.
3. Establish that the website was current as opposed to stale sites.

For example, postings reflect current information, dates, etc.

4. Establish how the site was accessed – Google search and followed the links; Internet Explorer, etc.
5. Description of the website access – identify material on the website including names, addresses, logos, phone numbers, etc.
6. Recognition of the website based on past visits

7. Proof that the screen shot was printed from the website and the date and time

8. Proof that the screenshot in the printout is the same as what the witness saw on the computer screen.

9. Proof that the printout was not altered or modified from the image on the computer

***SAMPLE QUESTIONS – FACEBOOK PAGE***

**Q: Are you familiar with the social media website Facebook?**

**A: Yes.**

**Q: How are you familiar with it?**

**A: I have been using it 4 to 5 times per week for the last 3 years.**

**Q: Generally speaking, what do you do with the social media site?**

**A: I generally keep up with my friends and what they are doing and special things in their lives.**

**Q: What is a Facebook friendship?**

**A: You are permitted to follow certain chosen friends.**

**Q: How is a Facebook friendship created?**

**A: You invite someone to be your friend and if the person accepts you become Facebook friends.**

**Q: Is Joan Smith your Facebook friends?**

**A: Yes.**

**Q: What is a Facebook wall?**

**A: This is an area where someone has personal information open only to friends.**

**Q: How can you access someone's Facebook wall?**

**A: You click their profile on the website.**

**Q: What type of information is found on Joan Smith's wall?**

**A: Personal information such as special events, pictures, employment, where she lives, etc.**

**Q: Have you ever visited Joan Smith's wall?**

**A: Many times.**

**Q: Have you done so recently?**

**A: Actually, I did last Thursday.**

**Q: What did you see on our wall?**

**A: I saw a picture of her and my husband with their arms around each other at what appeared to be a party, and another picture at the same place where they were kissing.**

**Q: Did you print a copy of the pictures you saw?**

**A: Yes.**

**Continue with identification of the printout in same manner as with email or text message.**

## **XVII. JUDICIAL NOTICE OF INFORMATION ON WEBSITES**

A. The court's computerized records, which were not included in the record, but of which we take judicial notice, show that in accordance with the warning in the court's scheduling notice dated November 23, 2004, admittedly received by plaintiff's attorney, the action was dismissed on March 2, 2005 pursuant to 22 NYCRR 202.27 when plaintiff failed to appear for a pre-note of issue conference. *Perez v. New York City Hous. Auth.*, 47 AD3d 505, 850 NYS2d 75 (1<sup>st</sup> Dept. 2008)

**B. OFFICIAL GOVERNMENT WEBSITES** - Federal Rules of Evidence §902(5) - website operated by a government agency is self-authenticating.

1. State Department of Insurance for corporate presence in county (*N.Y.C. Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 Misc.3d 925, 774 N.Y.S.2d 916 [Civ. Ct. NY 2004], *revd on other grounds*, 8 Misc.3d 33, 798 N.Y.S.2d 309 [App. T. 2d Dep't. 2004])

2. Surgeon General for dangers of second-hand smoke (*DeMatteo v. DeMatteo*, 194 Misc. 2d 640, 749 N.Y.S.2d 671 [Sup. Ct. NY 2002][Julian, J.]

3. Secretary of State for "entity information" for plaintiff as to its principal place of business (*Tener Consulting Services, LLC v FSA Main St., LLC*, 23 Misc 3d 1120(A), 886 NYS2d 72, [Sup Ct 2009]; Secretary of State for "entity information" regarding corporate officers (*Munaron v. Munaron*, 21 Misc.3d 295, 862 N.Y.S.2d 796 [Sup. Ct. Westchester Co. 2008][Jamieson, J.]

4. "However, the Court has learned (from its own research) that plaintiff is still registered with the Secretary of State as the "Chairman or Chief Executive Officer" of Venezia. The Court rather than counsel for defendant uncovered this evidence by a quick review of the official website of the New York Secretary of State. While certainly unusual, the Court is allowed to take judicial notice of this matter of public record. *See Brandes Meat Corp. v. Cromer*, 146 AD2d 666, 537 NYS2d 177 (2d Dept. 1989); *Chasalow v. Board of Assessors of County of Nassau*, 176 AD2d 800, 575 NYS2d 129 (2d Dept. 1991). The Court informed the parties that it would be taking judicial notice of this fact at a Court conference."

5. *U.S. Naval Observatory for time of sunrise (United States v. Bervaldi*, 226 F.3d 1256, 1266, n. 9 [11th Cir. 2000])

6. Federal Reserve Board for prime interest rate (*Levan v. Capital Cities ABC, Inc.*, 190 F.3d 1230, 1235, n. 12 [11th Cir. 1999])

7. National Personnel Records Center for records of retired military personnel (*Denius v. Dunlap*, 330 F.3d 919, 926 [7th Cir. 2003])

8. Department of State (NYS) online search results for whether physician was licensed to practice medicine in NYS (*Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.*, 12 M3d 1176(A), 820 NYS2d 845 (Civil Ct., NY, 2006) : "On the other hand, there are specific exceptions to the hearsay rules with regard to documents maintained by governmental agencies given the inherent reliability of such documents. It would seem that the fact that these

documents were obtained by downloading them from the government's website rather than through the physical receipt of them from the governmental agency itself is somewhat of a distinction without a difference. In this regard, the Court notes that the Appellate Division, Second Department, has recently cited with approval a number of cases in which trial courts have taken judicial notice of documents that the courts themselves have downloaded from government websites (*see Kingsbrook Jewish Med. Ctr. v. Allstate Ins. Co.*, 2009 N.Y. Slip Op 000351, 871 N.Y.S.2d 680 [2d Dept 2009], *citing Munaron v. Munaron*, 21 Misc.3d 295 [Sup Ct Westchester County 2008]; *Parrino v. Russo*, 19 Misc.3d 1127[A], 2008 WL 1915133 [Civ Ct Kings County 2008]; *Nairne v. Perkins*, 14 Misc.3d 1237[A], 2007 WL 656301 [Civ Ct Kings County 2007]; *Proscan Radiology of Buffalo v. Progressive Cas. Ins. Co.*, 12 Misc.3d 1176 [A], 2006 WL 1815210 [Buffalo City Ct.2006]; *see also Bernstein v. City of New York*, 2007 N.Y. Slip Op 50162[U], 14 Misc.3d 1225[A] [Sup Ct Kings County 2007]; *Miriam Osborn Memorial Home Assn. v. Assessor of City of Rye*, 9 Misc.3d 1019 [Sup Ct Westchester County 2005] ). There is every reason to believe that the information that appears on governmental websites is a reasonably reliable reflection of what the hard copies on file with the government show.

9. *cf. Morales v. City of New York*, 18 M3d 686, 849 NYS2d 406 (S.Ct., 2007) - “this Court is not aware that any New York appellate court has passed definitively upon the admissibility as evidence of public records printed from even a New York government website.”

### **C. PRIVATE OR COMMERCIAL WEBSITES**

1. Hospital website for asthmatic conditions and causes (*Gallegos v. Elite Model Management Corp.*, 758 N.Y.S.2d 777 [Sup. Ct. NY 2003])

2. Trial court abused its discretion in not taking judicial notice of defendant corporation’s historical retirement fund earnings posted on its website (*O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 [10<sup>th</sup> Cir. 2007])

3. Mapquest for mileage distance (*In Re Extradition of Gonzales*, 52 F.Supp.2d 725, 731, n. 12 [Wd La. 1999])

### **D. WEBSITE ADMISSIONS**

1. *NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 3 M3d 925, 774 NYS2d 916 (Civ. Ct., Qns. Co., 2004) - Information posted on corporate party’s website constitute admissions, and are encompassed by the admissions exception to the hearsay rule. *See, NYC Medical and Neurodiagnostic, P.C. v. Republic Western Ins. Co.*, 8 M3d 33, 798 NYS2d 309 (App Term) (Trial judge made independent internet investigation to see if defendant was transacting business in NY. “Even assuming the court was taking judicial notice of the facts, there was no showing that the Web sites consulted were of undisputed reliability, and the parties had no opportunity to

be heard as to the propriety of taking judicial notice in the particular instance (see, Prince, Richardson on Evidence §20202 [Farrell 11<sup>th</sup> ed]).

2. Website Statement as non-hearsay – Verbal Act (i.e., breach of warranty case)

XVIII.

A. *U.S. v. Washington*, 498 F.3d 225 (4<sup>th</sup> Cir. 2007) - computer readout of electronic forensic analysis of defendant's blood sample for drug and alcohol content admissible if authentic, readout was not hearsay because there was no "declarant" under rule 801 (b).

B. Important for authenticating computer simulations. Generally requires proof of reliability of scientific or technical principles and thus get involved in a *Daubert* or *Frye* situation

C. Requires a witness who has personal knowledge to explain how the social media evidence was created or, alternatively, is a qualified expert.

1. Example: Turbo Tax

## **XIX. SELF-AUTHENTICATION (RULE 902)**

A. Rule 907(7)) allows for self-authentication for documents that bear "inscriptions, signs, tags or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin."

B. *U.S. Equal Employment Opportunity Commission v. E.I. DuPont de Nemours & Co.*, 2004 WL 2347559 (E.D. La. 10/18/04) - "a printout of a table from the website of the United States Census Bureau," which "contain the internet domain address from which the table was printed, and the date on which it was printed," was admissible because it was self-authenticating."

1. Example: automatic signature at end of an e-mail

C. Comparison with another properly authenticated e-mail. (*U.S. v. Safavian*, 435 F.Supp.2d 36 (D.D.C. 2006))

## **XX. ISSUE OF EXPECTATION OF PRIVACY**

### **A. E-DOCS STORED AT WORK**

1. Physician's e-mail communications with his attorney, which e-mails were stored on defendant-hospital's e-mail server, were not confidential, for purposes of attorney-client privilege, where hospital's electronic communications policy, of which the physician had actual and constructive notice, prohibited personal use of hospital's e-mail system and stated that hospital reserved the right to monitor, access, and disclose communications

transmitted on hospital's e-mail server at any time without prior notice, though physician's employment contract required hospital to provide him with computer equipment. *Scott v. Beth Israel Med. Ctr.*, 17 Misc.3d 934, 847 N.Y.S.2d 436 [Sup. Ct. N.Y. Co. 2007][Ramos, J.]

2. An employee used a work-issued laptop to e-mail confidential files to her attorney purportedly in contravention of her employer's "work only" use policy. As the employee used the work computer to send the e-mails from home through her personal AOL account (and thus, the documents never "passed through" the employer's system), the court found that the privilege was not waived. *Curto v. Medical World Communications Inc.*, 2006 WL 1318387 (EDNY, 5/16/06)

3. Employee lacked any reasonable expectation of privacy, and thus confidentiality, in his personal use of employer's e-mail system, and accordingly e-mails which employee sent through employer's system were not subject to attorney-client privilege; employer's e-mail policy, of which employee had at least constructive notice, asserted that employer owned all e-mails on its system, that employer reserved the right to audit networks and systems to ensure employees' compliance with e-mail policy, and that employer reserved the right to access and review any messages and to disclose such messages to any party. *Peerenboom v. Marvel Entm't, LLC*, 148 AD3d 531, 50 NYS3d 49 (1<sup>st</sup> Dept. 2017)

**B. GPS - CELL PHONES** - *People v. Moorer*, NYLJ, 2/22/13 (County Ct., Monroe Co., DeMarco, J.) -- A cell phone user has no "reasonable" expectation of privacy that the devices built in global positioning technology will not be used by police to locate the phone.

1. Government can attach a GPS tracking device to a public employee's personal vehicle without a warrant. When an employee chooses to use his car during the business day, GPS tracking of the car may be considered a workplace search, and public employees have a diminished right of privacy in the workplace if a search satisfies a standard of reasonableness. *Matter of Cunningham v. NYS Department of Labor*, 21 NY3d 515, 974 NYS2d 896 (2013)

## **XXI. METADATA; HASH VALUES**

### **A. DEFINITION**

1. Data about data; DNA of a digital file; the information embedded within electronic documents - typically includes its history, tracking, and management, which may also include changes to that document.

2. Data hidden in documents that is generated during the course of creating and editing documents and which describes the history, tracking or management of an electronic document. The data shows the characteristics,

origins, usage, structure, alteration and validity of electronic evidence. Every digital file has metadata.

3. Important to get the file in its native format.

## **B. TYPES**

1. Substantive metadata - records and reflects any changes to a document made by the creator or user of a document, and can reveal prior edits made by the creator. Such metadata is automatically linked with the documents and travels with it anytime it is sent electronically.

2. System metadata – created automatically by operating system or application; includes author, date and time of creation and the date a document was modified.

a. Microsoft Office Documents - Metadata exists in all Microsoft Office Documents (Word, Excel, Power Point etc.)

## **C. DUTY TO PRESERVE; USE OF METADATA**

1. Plaintiff discarded computer after its duty to preserve arose but claimed that defendants were not prejudiced because many of the files were printed prior to disposal. The court noted “converting the files from the data format to hard copy form would have resulted in the loss of discoverable metadata.” *Harry Weiss v. Moscowitz*, 106 AD3d 668 (1<sup>st</sup> Dept. 2013)

D. Metadata associated with a digital photograph established that it had not been taken at the time of the event, and thus was not probative of the condition of the scene at the time of the accident. *Alfano v. LC Main*, 38 M3d 1233 (S.Ct., Westchester Co., 3/18/13)

## **E. MINING FOR METADATA - PROPER?**

1. ABA - Yes - “the ABA Model Rules of Professional Conduct permit a lawyer to review and use embedded information contained in e-mail and other electronic documents, whether received from opposing counsel, an adverse party or an agent of an adverse party.” The Model Rules thus do not prohibit a lawyer from “mining for metadata” and taking full advantage of any discoveries. (ABA Comm. on Ethics and Professional Responsibility, Formal Op. 06-442 (2006). It is the sending lawyer's duty to maintain client confidentiality by properly “scrubbing” the data to avoid disclosing client confidences. “Scrubbing” means eliminating certain embedded information in an electronic document before sending it to others.

2. NY County Lawyers - No - “when a lawyer sends opposing counsel correspondence or other material with metadata, the receiving attorney may not ethically search the metadata in those electronic documents with the intent to find privileged material . . .” Every lawyer still has an obligation to “scrub” electronic documents to avoid disclosing client confidences and secrets, but clearly not all documents will always be properly “scrubbed” because mistakes do happen. In such situations, the NYCLA opinion instructs New York lawyers

not to take advantage of the sending attorney's oversight by "mining for metadata."

3. NYSBA - NYS Bar Ass'n Comm. on Professional Ethics, Op. 749 (2001) and 782: "Lawyers may not ethically use available technology to surreptitiously examine and trace e-mail and other electronic documents." (Opinion 749)

a. "Lawyers must exercise reasonable care to prevent the disclosure of confidences and secrets contained in metadata in documents they transmitted electronically to opposing counsel or other third parties." (Opinion 782)

## **F. HASH VALUES**

1. Embedded unique identifier for a digital file; by means of an algorithm, a unique number is assigned to each digital file. The distinctive characteristic is used for authentication.

2. Equivalent of a "DNA Profile" for a Hard Drive or Single File

## **XXII. ESI PRESERVATION; SPYWARE**

A. Where husband installed spyware on the wife's iPhone and then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney, the court held that a negative inference and/or the production of the opposing parties computers was mandated, with the court reserving the right to impose harsher sanctions, depending on the results of the forensic computer inspection, with the preclusion of evidence being a possible partial sanction. As the husband invoked the Fifth Amendment regarding all questions surrounding purchases of spyware and whether he used it to intercept the wife's privileged communications, the only way to ascertain whether the husband actually violated the wife's attorney-client privilege was to be able to review the documents and data records on her husband's computing devices. *Crocker C. v. Anne R.*, 49 M3d 1202(A) (Supreme Court, Kings Co., 2015, Sunshine, J.)

B. Where husband installed spyware on the wife's iPhone and then used that spyware to monitor his wife's communications, including more than 200 privileged emails with her attorney, and then purposefully engaged in spoliation of the evidence while simultaneously asserting his Fifth Amendment right against self-incrimination, the Court struck his pleadings seeking spousal support, equitable distribution and counsel fees. *Crocker C. v. Anne R.*, 58 M3d 1221(A) (Supreme Court, Kings Co., 2018, Sunshine, J.)