Rules of Evidence

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INTRODUCTION TO RULES OF EVIDENCE

Evidence is any species of proof through the medium of witnesses, records, documents, exhibits, or concrete objects offered to establish an alleged fact or proposition or the falsity of a fact in issue (Black's Law Dictionary 6th Ed). Most evidence can be classified in one of the following categories:

1. Testimonial evidence is oral testimony of a sworn witness.
2. Documentary evidence is a writing or writings.
3. Physical evidence is a concrete object or item.

Rules of evidence govern the admission or exclusion of evidence and set forth the manner by which different types of evidence may be received. These rules have been established over time through case law and statute.

THE BUSINESS RECORDS RULE

Hearsay is an out of court statement made in the course of a trial that is offered for the truth of the matter asserted. See, People v. Huertas, 75 NY2d 487 (1990); People v. Nieves, 67 NY2d 125 (1986). Hearsay is not admissible. This is one of the most important exclusionary rules in evidence.

The Business Records Rule is an exception to the Hearsay Rule under which records made in the regular course of a business may be admitted into evidence. The Business Records Rule is derived from the earlier Shop Book Rule and later The Common Law Regular Entries

Rule. The Business Records Rule was codified in 1928. The New York Statute is found under Civil Procedure Law and Rules (CPLR) § 4518.

CPLR § 4518 (a) states:

> Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence 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. … The term business includes a business, profession, occupation and calling of every kind.

Business Defined:

The term business has been broadly interpreted, applying to among other things; medical records, bank documents, corporate records, records of a one-man business, receipts of transactions, government documents, and records of criminal enterprises. See, People v. Kennedy, 68 NY2d 569 (1986). Even law enforcement agencies are considered businesses and records made by them as part of a criminal transaction, provided the record was not made solely for the purpose of litigation, may be admissible. See, People v. Guidice, 83 NY2d 630 (1994); People v. Antongiorgi, 242 AD2d 578 (2nd Dept. 1997).

Foundation for Admitting Business Records:

In order to admit business records a factual foundation must first be laid. Under People v. Kennedy, 68 NY2d 569 (1986) the following elements must be established:

1. The record was made in the ordinary course of business.
2. That it is the regular course of business to make such a record.
3. That the record was made at or around the time of the transaction recorded.

Case Law has added a fourth element that everyone involved in producing

the document be acting within the regular course of business. See, Matter of Leon RR, 48 NY2d 117 (1979).

The preferred practice is to call a witness to lay this foundation through testimony. See, Daymin v. Unis, 171 AD2d 579 (1st Dept. 1991); Wilson v. Bodian, 130 AD2d 221 (2d Dept. 1987). The person who prepared the document need not testify, though this may affect the weight of the evidence, it does not make it inadmissible. See, Commerce & Industry Ins. v. Sciales, 132 AD2d 516 (2d dept. 1987). The foundation may come from testimony of the record maker, the owner or administrator of a business, or an employee familiar with the business's regular practices to whom the duty to oversee the transaction or records keeping has been delegated, such as a manager or records keeper.

Admitting Records Without a Witness:

CPLR § 2306 and CPLR § 2307 allow for the records of hospitals, medical providers, libraries and units of government to be admitted without the formality of a witness being called to lay the foundation. These statues also make the records admitted under them "prima facia" proof of their content. See, Barcher v. Radovich, 183 AD2d 689 (2d Dept. 1992). Under CPLR § 4518 (c) the records must be accompanied by a certification setting forth the same foundational elements required of a testifying witness. In addition, the certification must identify the business and be signed by a person authorized to make such a certification.

The best evidence rule requires that the original of the document be produced. However, if a proper reason is provided why this is not done and the copy is established as being an exact, unaltered copy of the original then it may also be admitted. See, Clark v. Bullock, 2 NYS 408 (NY Cty. Crt. 1888). Computer printouts may also be admitted if the stored data is shown to be

stored as part of the regular course of business. See, Ed Guth Realty v. Gingold, 34 NY2d 440 (1974).

Electronic records defined under the state's technology law section three hundred and two are also admissible as business records provided the court finds that the way the data was stored, maintained and recovered is sufficient to insure that it accurately reflects the electronic record. (CPLR § 4518 [a]). For example, under this provision, electronically certified calibration records for breath test instruments maintained by the New York State Police have been deemed admissible.

Limitations to The Business Records Rule:

The business records rule does not overcome other exclusionary rules such as attorney-client privilege, physician-patient privilege and double hearsay. It is not admissible if the person who made it would not have been permitted to testify about its contents at trial. See, Stevens v. Kirby, 86 AD2d 391 (4th Dept. 1982); Miller v. Alagna, 203 AD2d 264 (2d Dept. 1994); Klein v. Benrubi, 60 AD2d 548 (1st dept. 1977). In some instances while the document may be admissible some of its contents may be objectionable and need to be redacted. It is important for opposing counsel to be familiar with the document.

Business records may be objected to on foundational as well as constitutional grounds. Some of the more common objections include:

- Not made in the ordinary and regular course of business;
- Not made pursuant to established procedures for making such a record;
- Not made contemporaneous in time to the transaction;
- Certification is defective or the custodian is improper;
- The record is not complete or has been altered;
- Someone involved in preparing the record was not acting within the regular course of the business;
- Violation of the right to confrontation.

If an out of court statement, such as a business record, is "testimonial" in nature, then its admission violates the right to confrontation. See, Crawford v. Washington, 541 U.S. 36 (2004).

The person imparting the information contained in the record must also be under a business duty to do so. See, Johnson v. Lutz, 253 NY 124 (1930); holding that it was error to admit a police accident report where the officer had not witnessed the accident and received all of his information from witnesses at the scene.

HOSPTIAL RECORDS

Hospital Records are admissible under The Business Records Rule. CPLR § 4518 (c) allows for the admission of hospital records by using a properly executed certification and without calling a witness to testify at trial. The records are prima facie evidence of the facts they contain.

Patient's Rights & Confidentiality:

HIPPA restrictions and privacy rights may restrict access to hospital and other medical records. Hospital records may be subpoenaed pursuant to CPLR § 2306, by use of court ordered subpoenas or grand jury subpoenas. Medical records may also be obtained through a medical release from the patient. A defendant's medical records are *not* obtainable by the prosecution using a subpoena. A medical release signed by the defendant is required to permit law enforcement to obtain a copy of the defendant's medical records.

Similarly, psychiatric records are also privileged and though they may go to the credibility of a witness for the prosecution or defense the court must first make a finding that "the interests of justice significantly outweigh the need for confidentiality." (Men Hyg Law §

33.13 [c][1]). The court should therefore review the records in camera before releasing them and the moving party must show the information is material to issues in the case. See, People v. Arnold, 177 AD2d 633 (2d Dept. 1991); People v. Graham, 117 AD2d 832 (3d Dept. 1986).

Purpose of Admitting Hospital Records:

Entries in hospital records are admissible when they pertain to diagnosis and treatment. See, Wilson v. Bodian, 130 AD2d 221 (2d Dept. 1987); Williams v. Alexander, 309 NY 283 (1955). Hospital records can be used to show medical opinions and conclusions, Wilson v. Bodian, 130 AD2d 221 (2d Dept. 1987); observations of the patient's condition and the physician's diagnosis, People v. Kohlmeyer, 284 NY 366 (1940).

History Portion of Hospital Records:

The patient's statements regarding the cause of injury are only admissible if it is relevant to diagnosis or treatment and thus made for the purpose of assisting the hospital to carry on its regular course of business. See, Williams v. Alexander, 309 NY 283 (1955); People v. Ballerstein, 52 AD3d 1192 (4th Dept. 2008).

If the patient is a witness at trial, introduction of the records to show consistency between the patients testimony and their statements contained in the medical records is improper bolstering and the records would not be admissible. However, if the patient is called at trial and does not recall the events leading to their injury the hospital records may be used to refresh their recollection. If the patient-witness still does not recall then the hospital records may be admitted as a past recollection recorded.

A party opposing the patient may choose to use the history portion of the hospital records to try and impeach the testimony of the patient. If the adverse party feels the history portion contradicts the trial testimony it is admissible as an admission. See, Sanchez v. MABSTOA, 170

AD2d 402 (1st Dept. 1991); Castro v. Alden Leeds, Inc., 144 AD2d 613 (2d Dept. 1988); Gunn v. City of NY, 104 AD2d 848 (2d Dept. 1984).

It is also important for the adverse party to establish who provided the history portion of the hospital records to insure that they were a proper informant. This will help guard against double hearsay such as a patient telling a relative who is then the source of the information. It is important that the informant either be engaged in the business or be under a duty relating to the business.

Use of Records Without a Physician:

While the treating physician need not be called to admit hospital records, there can be no further explanation of the records without their testimony. As a practical matter the physician is called in many instances not only to explain the records but to expound on the medical findings. In, Campbell v. MABSTOA, 81 AD2d 529 (1st Dept. (1981), the court held that the illegible portion of a hospital record did not exclude the legible portion of the records.

Use of Defendant's Medical Records:

A defendant may use medical records to establish a physical feature that an identifying witness does not remember. The defendant does not need to take the stand to admit the hospital record unless the feature is easy to feign. See, People v. Shields, 81 AD2d 870 (2d Dept. 1981); People v. Scarola, 71 NY2d 769 (1988); People v. Brown, 44 AD3d 965 (2d Dept. 2007). The defense should also establish that the identifying mark or feature was present at the time of the crime.

INTRODUCING THE PHOTO

Photographs are admissible as evidence when they accurately depict what is shown. The witness must lay a foundation that establishes what the photo depicts and that the photograph contains a fair and accurate representation. See, People v. Brown, 216 AD2d 737 (3d Dept. 1995); Moore v. Leaseway Transp, 49 NY2d 720 (1980); Saporito v. City of NY, 14 NY2d 474 (1964). It is also necessary to establish the photograph accurately portrays its subject as it would have appeared at the time in question. See, People v. Smeraldo, 242 AD2d 886 (4th Dept. 1997).

Any witness with knowledge of what the photograph portrays may testify with respect to its accuracy. It is not necessary that the person who took the photograph testify.

Graphic Photographs:

Photographs which may unfairly prejudice the defendant, for instance those that are graphic or gruesome, and serve no purpose other than inflaming the emotions of the jury are typically inadmissible. See, People v. Blake, 139 AD2d 110 (1st dept. 1988). The defense may also object to the number of photos of the victim's body or crime scene in a violent crime being admitted as becoming excessive or duplicative.

Photographs of a deceased victim are admissible, provided they are relevant. See, People v. Norwood, 269 AD2d 609 (2d Dept. 2000). Photographs are admissible to establish the element of injury, People v. Cuffee, 112 AD2d 545 (3d Dept. 1985); intent, People v. Scott, 126 AD2d 582 (2d Dept. 1987); identity, when a photo from the defendant to another person shows previously unpublicized aspects of a crime, People v. Harris, 149 AD2d 433 (2d Dept. 1989). Photographs are also admissible to corroborate testimony, People v. Gordon, 131 AD2d 588 (2d Dept. 1987); to clarify testimony, People v. Conethan, 147 AD2d 654 (2d Dept. 1989); People v.

Carini, 139 AD2d 753 (2d Dept. 1988); People v. Murray, 140 AD2d 949 (4th Dept. 1988); or to aid a jury in understanding testimony or tests conducted by an expert, People v. Smith, 63 NY2d 41 (1984).

Arrest Photographs:

Arrest photographs of the defendant are not testimonial and therefore not excludable under the Fifth Amendment. See, People v. Peters, 135 AD2d 841 (2d Dept. 1987). Arrest photographs may be used to show; that the defendants physical condition and appearance matched a police description People v. Lee, 6 AD3d 751 (3d Dept. 2004); clothes worn at the time of arrest, People v. Vasquez, 89 NY2d 1041 (1997); by the defense to dispute identification, People v. Cobb, 104 AD2d 656 (2d Dept. 1984); showing the accuracy of the victim's description after the victim's ability to see and recollect have been attacked, People v. Douglas, 227 AD2d 130 (1st Dept. 1996); demonstrating defendant's statement was not coerced, People v. Chapman, 277 AD2d 392 (2d Dept. 2000).

Arrest photographs may not be used to show the defendant is dirty or unkempt, or to show that he or she possess a vicious nature. See, People v. Black, 117 AD2d 512 (1st Dept. 1986); People v. Mercado, 120 AD2d 619 (2d Dept. 1986). An arrest photograph cannot be used to impeach a witness on a collateral issue. See, People v. Cobb, 104 AD2d 656 (2d Dept. 1984).

Limiting Instructions:

It is often necessary to request the court issue a limiting instruction. These instructions can be used among other things to advise the jury that the photograph is only allowed to be used for a limited purpose; is only being allowed to show a specific part of the picture or to address a specific issue in the case; or to guard against the juries emotions becoming inflamed.

Computer Generated Images:

With digital technology it is also necessary to establish if the photograph has been enhanced in some way. If it has, it is important to voir dire with respect to the methods used and to ascertain to what degree the image has been altered. If the content of the image has been fundamentally changed as opposed to enhanced it may no longer be a fair and accurate depiction and would therefore not be admissible.

Digitally enhanced images fall under the scope of computer generated evidence, the rules of which are governed by CPLR § 4543. The decision of whether to admit computer generated evidence is within the sound discretion of the trial court. New York Courts generally admit such evidence as a demonstrative aid to trial testimony when the evidence fairly and accurately reflects the testimony and aids the jury's understanding of such testimony. See, People v. McHugh, 124 Misc.2d 559 (Sup 1984). Computer generated images and demonstrations have been admitted among other things to show; the "mechanics of shaken baby syndrome", People v. Yates, 290 AD2d 888 (3d Dept. 2002); as a demonstration of a shooting death, People v. Morency, 93 AD3d 736 (2d Dept. 2012); and the circumstances of a motor vehicle accident.

Computer generated evidence may be excluded for a variety of reasons including, a failure to lay a proper foundation. Computer generated simulations and animations are not admissible if they do not reflect the facts already established in evidence. See, Kane v. Triborough Bridge & Tunnel Authority, 8 AD3d 239 (2d Dept. 2004). Therefore, counsel for the non-moving party should voir dire regarding what factual assumptions were made in preparing the exhibit. If the computer generated images are offered to demonstrate an expert witnesses opinion it is important that a limiting instruction is given to tell the jury that the exhibit cannot be

used to demonstrate actual events. See, People v. Yates, 290 AD2d 888 (3d Dept. 2002); People v. Morency, 93 AD3d 736 (2d Dept. 2012). As the court in Kane found it is important to prevent a situation where "the jury may confuse art with reality." See, Kane v. Triborough Bridge & Tunnel Authority, 8 AD3d 239 (2d Dept. 2004) (Quoting, 2 McCormick on Evidence § 214 [5th Ed.]).

THE PRIOR INCONSISTENT STATEMENT

A prior inconsistent statement is one previously made by a witness that is inconsistent with his or her current testimony, and is introduced to impeach the witness's credibility. See, People v. Duncan, 46 NY2d 74 (1978). The prior inconsistency need not be direct, it is sufficient that it tends to prove contradictory facts. See, Larkin v. Nassau Electric RR, 205 NY 267 (1912). An inconsistent statement is admitted solely to challenge the credibility of a witness and cannot be used for its truth. Prior inconsistent statements come in two forms; oral and written.

Foundation for Prior Inconsistent Statement:

In order to introduce a witness's prior inconsistent statement in any form a foundation must first be laid with the witness establishing when a prior statement was made, who it was made to and the substance of what was said. The foundation is necessary to give the witness fair warning of the statement to be used against them and give them an opportunity to correct the testimony or explain the inconsistency. See, People v. Concepcion, 175 AD2d 324 (3d Dept. 1991); People v. Duncan, 46 NY2d 74 (1978). Once the witness denies making the statement or claims not to remember having made the statement it then becomes admissible as a prior inconsistency. See, Sloan v. NY Central RR, 45 NY 125 (1871). If however, the witness admits

having made the statement without any explanation that is the end of the matter and the statement is not admitted because the witness has discredited themselves. See, Hanlon v. Ehrich, 178 NY 474 (1904). But in some cases the court may allow the inconsistency to be further shown through other witnesses. See, People v. Schainuck, 286 NY 161 (1941).

A foundation is not necessary when the witness is a party to the action because such statements are considered admissions. See, Blossom v. Barrett, 37 NY 434 (1868); Hayes v. Henault, 131 AD2d 930 (3d Dept. 1987). Prior inconsistent statements are only admissible regarding a witness's credibility and may not be used to demonstrate a defendant's guilt. See, People v. Montgomery, 22 AD3d 960 (3d Dept. 2005).

Oral Statements:

A prior inconsistent oral statement can be introduced through the testimony of any witness who heard the statement being made. A 911 recording may be admitted under this theory, failure to admit the recording is deemed harmless error where the jury is made aware of the inconsistency by some other means. See, People v. Kelly, 166 AD2d 456 (2d Dept. 1990).

Written Statements:

A prior inconsistent written statement can be authenticated by the witness a party seeks to impeach and thereafter offered into evidence. If the witness to be impeached denies the authenticity of the written statement, other witnesses may be called for authentication purposes. The writing may not be read from unless it has first been received into evidence. See, Larkin v. Nassau Electric RR, 205 NY 267 (1912). However, the Judge may decline to allow the jury to actually be handed a document so received. See, People v. Piazza, 48 NY2d 151 (1979). If the

document contains irrelevant or otherwise prejudicial material, such portions must be redacted. See, Blackwood v. Chemical Corn Exchange Bank, 4 AD2d 656 (1st Dept. 1957).

Impeachment by Omission:

The Bornholdt Rule states that a witness may not be impeached by an omission of a fact or for failing to more fully state a fact. It must be shown that the witness was actually asked about the omitted fact. See, People v. Bornholdt, 33 NY2d 75 (1973). However, when material information that would have been expected to be mentioned in a prior statement is absent, then The Bornholdt Rule is inapplicable and the witness is subject to impeachment by omission. See, People v. Savage, 50 NY2d 673 (1980).

A witness may not be impeached by a prior inconsistent statement on a matter collateral to the issues of the case. See, People v. Aska, 91 NY2d 979 (1998). But if the matter establishes a motive to lie it cannot be deemed collateral. See, People v. Daley, 9 AD3d 601 (3d Dept. 2004).

Impeachment of Defense Witnesses:

A defense witness who provides exculpatory testimony may be questioned about a failure to come forward with such information sooner to stop a mistaken prosecution of a friend or loved one when it would have been natural to do so. The prior failure to come forward cannot be used to show the witness possesses a flawed moral character or is generally unworthy of belief. See, People v. Dawson, 50 NY2d 311 (1980); People v. Knight, 80 NY2d 845 (1992). In order to impeach the witness a prosecutor must first lay a foundation establishing;

1. that the witness was aware of the charges pending against the defendant;
2. the witness should have recognized they possessed exculpatory evidence;

3. the witness had a motive to act to exonerate the defendant;

4. the witness knew how to tell law enforcement such information. See, People v. Beaulieu, 184 AD2d 1061 (4th Dept. 1992); People v. McGrath, 136 AD2d 658 (2d Dept. 1988). The extent such a cross-examination is within the discretion of the court.

Rosario:

The Rosario rule imposes an obligation on the party calling a witness to provide the adverse party with any pre-trial statements of that witness known to them. Rosario applies to both the prosecution and defense. If the party possesses, knows of, or has the power to obtain such statements, they are under an obligation to do so and provide it to the adverse party. See, People v. Rosario, 9 NY2d 286 (1961). The prosecution is obligated to turn over evidence relevant to a witness's credibility. See, Giglio v. US, 405 US 150 (1972). It is a matter of fundamental fairness for the prosecution to provide defense counsel with such statements because they would have no other way of obtaining it. See, People v. Jones, 70 NY2d 547 (1987). The impeachment value of prior statements is to be determined by the "single-minded counsel for the accused." See, People v. Rosario, 9 NY2d 286, at 290 (1961).

Prior statements of a witness subject to the Rosario rule include; depositions, statements made to the police, prior testimony, statements made to and recorded by private parties, voice-messages, e-mails, texts, or postings on social media. Such statements must be in the control of law enforcement or be known by law enforcement to exist. See, People v. Perez, 65 NY2d 154 (1985); People v. Palmer, 137 AD2d 881 (3d Dept. 1988). The prosecution is not required to create Rosario material, People v. Steinberg, 170 AD2d 50 (1st Dept. 1991); or seize such

material from a private person, Nassau v. Sullivan, 194 AD2d 236 (2d Dept. 1993); People v. Washington, 196 AD2d 346 (2d Dept. 1994).