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Compendium: New York Law of Evidence

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NEW YORK LAW OF EVIDENCE*

I. JUDICIAL NOTICE

A. *Definition*: Process by which a judge takes notice of a fact or law without requiring evidence thereof.

People v. Langlois, 122 Misc. 2d 1018, 1021, 472 N.Y.S.2d 297, 300 (Suffolk County Ct. 1984); *People v. Finkelstein*, 11 N.Y.2d 300, 308, 183 N.E.2d 661, 665, 229 N.Y.S.2d 367, 373 (1962); RICHARDSON ON EVIDENCE § 8, at 6 (10th ed. 1985).

B. *Facts*: Judicial notice may be taken of facts which are either notorious or manifest.

1. *Notorious*: Facts which are part of common knowledge within the community (from which the jury is selected). Some examples of notorious facts which have been judicially noticed: the size and height of the human body, *Hunter v. New York, Ontario & Western R.R.*, 116 N.Y. 615, 621, 23 N.E. 9, 10 (1889), *aff'd*, 130 N.Y. 669, 29 N.E. 1034 (1891); the average human gestation period is 280 days, *In re Wells*, 129 Misc. 447, 454, 221 N.Y.S. 714, 722 (Sur. Ct. Westchester County 1927); what constitutes an alcoholic beverage, *People v. Leonard*, 8 N.Y.2d 60, 167 N.E.2d 842, 201 N.Y.S.2d 509 (1960); and that barriers should be used when working on scaffoldings *Rohlfs v. Weil*, 271 N.Y. 444, 448, 3 N.E.2d 588, 589 (1936).

2. *Manifest*: Facts ascertainable by unquestionably accurate sources. Some examples of manifest facts which have been judicially noticed: the time when the sun sets, *People v. Genn*, 144 Misc. 2d 596, 602, 545 N.Y.S.2d 478, 483 (Sup. Ct. Bronx County 1989); blood tests used to

disprove paternity, *Commissioner v. Costonie*, 277 A.D. 90, 92, 97 N.Y.S.2d 804, 806 (1st Dep't 1950); principles underlying HLA blood testing, *Lorraine M. v. Linwood H.S.*, 115 Misc. 2d 922, 929, 455 N.Y.S.2d 48, 53 (Family Ct. N.Y. County 1982).

3. Judicial notice may only be taken of matters which a judge knows in his or her capacity as a judge. *Gibson v. Von Glahn Hotel Co.*, 185 N.Y.S. 154, 156 (Sup. Ct. App. T. 1st Dep't 1920); *In re Bommer*, 159 Misc. 511, 513, 288 N.Y.S. 419, 423 (Sur. Ct. Kings County 1936); *People v. Dow*, 3 A.D.2d 979, 979, 162 N.Y.S.2d 960, 961 (4th Dep't 1957).

4. Practice: Before the judge may take judicial notice of fact, it must be requested by one of the parties. *Walton v. Stafford*, 14 A.D. 310, 313 (1st Dep't 1897), *aff'd*, 162 N.Y. 558, 57 N.E. 92 (1900). However, obvious facts may be judicially noticed for the first time on appeal, even to reverse a lower court judgment. *People v. Santiago*, 64 A.D.2d 355, 357, 409 N.Y.S.2d 716, 718 (1st Dep't 1978).

C. Law: N.Y. CIV. PRAC. L. & R. § 4511 is the authority for this area.

1. Mandatory: The court must judicially notice the following laws, even without pleading or proof:

   a. Federal Public Law—the United States Constitution, treaties, federal case law, public acts of Congress. *People v. Jackson*, 89 A.D.2d 697, 701, 453 N.Y.S.2d 875, 879 (3d Dep't 1982); *People v. Vitale*, 80 Misc. 2d 36, 39, 360 N.Y.S.2d 375, 379 (Nassau County Ct. 1974).

   b. State Public Law— common law, constitutions, and public statutes of New York and all other states. *Sega v. State*, 89 A.D.2d 412, 414, 456 N.Y.S.2d 856, 858 (3d Dep't 1982), *aff'd*, 60 N.Y.2d 183, 456 N.E.2d 1174, 469 N.Y.S.2d 51 (1983).

   c. Codes, rules and regulations of New York except those relating solely to the organization of a state agency.

N.Y. CIV. PRAC. L. & R. § 4511(a) (McKinney 1993); *Cruise v. New York State Thruway Auth.*, 28 A.D.2d 1029, 1030, 283 N.Y.S.2d 779, 781 (3d Dep't 1967), *aff'd*, 26 N.Y.2d 1037, 260 N.E.2d 553, 311 N.Y.S.2d 924 (1970); *Roberts v. Community Sch. Bd.*, 66 N.Y.2d 652, 655, 486 N.E.2d 818, 820, 495 N.Y.S.2d 960, 962 (1985).

d. Local laws and county acts.
N.Y. CIV. PRAC. L. & R. § 4511(a) (McKinney 1993); *Chanler v. Manocherean*, 151 A.D.2d 432, 433, 543 N.Y.S.2d 671, 672 (1st Dep't 1989); *Pellicio v. Axelrod*, 131 A.D.2d 650, 651, 516 N.Y.S.2d 940, 945 (2d Dep't 1987); *Industrial Refuge Sys. v. O'Rourke*, 70 N.Y.2d 610, 516 N.E.2d 1223, 522 N.Y.S.2d 110 (1987) (Westchester County law); *Franklin v. Krause*, 49 A.D.2d 740, 740, 372 N.Y.S.2d 225, 226 (2d Dep't), *aff'd*, 37 N.Y.2d 813, 338 N.E.2d 329, 375 N.Y.S.2d 574 (1975) (Nassau County law).

2. Permissive: Pursuant to N.Y. CIV. PRAC. L. & R. § 4511, the court may judicially take notice of the following laws on request or on its own motion:

a. A private act or resolution of U.S. Congress and of the New York legislature.
Atkacus v. Terker, 30 N.Y.S.2d 628, 631 (N.Y.C. Mun. Ct. Queens County 1941).

b. The laws of foreign countries or their political subdivisions.
Lerner v. Karageorgis Lines, Inc., 66 N.Y.2d 479, 487, 488 N.E.2d 824, 827, 497 N.Y.S.2d 894, 897 (1985) (court did not abuse discretion by not judicially noticing potentially applicable foreign laws without party's request); *Dresdner Bank v. Edelmann*, 129 Misc. 2d 686, 688, 493 N.Y.S.2d 703, 704 (Sup. Ct. Spec. T. N.Y. County 1985), *aff'd without op.*, 117 A.D.2d 1024, 499 N.Y.S.2d 565 (1st Dep't 1986) (German law relied upon); *Weston Banking Corp. v. Bankasi*, 57 N.Y.2d 315, 329, 442 N.E.2d 1195, 1202, 456 N.Y.S.2d 684, 691 (1982) (Turkish court order and decrees judicially

noticed).

c. The "ordinances and regulations of officers, agencies or governmental subdivisions of the state or of the United States."
N.Y. CIV. PRAC. L. & R. § 4511(b) (McKinney 1993); *Medical Malpractice Ins. Ass'n v. Super-intendent of Ins.*, 72 N.Y.2d 753, 764, 533 N.E.2d 1030, 1036, 537 N.Y.S.2d 1, 7 (1988), *cert. denied*, 490 U.S. 1080 (1989); *Rex Paving Corp. v. White*, 139 A.D.2d 176, 183, 531 N.Y.S.2d 831, 836 (3d Dep't 1988).

3. N.Y. CIV. PRAC. L. & R. § 4511(b) allows permissive judicial notice to become mandatory if a party (1) requests it; (2) gives the court sufficient information; and (3) notifies each adverse party of the request.
In re Will of Duysburgh, 154 Misc. 2d 82, 85, 584 N.Y.S.2d 516, 518 (Sur. Ct. N.Y. County 1992).

4. Role of Court: The court, via the charge, informs the jury of what is judicially noticed.
N.Y. CIV. PRAC. L. & R. § 4511(c) (McKinney 1992); *Cohen v. Gilbert*, 12 A.D.2d 301, 302, 210 N.Y.S.2d 895, 896 (1st Dep't 1961).

a. The court may use any information, whether furnished by a party or discovered on its own.
N.Y. CIV. PRAC. L. & R. § 4511(d) (McKinney 1992).

II. REAL EVIDENCE

A. *Definition*: Presentation, based upon the judge's discretion, to court and jury of an object that appeals to the senses.
People v. Diaz, 111 Misc. 2d 1083, 1084, 445 N.Y.S.2d 888, 889 (1975) (body itself used as real evidence).

1. Trial court has broad discretion as to the admissibility of real evidence.
Uss v. Town of Oyster Bay, 37 N.Y.2d 639, 641, 339 N.E.2d 147, 149, 376 N.Y.S.2d 449, 450 (1975).

B. *Rule*: Object must be relevant.
People v. Early, 191 A.D.2d 807, 809, 594 N.Y.S.2d 849, 851 (3d Dep't 1993). Even if relevant, object may not be

presented if it is:

1. Physically inconvenient; or
2. Indecent;

   People v. Herk, 179 Misc. 450, 452, 39 N.Y.S.2d 246, 248 (Sup. Ct. N.Y. County 1942); or
3. Potentially prejudicial and of low probative value.

   Allen v. Stokes, 260 A.D. 600, 601, 23 N.Y.S.2d 443, 444 (1st Dep't 1940); *People v. Bell*, 63 N.Y.2d 796, 797, 471 N.E.2d 137, 138, 481 N.Y.S.2d 324, 325 (1984).

C. Jury may not consider physical resemblance in determining family relationships. Such evidence is neither accurate nor reliable.

   Bilkovie v. Loeb, 156 A.D. 719, 721, 141 N.Y.S. 279, 281 (1st Dep't 1913); *Dep't of Public Welfare of the City of New York v. Hamilton*, 282 A.D. 1025, 1025, 126 N.Y.S.2d 240, 241 (1st Dep't 1953); *Commissioner of Welfare v. Leroy C.*, 45 A.D.2d 963, 963, 359 N.Y.S.2d 341, 342 (2d Dep't 1974).

D. Observation by the jury may be used to determine age.

   N.Y. CIV. PRAC. L. & R. § 4516 (McKinney 1993); *Wellington Assocs. v. Vandee Enter. Corp.*, 75 Misc. 2d 330, 332, 347 N.Y.S.2d 788, 791 (Civil Ct. N.Y. County 1973).

E. Grisly, shocking objects will more likely be permitted in criminal rather than civil cases.

   People v. Singer, 300 N.Y. 120, 122, 89 N.E.2d 710, 710 (1949); *People v. Cruz*, 176 A.D.2d 953, 953, 575 N.Y.S.2d 891, 892 (2d Dep't 1991).

F. Inspection of Premises—Criminal Case: The jury may be ordered by the court to inspect the premises where a material fact occurred.

   N.Y. CRIM. PROC. § 270.50(1) (McKinney 1993); *People v. Morton*, 189 A.D.2d 488, 494, 596 N.Y.S.2d 783, 790 (1st Dep't 1993).

   1. Defendant, absent waiver, has an absolute right to see and hear everything the jury sees and hears.

      N.Y. CRIM. PROC. § 270.50(2) (McKinney 1993);

People v. Morton, 189 A.D.2d 488, 494, 596 N.Y.S.2d 783, 789 (1st Dep't 1993).

2. Juror may not view the scene without permission of the court and an unauthorized view can be grounds for a mistrial.

People v. DeLucia, 20 N.Y.2d 275, 279, 229 N.E.2d 211, 214, 282 N.Y.S.2d 526, 530 (1967); *People v. Crimmins*, 26 N.Y.2d 319, 323, 258 N.E.2d 708, 709, 310 N.Y.S.2d 300, 302 (1970).

G. Inspection of Premises—Civil Case: During the course of a trial, the court may, in its discretion, order a viewing or observation by the jury.

N.Y. CIV. PRAC. L. & R. § 4110-C (McKinney 1993).

H. Exhibition of injured part of body allowed when done to show nature and extent of injury.

Dictz v. Aronson, 244 A.D. 746, 746, 279 N.Y.S. 66, 67 (2d Dep't 1935) (throat); *People v. Dananel*, 183 A.D.2d 778, 778, 584 N.Y.S.2d 485, 486 (2d Dep't), *appeal denied*, 80 N.Y.2d 902, 588 N.Y.S.2d 820, 602 N.E.2d 236 (1992) (chest and stomach).

I. Plaintiff Demonstrating Effect of Injuries—Left to the trial judge's discretion.

Harvey v. Mazal American Partners, 79 N.Y.2d 218, 223, 590 N.E.2d 240, 226, 581 N.Y.S.2d 639, 641 (1992) (plaintiff permitted to appear before jury and answer questions designated to demonstrate extent of brain damage).

J. Experiments: Conditions must be similar to the time at issue, unless the experiment is within the jurors' everyday experiences.

People v. Andrew, 156 A.D.2d 978, 979, 549 N.Y.S.2d 268, 269 (4th Dep't 1989).

K. Photographs and Movies

1. A photograph is admissible if relevant, if a proper foundation is laid, and if not unduly prejudicial. Any witness familiar with the circumstances may testify as to the photograph's fairness and accuracy to help lay the proper foundation.

People v. Perez, 300 N.Y. 208, 90 N.E.2d 40 (1949), *cert. denied*, 338 U.S. 952 (1950); *People v. Blagrone*, 183 A.D.2d 837, 837, 584 N.Y.S.2d 86, 87 (2d Dep't 1992).

a. In a criminal case, photographs are admissible if their probative value outweighs potential to arouse the emotions of the jury and to prejudice the defendant.
People v. Wood, 79 N.Y.2d 958, 960, 591 N.E.2d 1178, 1179, 582 N.Y.S.2d 992, 993 (1992).

2. Movies are usually not excluded even if other sufficient evidence exists. However, the court places restrictions on admission:

a. Left to trial judge's discretion;
Caprara v. Chrysler Corp., 71 A.D.2d 515, 523, 423 N.Y.S.2d 694, 698 (3d Dep't 1979), *aff'd*, 52 N.Y.2d 114, 417 N.E.2d 545, 436 N.Y.S.2d 251 (1981).

b. Must not cause delay; and

c. Cannot be sensational;
Boyarsky v. G.A. Zimmerman Corp., 240 A.D. 361, 365, 270 N.Y.S. 134, 138 (1st Dep't 1934).

L. X-Rays: Several statutory requirements for admissibility.
N.Y. CIV. PRAC. L. & R. § 4532-a (McKinney 1993); *Vanderwel v. Palozzo*, 155 A.D.2d 387, 388, 548 N.Y.S.2d 14, 15 (1st Dep't 1989).

M. It is discretionary as to what exhibits jury will be allowed to take with them while deliberating.
N.Y. CRIM. PROC. LAW § 310.20 (McKinney 1993); *Raynolds v. Vinier*, 125 A.D. 18, 20, 109 N.Y.S. 293, 295 (4th Dep't 1908).

III. AUTHENTICATION OF WRITINGS

A. *Two General Rules*:

1. No writing can be read to the jury to prove its content unless it is formally offered into evidence.

Blackwood v. Chemical Corn Exch. Bank, 4 A.D.2d 656, 659, 168 N.Y.S.2d 335, 339 (1st Dep't 1957), *rev'd*, 5 N.Y.2d 884, 156 N.E.2d 459, 182 N.Y.S.2d 830 (1959).

2. In order to be accepted into evidence, the writing must be proven to the judge's satisfaction to be genuine.

B. Methods of proving a writing's genuineness:

1. Obtain an admission by a notice to admit under N.Y. CIV.

PRAC. L. & R. § 3123 (McKinney 1993).

2. Have writer identify the writing from the stand.

3. Call someone who witnessed the execution of the writing.

N.Y. CIV. PRAC. L. & R. § 4537 (McKinney 1993).

4. Use statutory authority, which may make some writings genuine in the eyes of the court.

N.Y. CIV. PRAC. L. & R. § 4538 (McKinney 1993).

a. Even so, opposing party may still attack the genuineness with court's permission.
Albany Cty. Sav. Bank v. McCarty, 149 N.Y. 71, 79, 43 N.E. 427, 429 (1896).

5. Testimony of a handwriting expert.
People v. Yu, 166 A.D.2d 249, 249, 564 N.Y.S.2d 300, 301 (1st Dep't 1990), *appeal denied*, 76 N.Y.2d 992, 565 N.E.2d 530, 563 N.Y.S.2d 781 (1990).

6. Circumstantial evidence of genuineness:

a. Solicited Reply Doctrine—When a party sends another party a letter requesting a response, the responsive letter can be admitted into evidence without further proof that it is genuine.
People v. Dunbar, 215 N.Y. 416, 109 N.E. 554 (1915).

This doctrine also applies to the case where one party calls a second party and the second party sends back a letter. However, this doctrine is not used to authenticate the second party's voice on the

telephone.
Mankes v. Fishman, 163 A.D. 789, 149 N.Y.S. 228 (3d Dep't 1914).

b. Ancient Document Rule: A writing is considered authentic if it is 30 years old or older and is located in a place where it should naturally be found.

(1) However, in cases dealing with real property, proof of possession is required along with the document itself.
Porter v. State, 5 Misc. 2d 28, 34, 159 N.Y.S.2d 549, 556 (Ct. Cl. 1957).

7. Official documents: in New York, a certified copy is sufficient.
N.Y. CIV. PRAC. L. & R. § 4540 (McKinney 1993).

IV. BEST EVIDENCE RULE

A. Requires party to produce the original document whenever party must prove the contents of the writing.
Trombley v. Seligman, 191 N.Y. 400, 403, 84 N.E. 280, 281 (1908); *Clark v. N.Y.C. Transit Auth.*, 174 A.D.2d 268, 273, 580 N.Y.S.2d 221, 225 (1st Dep't 1992).

Three situations in which best evidence rule applies:

1. Where witness knows a fact only because he or she read it somewhere.
MCCORMICK ON EVIDENCE § 233, at 708 (3d ed. 1984).

2. Where the writing is a legally operative instrument.
Kain v. Larkin, 141 N.Y. 144, 151, 36 N.E. 9, 10 (1894).

3. Where the witness refers to a writing and tries to summarize it.

B. An oral confession may be testified to, even though later written and signed, as long as the oral and written confessions do not differ in substance from each other.
People v. Giro, 197 N.Y. 152, 160, 90 N.E. 432, 435 (1910).

C. In a civil case, testimony of a witness from a prior trial

between the same parties may be admitted without the minutes of the prior trial, as long as the witness's testimony is material to the issue at hand.

McRorie v. Monroe, 203 N.Y. 426, 430, 96 N.E. 724, 725 (1911).

1. However, in a criminal case, a transcript is needed.

N.Y. CRIM. PROC. § 670.20 (McKinney 1993).

D. Theoretically, the rule should apply to any chattel with writing on it.

In re New York City, 73 A.D.2d 932, 933, 423 N.Y.S.2d 686, 688 (1st Dep't 1980).

E. The original of the writing is the copy which the parties intended to be effective. A carbon copy is not valid unless signed.

Sarasohn v. Kamaiky, 193 N.Y. 203, 215, 86 N.E. 20, 24 (1908).

F. For secondary evidence, a party must show:

1. Document once existed;
2. Document was genuine, if genuineness is at issue; and
3. Excuse for non-production.

Rosenbaum v. Podolsky, 97 Misc. 614, 618, 162 N.Y.S. 227, 229 (Sup. Ct. N.Y. County 1916); *Falcone v. Edo Corp.*, 141 A.D.2d 498, 529 N.Y.S.2d 123 (2d Dep't 1988).

G. Excuses: The rationale behind allowing excuses for failure to produce the actual document is the belief that the need for relevant evidence takes precedence over the dangers of inaccuracy and fraud, which are left to the trier of fact in determining probative value. Some acceptable excuses are:

1. Physical inconvenience in producing the writing;
2. Loss of document by client. In this case, the document must be searched for in good faith.

Kearny v. Mayor, 92 N.Y. 617 (1883).

3. Destruction of document by client. In this case, the document must have been destroyed in good faith.

People v. Betts, 272 A.D.2d 737, 741, 74 N.Y.S.2d

791, 794 (1st Dep't 1947), *aff'd*, 297 N.Y. 1000, 80 N.E.2d 456 (1948).

4. If document is in the possession of a third party. In this case, it must be subpoenaed.
   People v. Burgess, 244 N.Y. 472, 479, 155 N.E. 745, 748 (1927).
5. Writing on file in a public place is proved by a certified copy.
   Masten v. State, 14 Misc. 2d 119, 120, 179 N.Y.S.2d 93, 95 (Ct. Cl. 1958), *aff'd*, 11 A.D.2d 390, 206 N.Y.S.2d 672 (3d Dep't 1960), *aff'd*, 9 N.Y.2d 796, 175 N.E.2d 166, 215 N.Y.S.2d 508 (1961).
6. Expert testimony as to the content of voluminous documents.
   People v. Weinberg, 183 A.D.2d 932, 934, 586 N.Y.S.2d 132, 134 (2d Dep't 1992).

H. A document labelled "collateral" is not subject to the best evidence rule. A "collateral" document is relatively unimportant to the issues at hand.
   Wolper v. New York Water Serv. Corp., 276 A.D. 1106, 1107, 96 N.Y.S.2d 647, 649 (2d Dep't 1950).

V. Examination of Witnesses

A. *Leading Questions*: Questions which, because of their phrasing or because of the friendly posture of the witness, suggest the desired response.
Becker v. Koch, 104 N.Y. 394, 400, 10 N.E. 701, 703 (1887); *People v. Sexton*, 187 N.Y. 495, 501, 80 N.E. 396, 400 (1907); *People v. Seligman*, 35 A.D.2d 591, 592-93, 313 N.Y.S.2d 593, 597 (2d Dep't 1970); *People v. Marshall*, 144 A.D.2d 1005, 534 N.Y.S.2d 623, 624 (4th Dep't 1988)

1. Whether a leading question should be allowed is to be determined by the trial court in the exercise of its discretion.
2. As a matter of precedent, leading questions will be allowed in the following instances:
   a. If asked by the court.

Zinman v. Black & Decker, Inc., 983 F.2d 431, 436 (2d Cir. 1983) (questioned expert in order to clarify evidentiary picture for benefit of jury); *People v. Purdie*, 174 A.D.2d 298, 299, 571 N.Y.S.2d 298, 299 (1st Dep't), *appeal denied*, 78 N.Y.2d 972, 580 N.E.2d 424, 574 N.Y.S.2d 952 (1991) (questioned complainant-clarified issues); *People v. Arthur*, 186 A.D.2d 661, 663, 588 N.Y.S.2d 881, 883 (2d Dep't 1992) (questioned witnesses-clarified issues); *People v. Glover*, 185 A.D.2d 458, 459, 585 N.Y.S.2d 873, 875 (3d Dep't 1992) (questioned 13-year-old rape victim about rape trauma syndrome); *People v. Alexander*, 190 A.D.2d 1052, 1053, 593 N.Y.S.2d 661, 662 (4th Dep't 1993) (questioned brief which elicited information already in evidence).

b. On cross-examination.

c. On direct examination:

(1) If used to elicit trivial, introductory matter.

(2) If the witness is hostile or unwilling to testify. *Becker v. Koch*, 104 N.Y. 394, 400 (1887); *People v. Sexton*, 187 N.Y. 495, 501 (1907); *People v. Walker*, 125 A.D.2d 732, 510 N.Y.S.2d 203 (2d Dep't 1986), *appeal denied*, 69 N.Y.2d 887, 507 N.E.2d 1106, 515 N.Y.S.2d 1036 (1987); *People v. Marshall*, 144 A.D.2d 1005, 534 N.Y.S.2d 623, 624 (4th Dep't 1988).

(3) Where the physical or mental weakness or immaturity of the witness requires its use. *People v. Greenhagen*, 78 A.D.2d 964, 966, 433 N.Y.S.2d 683, 685-86 (4th Dep't 1980) (child); *People v. Tyrrel*, 101 A.D.2d 946, 946, 475 N.Y.S.2d 937, 938 (3d Dep't 1984) (child).

(4) Where the witness's recollection has been exhausted. *Cheeney v. Arnold*, 15 N.Y. 345 (1857).

B. *Use of Memoranda by Witness*: The witness cannot read his testimony from a previously prepared memorandum. She may, however, use a memorandum in connection with her

testimony in the following instances:

1. To refresh her recollection.

   a. If the witness had personal knowledge of a relevant fact, but cannot recall the fact, she can refresh her recollection by the use of any memorandum (or anything else, for that matter).
   Huff v. Bennett, 6 N.Y. 337, 338 (1857); *People v. Ferrar*, 293 N.Y. 51, 56, 55 N.E.2d 861, 863 (1944); *Badr v. Hogan*, 75 N.Y.2d 629, 636, 554 N.E.2d 890, 894, 555 N.Y.S.2d 249, 253 (1990) (confession of judgment against plaintiff not admitted for other reasons); *Nappi v. Gerdts*, 103 A.D.2d 737, 477 N.Y.S.2d 202, 203 (2d Dep't 1984) (grand jury testimony); *People v. Fross*, 115 A.D.2d 247, 248, 496 N.Y.S.2d 313, 314, *appeal denied*, 67 N.Y.2d 761, 491 N.E.2d 290, 500 N.Y.S.2d 1033 (4th Dep't 1985) (police report not used on other grounds); *People v. Abair*, 134 A.D.2d 743, 744, 521 N.Y.S.2d 560, 562 (3d Dep't 1987), *appeal denied*, 70 N.Y.2d 1003, 521 N.E.2d 1081, 526 N.Y.S.2d 938 (1938) (prior victim statement); *People v. Gittens*, 165 A.D.2d 750, 564 N.Y.S.2d 270, 271 (1st Dep't 1990).

   b. The adversary has the right on cross-examination to inspect the memorandum and to question with respect to it.
   People v. Gezzo, 307 N.Y. 385, 393-94, 121 N.E.2d 380, 384 (1954); *Slotnick v. State*, 129 Misc. 2d 553, 554, 493 N.Y.S.2d 731, 732 (Ct.Cl. 1985) (extended rule to disclosure of documents used by witness at pretrial examination); *E.R. Carpenter Co. v. ABC Carpet Co.*, 98 Misc. 2d 1091, 1092, 415 N.Y.S.2d 351, 353 (N.Y.C. Civ. Ct. N.Y. County 1979).

   c. Although the proponent may not offer the memorandum in evidence, the adversary may.

   d. The best evidence rule is inapplicable.

   e. It makes no difference when the memorandum was made.
   People v. Ramos, 141 Misc. 2d 930, 935, 535

N.Y.S.2d 663, 667 (Sup. Ct. N.Y. County 1988); *People v. DiLoretto*, 150 A.D.2d 920, 921, 541 N.Y.S.2d 260, 262 (3d Dep't 1989), *appeal denied*, 74 N.Y.2d 739, 545 N.Y.S.2d 113 (1989).

f. Even a document which is inadmissible may be used to refresh a recollection.
Collins v. Pennsylvania Cent. Transp. Co., 497 F.2d 1296, 1298 (2d Cir. 1974).

2. As a "past recollection recorded."

a. A writing is admissible, as evidence auxiliary to the testimony of the witness, if:

(1) It was made "at or about" the time of the event recorded.
Howard v. McDonough, 77 N.Y. 592, 593 (1879); *Calandra v. Norwood*, 81 A.D.2d 650, 651, 438 N.Y.S.2d 381, 382 (2d Dep't 1981).

(2) The witness can testify to its accuracy.
Downs v. New York Cent. R.R., 47 N.Y. 83, 87 (1871); *People v. Fields*, 151 A.D.2d 598, 599, 542 N.Y.S.2d 356, 358 (2d Dep't 1989); *Iannielli v. Consolidated Edison Co.*, 75 A.D.2d 223, 228, 428 N.Y.S.2d 473, 476 (2d Dep't 1980).

(3) The witness had personal knowledge of the event, does not recall it, and the memorandum does not refresh her recollection.
People v. Taylor, 80 N.Y.2d 1, 8, 598 N.E.2d 693, 696, 586 N.Y.S.2d 545, 548 (1992); *Russell v. Hudson River R.R.*, 17 N.Y. 134, 140 (1858); *Calandra v. Norwood*, 81 A.D.2d 650, 438 N.Y.S.2d 381, 384 (2d Dep't 1981).

b. The best evidence rule applies.

3. As a summary of numerous items:

a. Where a witness testifies to numerous items (*e.g.*, inventory of articles), she will normally refresh her recollection by the use of a memorandum. After she testifies, the memorandum is admissible, not as evidence, but as a convenient statement of her tes-

timony.
Howard v. McDonough, 77 N.Y. 592, 593 (1879).

C. *Opinion Evidence—General Rule*: A witness is required to state facts, not conclusions or opinions.
Morehouse v. Matthews, 2 N.Y. 514, 515 (1849); *People v. Adorno*, 128 Misc. 2d 389, 393, 489 N.Y.S.2d 441, 444 (N.Y. Crim. Ct. Queens County 1984).

D. *Lay Witness Exception*: A lay witness may testify to an opinion or conclusion where it is unreasonable to expect her to describe all the facts which would permit the jury to draw the conclusion.
People v. Kenny, 36 A.D.2d 477, 478-79, 320 N.Y.S.2d 972, 973 (3d Dep't 1971), *aff'd*, 30 N.Y.2d 154, 282 N.E.2d 295, 331 N.Y.S.2d 392 (1972).

1. Thus, a lay witness may state her opinion or conclusion as to:

a. The emotions of another.
Blake v. People, 73 N.Y. 586, 586-87 (1878).

(1) But she may not testify that two people appeared to be in love.
Pearce v. Stace, 207 N.Y. 506, 512, 101 N.E. 434 (1913); *In re Sanchez*, 141 Misc. 2d 1066, 1067, 535 N.Y.S.2d 937, 938 (Family Ct. Bronx County 1988).

2. Matters of taste and smell; *e.g.*, that a particular liquid tasted was water or whiskey.

3. The speed of a moving vehicle.

a. Testimony that the vehicle was going "fast" or "very fast" has been held proper.
Pieniewski v. Benbenek, 56 A.D.2d 710, 392 N.Y.S.2d 732, 733 (4th Dep't 1977) (foundation for testimony must first be established); *Marcucci v. Bird*, 275 A.D. 127, 128, 88 N.Y.S.2d 333, 335 (3d Dep't 1949); *Larsen v. Vigliarolo Bros.*, 77 A.D.2d 562, 429 N.Y.S.2d 273, 275 (2d Dep't 1980) (witness not allowed to testify about speed of motorcycle); *Swoboda v. We Try Harder, Inc.*, 128 A.D.2d 862,

863, 513 N.Y.S.2d 781, 783 (2d Dep't 1987) (testimony regarding speed of motorcycle not allowed where foundation witness not qualified).

4. Identification of another's voice.
   a. A foundation must first be laid to show a basis for the identification; *e.g.*, that the witness heard the person speak on another occasion, and for this reason, recognized the voice at the time in question. *Mankes v. Fishman*, 163 A.D. 789, 799, 149 N.Y.S. 228, 235 (3d Dep't 1914).
5. The witness's own intent where that is relevant. *People v. Levan*, 295 N.Y. 26, 33-34, 64 N.E.2d 341, 345 (1945); *People v. Rivera*, 101 A.D.2d 981, 981, 477 N.Y.S.2d 732, 733-34 (3d Dep't 1984), *aff'd*, 65 N.Y.2d 661, 481 N.E.2d 253, 491 N.Y.S.2d 621 (1985).
6. The genuineness of another's handwriting.
   a. The witness must first lay a foundation by showing sufficient familiarity with the signature of the person in question.
   People v. Corey, 148 N.Y. 476, 484, 42 N.E. 1066, 1074 (1896) (foundation must first be established); *People v. Clark*, 122 A.D.2d 389, 389, 504 N.Y.S.2d 799, 800 (3d Dep't 1986).
7. The value of his own services. He must be an expert to testify to the value of the services of a third person. *Mercer v. Vose*, 67 N.Y. 56, 58 (1876).
8. There are two cases in which a lay witness is permitted to state an opinion, but is expected to follow an established formula:
   a. The irrational conduct of another.
      (1) A lay witness, not subscribing to a will, may not express his opinion of the sanity of another. He is permitted to describe the acts and to testify to the declarations of the person in question, and then to state whether these acts and declarations impressed him as being rational or irrational. A subscribing witness to a will is

competent to express an opinion as to the testator's sanity. In other words, a lay witness may characterize the acts, but not the actor; a subscribing witness may characterize the actor.
People v. Pekarz, 185 N.Y. 470, 481, 78 N.E. 294, 297 (1906); *Gomboy v. Mitchell*, 57 A.D.2d 916, 916, 395 N.Y.S.2d 55, 56 (2d Dep't 1977); *In re Estate of Vickery*, 167 A.D.2d 828, 828, 561 N.Y.S.2d 937, 938 (4th Dep't 1990).

(2) Lay witness may only state whether conversations or conduct was rational or irrational but not the general soundness or unsoundness of a person's mind.
People v. Clark, 94 A.D.2d 846, 847, 463 N.Y.S.2d 601, 603 (3d Dep't 1983).

b. A lay witness may testify that another person was intoxicated.
People v. Eastwood, 14 N.Y. 562, 566 (1856); *Ellison v. N.Y.C. Transit Auth.*, 63 N.Y.2d 1030, 1030, 484 N.Y.S.2d 797, 797 (1984); *Lipp v. Saks*, 129 A.D.2d 681, 683, 514 N.Y.S.2d 443, 445 (2d Dep't 1987); *Allan v. Keystone Nineties Inc.*, 74 A.D.2d 992, 992, 427 N.Y.S.2d 107, 108 (4th Dep't 1980).

(1) But one court went as far as to require the witness to preface this conclusion with a statement of the constitutive facts ("his eyes were glazed, his speech was slurred, among other things"), and then to state that the person was drunk.
People v. Kessler, 16 Misc. 2d 179, 180, 183 N.Y.S.2d 834, 835 (Sup. Ct. Jefferson County 1959).

F. *Expert Witness Exception*: An expert may be permitted to express an opinion where three conditions are met:

1. The facts or the inferences to be drawn from the facts depend "upon professional or scientific knowledge or skill not within the range of ordinary training or intelligence."
People v. Cronin, 60 N.Y.2d 430, 432, 458 N.E.2d

351, 352, 470 N.Y.S.2d 110, 111 (1983); *Dougherty v. Milliken*, 163 N.Y. 527, 533, 57 N.E. 757, 759 (1900).

a. An expert in the marketing of fruit was permitted to testify as to how much money a decedent would probably have earned if he had lived, although an expert could not testify as to the monetary loss occasioned by the simultaneous death of the decedent's wife.

Zaninovich v. American Airlines, Inc., 26 A.D.2d 155, 158, 271 N.Y.S.2d 866, 870 (1st Dep't 1966). Notably, the holding of this case was rejected by the Fourth Department in *Delong v. County of Erie*, 89 A.D.2d 376, 380, 455 N.Y.S.2d 887, 894 (4th Dep't 1982), *aff'd*, 60 N.Y.2d 296, 457 N.E.2d 717, 469 N.Y.S.2d 611 (1983).

2. The expert must first be qualified. Whether the witness is qualified is a question for the trial court to determine in the exercise of its discretion.

Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 398, 34 N.E.2d 367, 372 (1941); *Werner v. Sun Oil Co.*, 65 N.Y.2d 839, 840, 482 N.E.2d 921, 922, 493 N.Y.S.2d 125, 126 (1985); *Hong v. County of Nassau*, 139 A.D.2d 566, 566, 527 N.Y.S.2d 66, 66 (2d Dep't 1988); *Goldman v. County of Nassau*, 170 A.D.2d 648, 648, 567 N.Y.S.2d 360, 361 (2d Dep't 1991).

3. The expert must have "reasonable certainty" as to his conclusion, but an expert is not required to state specifically, that he is reasonably certain. However, an expert is no more entitled to speculate than a layman.

Matott v. Ward, 48 N.Y.2d 455, 460-61, 399 N.E.2d 532, 534-35, 423 N.Y.S.2d 645, 647-48 (1979) (medical opinion); *Sitaris v. James Ricciardi & Sons, Inc.*, 154 A.D.2d 451, 453, 545 N.Y.S.2d 937, 939 (2d Dep't 1989), *appeal denied*, 74 N.Y.2d 708, 553 N.E.2d 1343, 554 N.Y.S.2d 833 (1989) (accident reconstruction expert).

G. *Expert—Form of Testimony*: The general rule is that the

expert may state his opinion without first specifying the data upon which his opinion is based.

1. Expert does not have to state facts or data before stating an opinion.

   N.Y. CIV. PRAC. L. & R. § 4515 (McKinney 1993); *People v. Youngs*, 151 N.Y. 210, 218-19 (1896); *People v. DiPiazzi*, 211 N.Y.2d 342, 351, 248 N.E.2d 412, 417, 300 N.Y.S.2d 545, 552 (1969).

2. Upon cross-examination expert may be required to specify the data and other criteria supporting the opinion.

   Caton v. Doug Urban Constr. Co., 65 N.Y.2d 909, 911, 483 N.E.2d 128, 129, 493 N.Y.S.2d 453, 454 (1985).

3. In a criminal matter, an expert who relies on necessary facts not contained on the record is required to testify to those facts prior to rendering the opinion.

   People v. Jones, 73 N.Y.2d 427, 430, 539 N.E.2d 96, 98, 541 N.Y.S.2d 340, 342 (1989).

H. *Expert—The Hypothetical Question*: Prior to September 1, 1963, a hypothetical question was necessary in New York when the expert lacked personal knowledge of the facts upon which his opinion rested. CPLR 4515 now provides: "Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data and other criteria supporting the opinion."

   N.Y. CIV. PRAC. L. & R. § 4515 (McKinney 1993); *Tarlowe v. Metropolitan Ski Slopes, Inc.*, 28 N.Y.2d 410, 414, 271 N.E.2d 515, 516, 322 N.Y.S.2d 665, 667 (1971).

1. Note that the hypothetical question may still be used and the court may even direct its use.

2. A hypothetical question must specify each assumption of fact which the expert is to consider. Every assumed fact must be in evidence, but there are two occasions where the expert may rely on facts that are not admissible:

People v. Keough, 276 N.Y. 141, 145, 11 N.E.2d 570, 572 (1937); *People v. Samuels*, 302 N.Y. 163, 171, 96 N.E.2d 757, 761-62 (1951); *People v. Jones*, 10 Misc. 2d 1067, 1075, 171 N.Y.S.2d 325, 333-34 (N.Y.C. Magis. Ct. N.Y. County 1958); *Livreri v. Berliner*, 123 A.D.2d 670, 670-71, 507 N.Y.S.2d 41, 41 (2d Dep't 1986); *Natale v. Niagara Mohawk Power Corp.*, 135 A.D.2d 955, 957, 522 N.Y.S.2d 364, 365 (3d Dep't), *appeal denied*, 71 N.Y.2d 804, 524 N.E.2d 149, 528 N.Y.S.2d 829 (1989).

a. When the facts are "of a kind accepted in the profession as reliable . . ." or
Hambsch v. New York City Transit Auth., 63 N.Y.2d 723, 726, 469 N.E.2d 516, 518, 480 N.Y.S.2d 195, 197 (1984); *People v. Jones*, 73 N.Y.2d 427, 430, 539 N.E.2d 96, 97, 541 N.Y.S.2d 340, 341 (1989); *People v. Fitzgibbon*, 166 A.D.2d 745, 747, 563 N.Y.S.2d 518, 521 (3d Dep't 1990), *appeal denied*, 77 N.Y.2d 838, 568 N.E.2d 655, 567 N.Y.S.2d 2061 (1991).

b. When the facts come "from a witness subject to full cross-examination on the trial."
People v. Sugden, 35 N.Y.2d 453, 459, 323 N.E.2d 169, 172, 363 N.Y.S.2d 923, 927 (1974); *People v. Wilson*, 133 A.D.2d 179, 183-84, 518 N.Y.S.2d 690, 693 (2d Dep't 1987).

I. *Handwriting Expert*: A handwriting expert compares the disputed writing with a standard and states his opinion as to whether both documents were written by the same hand. The "standard" is any writing proved to the satisfaction of the court to be the genuine handwriting of the person whose signature is in question.

N.Y. CIV. PRAC. L. & R. § 4536 (McKinney 1994); *People v. Molineux*, 168 N.Y. 264, 320-21, 61 N.E. 286, 304-05 (1901); *Heller v. Murray*, 112 Misc. 2d 745, 749, 447 N.Y.S.2d 348, 351 (N.Y.C. Civ Ct. Queens County 1981), *aff'd*, 118 Misc. 2d 508, 464 N.Y.S.2d 391 (Sup. Ct. App. T. 2d Dep't 1983).

J. *Expert Cross-Examination*: An expert may be cross-examined

by the use of textbooks which contradict him only where the expert has acknowledged the authority of the textbook or its author.

Hastings v. Chrysler Corp., 255 A.D. 316, 316-17, 7 N.Y.S.2d 524, 527 (1st Dep't 1948); *Florence v. Goldberg*, 48 A.D.2d 917, 919, 369 N.Y.S.2d 794, 798-99 (2d Dep't 1977), *aff'd*, 44 N.Y.2d 189, 375 N.E.2d 736, 404 N.Y.S.2d 583 (1978).

K. *Expert-Subpoena*: Experts may be subpoenaed to testify to:

1. Facts within their knowledge and physical observations, but not to matters which require their expertise, education, judgement, or opinion.

   In re Estate of Atkinson, 103 A.D.2d 960, 960, 479 N.Y.S.2d 805, 806 (3d Dep't 1984).

2. If it cannot be determined if the witness is being called to testify about general custom and usage, or for the particular incident.

   Waters v. East Nassau Medical Group, 92 A.D.2d 893, 893, 460 N.Y.S.2d 98, 99 (2d Dep't 1983); *In re Estate of Atkinson*, 103 A.D.2d 960, 960, 479 N.Y.S.2d 805, 806 (3d Dep't 1986).

L. *Cross-Examination—In General*: A party has the absolute right to cross-examine the witnesses against him.

1. If a party is deprived of the opportunity to cross-examine, the direct examination will usually be stricken.

   People v. Cole, 43 N.Y. 508, 512 (1871); *Diocese of Buffalo v. McCarthy*, 91 A.D.2d 213, 219-20, 458 N.Y.S.2d 764, 768 (4th Dep't 1983); *People v. Ramistella*, 306 N.Y. 379, 383-84, 118 N.E.2d 566, 568-69 (1954).

2. The proper scope of cross-examination covers:

   a. Matters brought out on direct examination and the implications flowing therefrom.

      But see People v. Bethune, 105 A.D.2d 262, 484 N.Y.S.2d 577 (2d Dep't 1984) (party to criminal case proves through cross-examination any relevant proposition irrespective of scope of direct

examination once redirect and recross inquiry limited to new matters brought out on preceding examination).

b. Matters affecting the witness's credibility.

3. If the cross-examiner goes into "new matter," with or without permission of the court, the cross-examiner makes the witness his own witness, and thus loses the right to impeach him.

Bennett v. Crescent Athletic-Hamilton Club, 270 N.Y. 456, 1 N.E.2d 963 (1936).

M. *Impeaching One's Own Witness*: A party may not impeach his own witness, except:

1. By contradictory statements provided they were in writing and subscribed, or made under oath. *See* CPLR 4514. CRIM. PROC. LAW § 60.35 is to the same general effect, but permits this only where the witness has affirmatively hurt the party who called him and not where he has simply disappointed the party who called him.

Cf. Chambers v. Mississippi, 410 U.S. 284 (1973) (state evidence rule may not unduly intrude into right to present effective defense under Sixth Amendment). *But see Grochulski v. Henderson*, 637 F.2d 50, 54 (2d Cir. 1983) (confined *Chambers* holding to reliable confession); *Crawford v. Nilan*, 289 N.Y. 444, 450, 46 N.E.2d 512, 515 (1943); *Carriage House Motor Inn, Inc. v. Watertown*, 136 A.D.2d 895, 895-96, 524 N.Y.S.2d 930, 931-32 (4th Dep't), *aff'd*, 72 N.Y.2d 990, 531 N.E.2d 295, 534 N.Y.S.2d 663 (1988).

2. Where the witness is a compulsory witness, *e.g.*, a subscribing witness to a will. *In re Cottrell*, 95 N.Y. 329, 333-34 (1884). In this instance, the witness may be impeached as if he had been called by the adversary.

3. A witness who is called by the court may also be impeached by any party.

4. This rule applies where a party calls his adversary as his own witness. Such an adversary-witness may be

led, but he may not be impeached. As noted in section 1, *supra*, the party's admissions may be used as an exception to the hearsay rule.

Cross v. Cross, 108 N.Y. 628, 629, 15 N.E. 333, 334 (1888).

N. *No Advance Accreditation*: Until a witness has been impeached, the party who called him may not accredit him. Thus, the party may not put in proof of the witness's good reputation for truth and veracity, or proof of prior consistent statements, until the witness has been attacked.

People v. Jung Hing, 212 N.Y. 393, 405, 106 N.E. 105, 109 (1914).

Exceptions:

1. The timely complaint of the victim of a forcible rape, assault, or robbery may be shown if the complainant testifies in the subsequent criminal prosecution.

   People v. McDaniel 81 N.Y.2d 10, 16, 611 N.E.2d 265, 268-69, 595 N.Y.S.2d 364, 367-68 (1993).

2. When identification of the defendant is in issue, a witness who has on a previous occasion identified the defendant may testify to such previous identification.

   N.Y. CRIM. PROC. LAW § 60.30 (McKinney 1992).

   a. Except as noted in 2(d), *infra*, only the person who made the previous identification may testify to it on trial.

      People v. Trowbridge, 305 N.Y. 471, 476, 113 N.E.2d 841, 843 (1953).

   b. The prior identification must have been of the defendant in person and not by selection from a "mug book" (*People v. Cioffi*, 1 N.Y.2d 70, 73, 133 N.E.2d 703, 705, 150 N.Y.S.2d 192, 194 (1956)) or a police artist's "composite sketch" (*People v. Griffin*, 29 N.Y.2d 91, 92-93, 272 N.E.2d 477, 477-78, 323 N.Y.S.2d 964, 964-65 (1971)).

   c. The lineup must have been conducted without violating the defendant's constitutional rights.

      United States v. Wade, 388 U.S. 218, 241 (1966); *Gilbert v. United States*, 388 U.S. 263, 272 (1967).

d. If a witness, who has identified the defendant on an earlier occasion, is unable to identify the defendant in court, the witness may testify to the prior identification, so long as he can swear that he is presently certain that the man he saw on the prior occasion (*e.g.*, at a lineup) is the man who committed the crime. Testimony of other witnesses (*e.g.*, police) would be required to prove that the man the witness identified on the prior occasion is the defendant.

CRIM. PROC. LAW § 60.25 (McKinney 1994); *People v. Quevas*, 81 N.Y.2d 41, 45, 611 N.E.2d 760, 762, 595 N.Y.S.2d 721, 723 (1993).

O. *Impeachment of Adversary's Witness by Evidence of Bias, Interest, or Hostility*:

1. The fact that the adversary's witness is biased in favor of the party calling him can be shown. For this purpose, it is competent to show among other matters, that:

   a. The witness has been bribed.

   b. The witness is being paid a fee to testify.

   c. The witness is related to the party calling him.
   Coleman v. New York City Trans. Auth., 37 N.Y.2d 137, 142, 332 N.E.2d 850, 853, 371 N.Y.S.2d 663, 668 (1975).

   d. The witness was injured simultaneously with the plaintiff, but the witness settled his claim, and is now testifying for the defendant.
   Thompson v. Korn, 48 A.D.2d 1007, 1008, 368 N.Y.S.2d 923, 926 (4th Dep't 1975).

2. Where the witness has been attacked on the grounds of interest or bias, the party calling him is entitled to prove any fact which tends to show the absence of such interest or bias.

   Ryan v. Dwyer, 33 A.D.2d 878, 879, 307 N.Y.S.2d 565, 566 (4th Dep't 1969).

3. Under common law, a person was incompetent to testify, if interested in the event, on the presumed ground

that he or she was unworthy of belief. However, for the most part and under statute, interest as a disqualification has been abolished.

N.Y. CIV. PRAC. L. & R. § 4512 (McKinney 1993); *Coleman v. New York City Trans. Auth.*, 37 N.Y.2d 137, 141, 332 N.E.2d 850, 852, 371 N.Y.S.2d 663, 667 (1975).

a. A lingering vestiga of the common law remains under the "Dead Man's" statute.

N.Y. CIV. PRAC. L. & R. § 4519 (McKinney 1993).

4. The hostility of the adversary's witness towards the party against whom he is testifying, may be shown either on cross-examination by calling other witnesses to testify to hostile acts and or declarations.

People v. McDowell, 9 N.Y.2d 12, 14, 172 N.E.2d 279, 210 N.Y.S.2d 514, 515 (1961); *People v. Brooks*, 131 N.Y. 321, 325, 30 N.E. 189, 190 (1889); *People v. Champen*, 97 Misc. 2d 176, 178, 411 N.Y.S.2d 113, 115 (Sup. Ct. N.Y. County 1978); *People v. Miranda*, 176 A.D.2d 494, 495, 574 N.Y.S.2d 563 (1st Dep't 1991), *appeal denied*, 79 N.Y.2d 861, 588 N.E.2d 768, 580 N.Y.S.2d 733 (1992); *People v. Justice*, 172 A.D.2d 851, 851-52, 569 N.Y.S.2d 456 (1991), *appeal denied*, 78 N.Y.2d 923, 577 N.E.2d 1068, 573 N.Y.S.2d 476 (1991).

5. The extent, however, to which a party may use this method—as in all forms of impeachment—rests in the discretion of the court. But the court may not refuse to admit all such evidence.

People v. McDowell, 9 N.Y.2d 12, 15, 172 N.E.2d 279, 280, 210 N.Y.S.2d 514, 515 (1961); *People v. Brooks*, 131 N.Y. 321, 325, 30 N.E. 189, 190-91 (1889); *People v. Champen*, 97 Misc. 2d 176, 411 N.Y.S.2d 113, 115 (Sup. Ct. N.Y. County 1978).

6. It is not necessary to first ask the adversary's witness on cross-examination about an alleged act or statement of hostility in order to prove it through other witnesses.

People v. McDowell, 9 N.Y.2d 12, 15, 172 N.E.2d 279, 210 N.Y.S.2d 514, 515 (1961).

P. *By Evidence of Conviction*: The fact that the adversary's witness had previously been convicted of a crime may be shown either by the record or by eliciting an admission on cross-examination.

N.Y. CIV. PRAC. L. & R. § 4513 (McKinney 1993); CRIM. PROC. LAW § 60.40 (McKinney 1994).

1. An inquiry on cross examination as to an arrest or indictment is improper.

2. Only convictions may be asked. While in a criminal proceeding a witness may be impeached by proof that he has been convicted of a mere violation, *e.g.*, harassment (*People v. Gray*, 41 A.D.2d 125, 126, 341 N.Y.S.2d 485, 486 (3d Dep't 1973), *aff'd*, 34 N.Y.2d 903, 316 N.E.2d 719, 359 N.Y.S.2d 286 (1974), *cert. denied*, 419 U.S. 1055 (1974); N.Y. CRIM. PROC. LAW § 60.40(3) (McKinney 1992)), it has long been the rule in civil actions that only convictions of crimes may be mentioned. *Derrick v. Wallace*, 217 N.Y. 520, 525, 112 N.E. 440, 442 (1916); *Dance v. Southampton*, 95 A.D.2d 442, 452-53, 467 N.Y.S.2d 203, 210 (2d Dep't 1983). In no case may traffic infractions be mentioned. Upon adjudication as a youthful offender, no youth shall be denominated a criminal by reason of such determination, nor shall such determination be deemed a conviction. However, the acts underlying these convictions, if immoral or vicious, may be inquired into by the adversary. *People v. Vidal*, 26 N.Y.2d 249, 253-54, 257 N.E.2d 886, 889, 309 N.Y.S.2d 336, 340 (1970). Any crime may be inquired into, even though it does not involve moral turpitude. Witness must also answer questions as to prior convictions asked during pretrial examinations. *Goberman v. McNamara*, 76 Misc. 2d 791, 793, 93 N.Y.S.2d 369, 371 (Sup. Ct. Nassau County 1974); *Guarisco v. E. J. Milk Farms*, 90 Misc. 2d 81, 82, 393 N.Y.S.2d 883, 884 (N.Y.C. Civ. Ct. Queens County 1974).

3. Historically, the same rules applied to a defendant who elected to testify in a criminal case because this would chill the desire of a defendant with a prior record to testify in a criminal prosecution, *People v. Sandoval*, 34

N.Y.2d 371, 375, 314 N.E.2d 413, 416, 357 N.Y.S.2d 849, 854 (1974), announced a new rule: in a criminal action the court has the discretion to grant a motion (normally made before trial) to prevent the prosecution from mentioning defendant's prior convictions for crimes (*e.g.*, murder, rape, assault) that do not significantly reflect upon the defendant's inclination to tell the truth.

a. The *Sandoval* rule does not apply to anyone but the defendant in a criminal prosecution; thus, it does not extend to a party in civil litigation nor even to a witness in a criminal case.

People v. Duffy, 44 A.D.2d 298, 300, 354 N.Y.S.2d 672, 673 (2d Dep't 1974), *aff'd*, 36 N.Y.2d 258, 326 N.E.2d 804, 367 N.Y.S.2d 236, *cert. denied*, 423 U.S. 861 (1975); *People v. Smoot*, 59 A.D.2d 898, 899, 399 N.Y.S.2d 133, 135 (2d Dep't 1977).

Q. *Cross-Examination as to Previous Specific Acts of Misconduct*: The adversary's witness, on cross-examination, may be asked about any immoral, vicious, or criminal act performed by him in the past, if the act evidences moral turpitude.

Badr v. Hogan, 75 N.Y.2d 629, 634, 554 N.E.2d 890, 892, 555 N.Y.S.2d 249, 251 (1990).

1. The extent to which the cross-examiner may go rests in the discretion of the court. *People v. Schwartzman*, 24 N.Y.2d 241, 244, 247 N.E.2d 642, 644, 299 N.Y.S.2d 817, 820, *cert. denied*, 396 U.S. 846 (1969). The cross-examiner must act in good faith. *People v. Kass*, 25 N.Y.2d 123, 125-26, 250 N.E.2d 219, 221, 302 N.Y.S.2d 807, 809 (1969).

2. An inquiry on cross-examination as to specific acts of misconduct is an inquiry into a collateral matter. This means that the cross-examiner is precluded by the witness's answer, and thus, cannot disprove it by calling other witnesses or by introducing other evidence. *People v. Zabrocky*, 26 N.Y.2d 530, 535, 260 N.E.2d 529, 532, 311 N.Y.S.2d 892, 896 (1970).

3. A witness may be examined as to these acts even though he was not convicted or even arrested for them. Con-

versely, the fact that the witness was convicted does not, as a general matter, preclude an examiner's inquiry into the details of the crime. If, however, the prosecution knows that the witness was tried and acquitted of the act, it is reversible error to inquire into it. If the prosecution, in good faith, does not know of the acquittal, the error may be harmless. Generally, evidence of prior uncharged criminal conduct may not be admitted as part of the prosecution's case if its only purpose is to establish the propensity of the accused to engage in criminal activities. *People v. Sorge*, 301 N.Y. 198, 200, 93 N.E.2d 637, 639 (1950) (permitted to cross-examine as to other crimes committed by defendant); *People v. Santiago*, 15 N.Y.2d 640, 641, 204 N.E.2d 197, 198, 255 N.Y.S.2d 864, 864 (1964) (lower court decision permitting cross-examination regarding criminal charge of which defendant was acquitted reversed as prejudicial); *People v. Schwartzman*, 24 N.Y.2d 241, 250-51, 247 N.E.2d 642, 647, 299 N.Y.S.2d 817, 825-26, *cert. denied*, 398 U.S. 846 (1969) (documentary evidence of other misrepresentations of defendant during cross-examination permissible to show intent to defraud and did not constitute improper impeachment on collateral matter); *People v. Mapp*, 39 A.D.2d 968, 969, 333 N.Y.S.2d 539, 542 (2d Dep't 1972) (prosecution rebuttal evidence which tended to establish other crimes not charged in indictment which contradicted defendant's direct answers).

4. Subject to the limitations of the *Sandoval* case (3, *supra*), these rules apply to a defendant in a criminal case when he elects to testify. *People v. Sorge*, 301 N.Y. 198, 93 N.E.2d 637 (1950). But the scope of the inquiry is limited by its purpose: to impugn the defendant's credibility. The inquiry may not degenerate into an attack upon the defendant's character as a person inclined towards a life of crime of which he stands indicted. *See People v. Moore*, 20 A.D.2d 817, 817, 248 N.Y.S.2d 739, 740 (2d Dep't 1964) (in manslaughter case, error for district attorney to offer evidence that defendant committed two prior assaults in same man-

ner as one for which he was being prosecuted).

People v. Molineux, 168 N.Y. 264, 293, 305-306, 61 N.E. 286, 294, 299 (1901); *People v. Santarelli*, 49 N.Y.2d 241, 247, 401 N.E.2d 199, 202, 425 N.Y.S.2d 77, 81 (1980).

5. In sex offense cases, *e.g.*, rape, the victim may not be generally impeached by asking about her sexual conduct unless the conduct is with the defendant.

N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1994); *People v. Williams*, 81 N.Y.2d 303, 312, 614 N.E.2d 730, 733, 598 N.Y.S.2d 167, 170 (1993).

R. *By Inconsistent Statements*: The adversary's witness may be shown to have made statements inconsistent with a material part of his testimony on trial.

N.Y. CIV. PRAC. L. & R. § 4515 (McKinney 1993); Milton Roberts, Annotation, *Impeachment of Defense Witnesses in Criminal Cases By Showing Witness' Prior Silence or Refusal to Testify*, 20 A.L.R. 4th 245 (1992); *Larkin v. Nassau Electric R.R.*, 205 N.Y. 267, 268-69, 98 N.E. 465, 466 (1912) (plaintiff's witness gave material testimony in plaintiff's favor, signed and sworn statement contradicting testimony admissible); *People v. Dawson*, 50 N.Y.2d 311, 318, 406 N.E.2d 771, 775, 428 N.Y.S.2d 914, 919 (1980) (district attorney had right to attempt to impeach credibility of defendant's alibi witness by cross-examination on latter's prior failure to come forward to exculpate her son).

1. A foundation must first be laid.

a. If the inconsistent statement was made orally, the witness must first be asked on cross-examination if he made the statement, specifying the time, place, person to whom made, and substance of language used. If witness denies making the statement, a proper foundation is laid.

Loughlin v. Brassil, 187 N.Y. 128, 134, 79 N.E. 854, 856 (1907); *People v. Duncan*, 46 N.Y.2d 74, 80, 385 N.E.2d 572, 576, 412 N.Y.S.2d 833, 838, *cert. denied*, 442 U.S. 910 (1979).

b. If the inconsistent statement is in writing, the writing must be shown to the witness, and the witness asked whether he wrote or signed it.
N.Y. CRIM. PROC. LAW § 60.35 (McKinney 1994); *Rometze v. East River National Bank*, 49 N.Y. 577, 579 (1872); *People v. Cartagena*, 160 A.D.2d 608, 554 N.Y.S.2d 252, 253 (1st Dep't 1990).

c. If the inconsistent statement is that of a party, no foundation is required since the statement is then admissible as an admission.

2. Types of prior inconsistent statements admissible:

a. Statements made in pleadings or affidavits by an agent of a party within the scope of his authority.
People v. Rivera, 58 A.D.2d 147, 148, 396 N.Y.S.2d 26, 28 (1st Dep't 1977), *aff'd*, 45 N.Y.2d 989, 385 N.E.2d 1073, 413 N.Y.S.2d 146 (1978).

b. Statements given and signed by a witness to a detective.
Robbins v. New York City Trans. Auth., 105 A.D.2d 616, 617, 481 N.Y.S.2d 349, 350 (1st Dep't 1984).

c. Witness's prior inconsistent statements made by him at an earlier trial.
Millington v. New York City Trans. Auth., 54 A.D.2d 649, 649, 387 N.Y.S.2d 865, 867 (1st Dep't 1976).

3. The traditional rule has been that these prior statements are admissible only to impeach the witness and not to prove the truth of the matters asserted therein. *Cf. Letendre v. Hartford Accid. & Indem. Co.*, 21 N.Y. 2d 518, 523-24, 236 N.E.2d 467, 470, 289 N.Y.S.2d 183, 188 (1968) (in action by employer against fidelity insurer to recover for employee defalcation, admissions by employee that he stole money admissible to prove theft, not merely to impeach employee who subsequently denied theft at trial); *Vincent v. Thompson*, 50 A.D.2d 211, 224-25, 377 N.Y.S.2d 118, 131 (2d Dep't 1975).

4. In a criminal trial, the defense has the right to inspect and to use on cross-examination any pretrial statement

given by the witness to the authorities, provided the statement relates to the witness's testimony, and "that the necessities of effective law enforcement do not require that the statement be kept secret or confidential."

N.Y. CRIM. PROC. LAW § 240.45 (McKinney 1994); *People v. Rosario*, 9 N.Y.2d 286, 290, 173 N.E.2d 881, 883, 213 N.Y.S.2d 448, 451, *cert. denied*, 368 U.S. 866 (1961).

a. The *Rosario* rule has been extended in many instances.

People v. Fasano, 11 N.Y.2d 436, 444, 184 N.E.2d 289, 293, 230 N.Y.S.2d 689, 696 (1969) (grand jury minutes); *People v. Perez*, 65 N.Y.2d 154, 158-59, 480 N.E.2d 361, 364, 490 N.Y.S.2d 747, 750 (1985) (taped statements given to private parties, not involved in law enforcement or prosecution); *People v. Malinsky*, 15 N.Y.2d 86, 90-91, 349 N.E.2d 694, 697, 262 N.Y.S.2d 65, 70 (statements of prosecution witness at suppression hearings); *People v. Gilligan*, 39 N.Y.2d 769, 770, 349 N.E.2d 879, 879, 384 N.Y.S.2d 778, 778 (notes and reports of investigating officers); *People v. Consolazio*, 40 N.Y.2d 446, 453, 354 N.E.2d 801, 804, 387 N.Y.S.2d 62, 65 (1976), *cert. denied*, 433 U.S. 914 (1977) (prosecutors work sheets); *In re Kelvin D.*, 40 N.Y.2d 895, 896, 357 N.E.2d 1005, 1006, 389 N.Y.S.2d 350, 351 (1976) (family court juvenile delinquency proceedings).

b. This is a matter of right only after the witness has testified.

People v. Giles, 31 Misc. 2d 354, 354, 220 N.Y.S.2d 905, 906-07 (Sup. Ct. Rensselaer County 1961); *Vartanesian v. Purcell*, 57 Misc. 2d 217, 217, 292 N.Y.S.2d 537, 538 (1968) (declined to extend *Rosario* to civil actions).

c. In *People v. Damon*, 30 A.D.2d 640, 291 N.Y.S.2d 287 (4th Dep't 1968), *rev'd on other grounds*, 24 N.Y.2d 256, 247 N.E.2d 651, 299 N.Y.S.2d 830

(1969), this principle was extended to defendant's witnesses. After such a witness has testified, the prosecution is entitled to any statements made by that witness which the defendant may have. This has been held not to violate the defendant's Fifth Amendment rights. *See United States v. Nobles*, 422 U.S. 225, 233 (1975).

S. *By Reputation Evidence*: The adversary's witness may be shown to have a bad reputation for truth and veracity.

Carlson v. Winterson, 147 N.Y. 652, 656 (1895); *People v. Pavao*, 59 N.Y.2d 282, 291, 451 N.E.2d 210, 221, 464 N.Y.S.2d 458, 462 (1983).

1. The witness testifying to the bad reputation of another must first be qualified in generally the same manner as a character witness is qualified.

People v. Barber, 74 N.Y.2d 653, 655, 541 N.E.2d 394, 395, 543 N.Y.S.2d 365, 366 (1989).

2. The reputation witness, on direct examination, may not refer to specific acts committed by the attacked witness, nor may he give his own personal opinion of the attacked witness's reliability. He must limit himself to reporting the witness's reputation, although he is then permitted to answer the question: "Based upon your knowledge of this reputation, would you believe the witness under oath?"

Elmendorf v. Ross, 221 A.D. 376, 377, 222 N.Y.S. 737, 738 (3d Dep't 1927); *People v. Streitferdt*, 169 A.D.2d 171, 175, 572, N.Y.S.2d 893, 895 (1st Dep't), *appeal denied*, 78 N.Y.2d 1015, 581 N.E.2d 1069, 575 N.Y.S.2d 823 (1991).

a. New York along with a majority of jurisdictions, holds that it is improper to allow inquiries as to the general moral character, as distinguished from specific immoral acts, of the witness for the purposes of impeaching his credibility.

b. General Rule: witness by taking the stand, puts in issue his character or reputation for truthfulness and may be impeached by testimony of other wit-

nesses.

Carlson v. Winterson, 147 N.Y. 652, 656, 42 N.E. 347, 348 (1895); *People v. Hinksman*, 192 N.Y. 421, 430, 85 N.E. 676, 679 (1908); *People v. Pavao*, 59 N.Y.2d 282, 291, 451 N.E.2d 216, 221, 464 N.Y.S.2d 458, 462 (1983).

T. *By Evidence of Intoxication, Insanity*: Mental or physical weakness of the adversary's witness at the time of the event or at the time of the trial may be shown on cross-examination or by other witnesses, or by both.

People v. Webster, 139 N.Y. 73, 81-82, 34 N.E. 730, 732 (1893); *Ellarson v. Ellarson*, 198 A.D. 103, 105-06, 190 N.Y.S. 6, 9 (3d Dep't 1921); *People v. Freshley*, 87 A.D.2d 104, 110, 451 N.Y.S.2d 73, 77 (1st Dep't 1982).

1. That the witness is a drug addict is admissible to impeach the witness; but a psychiatrist may not add that all "mainliners" are pathological liars, incapable of telling the truth.

People v. Williams, 6 N.Y.2d 18, 24-25, 159 N.E.2d 549, 551-53, 187 N.Y.S.2d 750, 755-56 (1959); *People v. Freeland*, 36 N.Y.2d 518, 526, 330 N.E.2d 611, 615, 369 N.Y.S.2d 649, 654 (1975).

2. That the witness is an alcoholic is not admissible unless there is some evidence that he was intoxicated at the time about which he is now testifying.

Tinney v. Neilson's Flowers, Inc., 61 Misc. 2d 717, 717-18, 305 N.Y.S.2d 713, 714 (Sup. Ct. Nassau County), *aff'd*, 35 A.D.2d 532, 314 N.Y.S.2d 161 (2d Dep't 1969).

U. *Rehabilitation of Witness-Admissibility of Previous Consistent Statements*: The general rule is that a witness cannot corroborate the testimony which he gives on the trial by showing he made statements of the same tenor before trial.

People v. McClean, 69 N.Y.2d 426, 428, 508 N.E.2d 140, 141, 515 N.Y.S.2d 428, 429 (1987); *People v. Davis*, 44 N.Y.2d 269, 277, 376 N.E.2d 901, 905, 405 N.Y.S.2d 428, 432 (1978).

1. But where the witness's testimony has been attacked as

a recent fabrication, he may show prior consistent statements made at a time when there was no motive to misrepresent.

People v. McDaniel, 81 N.Y.2d 10, 18, 611 N.E.2d 265, 270, 595 N.Y.S.2d 364, 369 (1993).

a. This method of rehabilitation may be used only where the cross-examiner suggested a motive which would lead the witness to lie at trial.
People v. Baker, 23 N.Y.2d 307, 322-23, 244 N.E.2d 232, 239, 296 N.Y.S.2d 745, 755 (1968).

V. *Scientific Truth Determinants*: The result of a lie detector test (*Sowa v. Looney*, 23 N.Y.2d 329, 334, 244 N.E.2d 243, 245, 296 N.Y.S.2d 760, 764 (1968); *People v. Periera*, 35 N.Y.2d 301, 306-07, 319 N.E.2d 413, 416-17, 361 N.Y.S.2d 148, 152-53 (1974)) or the so-called truth serums (*People v. Brownsky*, 35 Misc. 2d 134, 134-35, 228 N.Y.S.2d 476, 477-78 (1962)) are inadmissible for any purpose.

VI. HEARSAY

A. *Definition*: Evidence of an out-of-court statement offered to prove the truth of the matter asserted.

People v. Egan, 78 A.D.2d 34, 35, 434 N.Y.S.2d 55, 77 (4th Dep't 1980); *People v. Edwards*, 47 N.Y.2d 493, 392 N.E.2d 1229, 419 N.Y.S.2d 5 (1979); *People v. Caviness*, 38 N.Y.2d 227, 342 N.E.2d 496, 379 N.Y.S.2d 695 (1975).

1. Hearsay evidence may be oral or written, or may even take the form of conduct.

Egan, 78 A.D.2d at 35, 434 N.Y.S.2d at 57; *People v. Nieves*, 67 N.Y.2d 125, 131 n.1, 492 N.E.2d 109, 112 n.1, 501 N.Y.S.2d 1, 4 n.1 (1986); *Caviness*, 38 N.Y.2d at 230, 342 N.E.2d at 498, 379 N.Y.S.2d at 698; *Boshen v. Stockwell*, 224 N.Y. 356, 120 N.E. 728 (1918); *James K. Thompson Co. v. International Compositions Co.*, 191 A.D. 553, 181 N.Y.S. 637 (1st Dep't 1920).

2. A hearsay risk is created any time the jury is required to rely on the testimonial attributes of a declarant in order

to find a fact as true, and yet, the declarant is not present in court for cross-examination. If cross-examination of the declarant would be of no use because his statement is not being used assertively, then there is no hearsay risk.

3. A declarant is a person who makes a statement.

   People v. Harding, 37 N.Y.2d 130, 135, 332 N.E.2d 354, 358, 371 N.Y.S.2d 493, 497 (1975) (Cooke, J., concurring).

4. Hearsay that does not fall within an exception must be excluded from evidence.

   People v. Jardin, 154 Misc. 2d 172, 174, 584 N.Y.S.2d 732, 733-34 (Sup. Ct. Bronx County) ("Absent a demonstrated applicable exception, any out-of-court statement offered in court to establish the truth of the facts asserted therein constitutes inadmissible hearsay.").

   a. If there are several links in the chain of hearsay (*e.g.*, A told B, who repeated it to C, who then passed it on to D), each link will have to be independently justified as an exception to the hearsay rule.

B. *Categories of Non-Hearsay*: The hearsay rule does not exclude evidence offered to prove the fact that a statement was made rather than to prove the fact asserted by the statement.

   1. Verbal Acts: the utterance of the words is treated as a physical act, and thus, the truth or falsity of the words is irrelevant. Verbal acts are generally of two types:

      a. Material verbal acts: words, the utterance of which the pleadings make an issue in the case; *e.g,* a witness's testimony as to the defamatory words uttered by the defendant, words of an offer, of an acceptance, of a bribe, among other things.

      b. Words as the springboard of an inference: X said "the light is red," when offered, not to prove the color of the light, but simply to prove that X could talk (assuming that X's ability to talk is relevant).

2. Words which would have a relevant effect on the state of mind of the listener: where the listener's belief is relevant. *For example*, threats made to the defendant by the victim of a homicide.

   Fgerrara v. Galluchio, 5 N.Y.2d 16, 19-20, 152 N.E.2d 249, 251, 176 N.Y.S.2d 996, 998 (1958) (plaintiff's testimony that dermatologist told her she had cancer from allegedly improper x-ray treatments was admissible to show basis for cancer phobia); *People v. Gilmore*, 66 N.Y.2d 863, 866, 489 N.E.2d 721, 723, 498 N.Y.S.2d 752, 754 (1985) (defendant improperly prevented from testifying about conversation with his mother-in-law, purpose of which was to show that his flight may have been motivated by facts other than consciousness of guilt).

3. Words which indicate circumstantially the state of mind of the speaker: a statement made without regard for its truth, may indicate circumstantially the state of mind of the speaker.

   People v. Harris, 209 N.Y. 70, 102 N.E. 546 (1913); *Loetsch v. NYC Omnibus Corp.*, 291 N.Y. 308, 52 N.E.2d 448 (1943).

   a. All statements which are used to indicate circumstantially the speaker's knowledge, reason, belief, intent, emotion or other state or condition of mind are not hearsay. *See People v. Reynoso*, 73 N.Y.2d 816, 534 N.E.2d 30, 537 N.Y.S.2d 113 (1988); *People v. Harris*, 209 N.Y. 70, 102 N.E. 546 (1913); *Waterman v. Whitney*, 11 N.Y. 157 (1854). When the statements are offered, not as testimony to the fact asserted, but to indicate circumstantially the state of mind of the speaker, they are not rendered inadmissible by the hearsay rule, provided that such declarations were made spontaneously naturally, and under circumstances free from suspicion. *See Kynast v. Dora Holding Corp.*, 21 A.D.2d 865, 250 N.Y.S.2d 1019 (1st Dep't 1964); *Bergstein v. Board of Ed.*, 34 N.Y.2d 318, 313 N.E.2d 767, 357

N.Y.S.2d 465 (1974).

b. Statements of X's intention may be admissible as circumstantial evidence that X performed the intended act. *See Mutual Life Ins. Co. v. Hillmon*, 145 U.S. 285 (1892). Additionally, if the circumstances are appropriate, X's declaration of intent to participate in conduct with Y is admissible as evidence that Y also engaged in the conduct in question. *See People v. Malizia*, 92 A.D.2d 154, 460 N.Y.S.2d 23 (1st Dep't 1983), *aff'd*, 62 N.Y.2d 755, 465 N.E.2d 364, 476 N.Y.S.2d 825, *cert. denied*, 469 U.S. 932 (1984). *But see People v. Slaughter*, 189 A.D.2d 157, 596 N.Y.S.2d 22 (1st Dep't 1993) (X's statement "Y is going to kill me," cannot be used as proof of Y's intent or conduct or both because statement did not reveal any intent on part of declarant).

c. The failure of other persons to complain about the quality of food is inadmissible in an action for breach of warranty when offered to prove that the food was wholesome.
James K. Thompson Co. v. International Compositions Co., 191 A.D. 553, 181 N.Y.S. 637 (1st Dep't 1920).

EXCEPTIONS TO THE HEARSAY RULE

C. *Admission of Former Testimony*:

1. In a civil case, CPLR 4517 states that the following elements are necessary to introduce former testimony into evidence:

   a. Both actions must involve the same parties or their representatives;

   b. Both actions must involve the same subject matter;

      (1) Note: The requirement that the parties and the subject matter be the same is intended "to insure that the party against whom the testimony is now offered had an adequate opportunity to cross-examine the witness" in the prior

proceeding. *See Healey v. Rennert*, 9 N.Y.2d 202, 208-209, 173 N.E.2d 777, 780, 213 N.Y.S.2d 44, 48-49 (1961). Therefore, testimony given by a now-deceased witness in a criminal proceeding is admissible against the defendant in a subsequent civil action involving the same subject matter. *See Healey*, *supra*.

(2) It is, of course, unnecessary that the precise cause of action be the same in both proceedings. *See In re White's Will*, 2 N.Y.2d 309, 141 N.E.2d 416, 160 N.Y.S.2d 841 (1957).

c. That the witness's testimony is unavailable because of:

(1) privilege;

(2) death;

(3) physical or mental illness;

(4) absence beyond the jurisdiction of the court to compel appearance;

(5) absence because the proponent of his statement does not know and with reasonable diligence has been unable to ascertain his whereabouts; or

(6) because the witness has become incompetent to testify by virtue of CPLR 4519, the "deadman's" statute.

Comment: the Rule provides that the former testimony may not be used if the witness's unavailability was procured through the culpable neglect or wrongdoing of the party offering the evidence.

d. Although CPLR 4517 is comprehensive in its statement of the former testimony exception to the hearsay rule, there exists, side-by-side with the statute, a common-law exception for former testimony. The CPLR covers testimony given "at a former trial." The common-law exception extends to testimony given under oath and subject to cross-examination, even though there was no former "trial." This

would apply to former administrative hearings and may apply to arbitration hearings. *See Fluery v. Edwards*, 14 N.Y.2d 334, 200 N.E.2d 550, 251 N.Y.S.2d 647 (1964). The common-law exception, however, does not apply to criminal cases, which continue to be governed solely by CRIM. PROC. LAW § 670.10. *See People v. Harding*, 37 N.Y.2d 130, 332 N.E.2d 354, 371 N.Y.S.2d 493 (1975).

e. The former testimony may be read against a person who is in privity with a party to the first action. The term "privity" is still given its narrow, common-law definition: mutual or successive interest in the same property. The following are in privity: grantor-grantee; testator-executor; life tenant-remainderman; joint tenants.

2. Criminal Procedure Law §§ 670.10 & 670.20 govern the admissibility of former testimony in criminal actions. *See* N.Y. CRIM. PRO. LAW §§ 670.10 and 670.20 (McKinney 1992). The elements required under this section are:

   a. The same defendant must be involved;

   b. There must be the same charge;

   c. The witness must be unavailable because of death, illness or incapacity, or because the witness cannot with due diligence be brought before the court.

      (1) Comment: If the witness's presence can be compelled, even though he is outside the state, it is a violation of the defendant's sixth amendment right of confrontation to read in the former testimony. *See Barber v. Page*, 390 U.S. 719 (1968).

   d. Criminal Procedure Law § 670.20 requires advance notice that the testimony is to be used and a copy of the testimony must be furnished to the other side before it is read in court.

   N.Y. CRIM. PROC. LAW § 670.20 (McKinney 1992).

3. Comments:

a. Former testimony is subject to all objections to admissibility "other than hearsay."
N.Y. CIV. PRAC. L. & R. § 4517 (McKinney 1992).

b. If the court during a former trial lacked jurisdiction, or if the adversary had no opportunity to cross-examine, the testimony may not be read at a subsequent trial. In a criminal case, the absence of counsel is tantamount to a denial of opportunity to cross-examine. Testimony taken against defendant without counsel could not thereafter be used against defendant.
Pointer v. Texas, 380 U.S. 400 (1965).

D. *Admissions*: An admission is an act or declaration of a party which is inconsistent with his position at trial. *See Dlugosz v. Exchange Mutual Ins. Co.*, 176 A.D.2d 1011, 574 N.Y.S.2d 864 (3d Dep't 1991); *Reed v. McCord*, 160 N.Y. 330, 54 N.E. 737 (1899). It is received at trial as evidence-in-chief as an exception to the hearsay rule. *See Iannieli v. Consolidated Edison Co.*, 75 A.D.2d 223, 227, 428 N.Y.S.2d 473, 475 (2d Dep't 1980). Unlike a declaration against interest (E, *infra*), the statement need not be against the interest of the party at the time it is made.

1. The weight of an admission is for the jury. However, as a matter of policy, an admission alone is not sufficient to prove certain issues; *e.g.*, in an action brought to annul a marriage, "the declaration or confession of either party to the marriage is not alone sufficient as proof." *See* N.Y. DOM. REL. LAW § 144 (McKinney 1992). Additionally, the admission of a decedent is deemed the weakest kind of evidence in an action against his estate.

2. Explanation of admissions: When an act or declaration of a party is received in evidence as an admission, the party against whom it is admitted has the right to offer an explanation.
Chamberlain v. Iba, 181 N.Y. 486, 74 N.E. 481 (1905); *Ando v. Woodberry*, 8 N.Y.2d 165, 168 N.E.2d 520, 203 N.Y.S.2d 74 (1960); *Xerox v. Kuhn*, 133 Misc. 2d 1107, 509 N.Y.S.2d 741 (Sup. Ct. Monroe County 1986).

3. Classification of admissions: Admissions are either judicial or extrajudicial.

   a. Judicial admissions are admissions made on the record of, or in connection with judicial proceedings.

   b. Extrajudicial admissions are admissions made outside the course of, or unconnected with judicial proceedings.

   c. Judicial admissions are either formal or informal.

      (1) A formal judicial admission is one made by the pleadings, stipulations, or a formal notice to admit (CPLR 3123). *See East Egg Associates v. Diraffaele*, 158 Misc. 2d 364, 600 N.Y.S.2d 999 (N.Y.C. Civ. Ct. New York County 1993) (unqualified statements in pleadings constitute formal judicial admissions). A formal judicial admission (*e.g.*, plea of guilty to an indictment, or an admission in an answer) is conclusive of the facts in the action in which it is made. *See People v. Rivera*, 45 N.Y.2d 989, 385 N.E.2d 1073, 413 N.Y.S.2d 146 (1978).

      (2) An informal judicial admission (*e.g.*, one made at an examination before trial, or on the stand in court) are not conclusive but are merely evidence of the fact or facts admitted. *See Hill v. King Kullen Grocery Co.*, 181 A.D.2d 812, 581 N.Y.S.2d 378 (2d Dep't 1992). As a general rule, judicial admissions are only binding and conclusive in the proceeding in which they are made. In other separate actions, they are converted to informal judicial admissions, receivable in evidence as an admission, but subject to being contradicted or explained away. *See People v. Jacobs*, 149 A.D.2d 112, 544 N.Y.S.2d 1011 (3d Dep't 1989); *Ando v. Woodberry*, 8 N.Y.2d 165, 168 N.E. 2d 520, 203 N.Y.S.2d 74 (1960) (defendant's plea of guilty to traffic infraction is admissible against him as an infor-

mal judicial admission in later civil action arising out of same facts). A formal judicial admission, which is withdrawn, may in that same action become an informal judicial admission. *McNulty v. Zaganos*, 255 A.D.2d 274, 7 N.Y.S.2d 446 (1st Dep't 1938) (statements in original answer are admissible although superseded by amended answer). A withdrawn plea of guilty is, however, not admissible against defendant on the trial arising from his substituted plea of not guilty. *See People v. Spitaleri*, 9 N.Y.2d 168, 173 N.E.2d 35, 212 N.Y.S.2d 53 (1961).

d. Extrajudicial admissions are sometimes called ordinary or evidential admissions. The legal effect of an extrajudicial admission and of an informal judicial admission is exactly the same: some evidence of the truth of the matters admitted.

4. An admission may be receivable against a party even though it appears that the party did not have personal knowledge of the facts admitted. *See Reed v. McCord*, 160 N.Y. 330, 54 N.E. 737 (1899). The reason for the rule that a party's admission may be receivable even though he does not himself have first-hand knowledge of the facts, is that it is highly improbable that a party will admit anything against himself unless it is true. *See Reed, supra*; *Cox v. State*, 3 N.Y.2d 693, 698-99, 148 N.E.2d 879, 881-82, 171 N.Y.S.2d 818, 822 (1958).

a. The admission of a child too young to comprehend the obligation of an oath is still admissible if the child possesses other testimonial attributes. *Gangi v. Fradus*, 227 N.Y. 452, 125 N.E. 677 (1920).

5. Admission by conduct: Conduct of a party which is inconsistent with the position maintained by the party in court is admissible as an admission by conduct. *Walden v. Walden*, 41 A.D.2d 664, 340 N.Y.S.2d 709 (2d Dep't 1973). *E.g.*, in a homicide case, defendant was found burying the body; in a civil action,

defendant disposed of most of his assets during the litigation.

6. Silence as an admission: Failure to answer a charge will be regarded as an admission if the person to whom the charge was made understood it, had the opportunity to respond, and would naturally have responded if the statement was untrue.

   a. In order for silence to be construed as an admission, the following requirements must be satisfied:

      (1) The statement must have been made in the presence of the person charged, see *People v. Harcourt*, 89 Misc. 262, 153 N.Y.S. 5 (N.Y.C. Gen. Sess. N.Y. County 1915), and must have been fully heard and comprehended. *See People v. Prince*, 192 A.D.2d 903, 244 N.Y.S.2d 820 (2d Dep't 1963). Accordingly, presumption of acquiescence arises where a person is asleep, intoxicated, deaf, or a foreigner unable to understand the language in which the statement was made. *See People v. Koerner*, 154 N.Y. 355, 48 N.E. 730 (1897); *People v. Lourido*, 70 N.Y.2d 428, 522 N.Y.S.2d 98, 516 N.E.2d 698 (1987) (held error to admit testimony that defendant when told of nature of accusation against him responded by shrug of shoulders where it was not shown that he understood English).

      (2) The person to whom the charge was made must have been physically and mentally capable of replying to the charge.
      People v. Koerner, 154 N.Y. 355, 48 N.E. 730 (1897); *People v. Kennedy*, 164 N.Y. 449, 58 N.E. 652 (1900); *People v. Allen*, 300 N.Y. 222, 225, 90 N.E.2d 48, 51 (1949); *People v. Benanti*, 158 A.D.2d 698, 551 N.Y.S.2d 963 (2d Dep't 1990).

      (3) The circumstances must be such as would naturally call for contradiction or reply from persons similarly situated.

People v. Rhodes, 96 A.D.2d 565, 465 N.Y.S.2d 249 (2d Dep't 1983) (was reasonable for defendant to remain silent rather than respond to statements and thereby incur additional wrath from obviously hostile crowd); *People v. Egan*, 78 A.D.2d 34, 434 N.Y.S.2d 55 (4th Dep't 1980) (wife's silence, when she would naturally be expected to deny her husband's accusation, was tacit admission of its truth).

b. A person placed under arrest is under no obligation to make a statement. Therefore, his silence in face of an accusation is not an admission. He may not be asked on cross-examination why he never told his version of the facts until the trial.
Doyle v. Ohio, 426 U.S. 610 (1976); *People v. Rutigliano*, 261 N.Y. 103, 184 N.E. 689 (1933).

c. As a general matter, a party is not obligated to answer a letter mailed by his adversary.
Viele v. McLean, 200 N.Y. 260, 93 N.E. 468 (1910); *Learned v. Tillotson*, 97 N.Y. 1 (1884).

7. Persons against whom an admission is receivable:

a. An admission is receivable against the party who made the statement.
Reed v. McCord, 160 N.Y. 330, 54 N.E. 737 (1899); *Mindlin v. Dorfman*, 197 A.D. 770, 189 N.Y.S. 265 (1st Dep't 1921).

b. The declaration of an agent is receivable against his principal as an admission only if made within the scope of his authority; *i.e.*, when the declaration was authorized by the principal, expressly or impliedly.
Spett v. President Monroe Bldg. & Mfg. Corp., 19 N.Y.2d 203, 225 N.E.2d 527, 278 N.Y.S.2d 826 (1967); *Risoli v. Long Island Lighting Co.*, 195 A.D.2d 543, 600 N.Y.S.2d 497 (2d Dep't 1993).

(1) Authority to perform an act (*e.g.*, to drive a truck) does not imply authority to make statements about the act.

RESTATEMENT (SECOND) OF AGENCY § 286.

(2) An admission made by any partner concerning partnership affairs within the scope of his authority is binding upon his copartners, because as to such matters each partner is deemed the agent of the others.
N.Y. PARTNERSHIP LAW § 22 (McKinney 1988); *see also Vogt v. Tully*, 53 N.Y.2d 580, 428 N.E.2d 847, 444 N.Y.S.2d 441 (1981); *Caplan v. Caplan*, 268 N.Y. 445, 198 N.E. 23 (1935).

(3) Coconspirators are "partners in crime." Hence, an admission of one coconspirator is admissible against another coconspirator as long as those statements were made during the course of and in furtherance of the conspiracy.
People v. Salko, 47 N.Y.2d 230, 391 N.E.2d 976, 417 N.Y.S.2d 894 (1979); *People v. Liccione*, 63 A.D.2d 305, 407 N.Y.S.2d 753 (4th Dep't 1978), *aff'd*, 50 N.Y.2d 850, 407 N.E.2d 1333, 430 N.Y.S.2d 36 (1980); *People v. Davis*, 56 N.Y. 95 (1874).

(4) In all the foregoing cases, the agency or conspiracy must be proven independently of the "agent's" extra-judicial declarations that he is an "agent."
People v. Bac Tran, 80 N.Y.2d 170, 179, 603 N.E.2d 950, 589 N.Y.S.2d 845, 850 (1992).

c. An admission is also admissible against a person in privity with the person making the admission. *See, e.g., Hayes v. Claessens*, 234 N.Y. 230, 137 N.E. 313 (1922) (admission of one joint owner admissible against other); *Chadwick v. Fonner*, 69 N.Y. 404 (1877) (admission of former owner of real property made at time he held title or apparent title was admissible against those who claimed under him). Privity in this context, generally means the same as in the hearsay exception for former testimony (*see* C. 1. e., *supra*). However, certain extensions have occurred.

(1) A statement by an employee that he stole money has been admitted in his employer's action against an insurer on a fidelity bond.
Letendre v. Hartford Accid. & Indem. Co., 21 N.Y.2d 518, 236 N.E.2d 467, 289 N.Y.S.2d 183 (1968).

d. If there are two or more parties, the admission of one is receivable against him, but in the absence of authority, not against his coparty.

(1) However, in a contested will probate case where there are two or more legatees, the admission of one is not receivable even against the legatee who made it. Since the will must stand or fall as a unit, it is not possible to limit the effect of the admission to the party who made it.
In re Meyer, 184 N.Y. 54, 76 N.E. 920 (1906); *In re Kennedy*, 167 N.Y. 163, 60 N.E. 442 (1901); *In re Esterheld*, 173 Misc. 1056, 19 N.Y.S.2d 572 (Yates County Ct. 1940).

e. An admission by a nominal party is not receivable against a real party; *e.g.*, an admission by a guardian ad litem is not admissible against the infant. *See Hermace v. Slopey*, 32 A.D.2d 573, 299 N.Y.S.2d 38 (3d Dep't 1969). Nevertheless, an admission by the real party is receivable against the nominal party.

(1) An executor is not regarded as a nominal party within the above rule. *See Strang v. Prudential Ins. Co.*, 263 N.Y. 71, 188 N.E. 161 (1933). An admission made by an executor within the scope of his authority is, therefore, admissible against the estate.

f. A declaration concerning real property made by a person at a time when he had actual or apparent interest in the property is receivable against all subsequent possessors except where the declaration would tend to destroy record title.
Chadwick v. Fonner, 69 N.Y. 404 (1877).

g. A declaration concerning personal property made by a person at a time when he had actual or apparent interest in the property is not receivable against a subsequent purchaser or assignee for value.
Merkle v. Beidleman, 165 N.Y. 21, 58 N.E. 757 (1900).

E. *Declarations Against Interest*:

1. Unlike an admission, which may be used only against the party who made it or his privies in interest, a declaration against interest may be introduced in evidence "by or against anyone."
People v. Brensic, 70 N.Y.2d 9, 14-15, 509 N.E.2d 1226, 1228, 517 N.Y.S.2d 120, 122 (1987); *Kelleher v. F.M.E. Auto Leasing Corp.*, 192 A.D.2d 581, 596 N.Y.S.2d 136 (2d Dep't 1993).

a. Theory underlying the admission of declarations against interest: Assurance that the evidence is reliable flows from the belief that a person ordinarily does not reveal facts that are contrary to his or her own interest.
People v. Maerling, 46 N.Y.2d 289, 295, 385 N.E.2d 1245, 1248, 413 N.Y.S.2d 316, 319 (1978).

2. A declaration against interest may be received if the following conditions are satisfied:

a. The declarant is unavailable.

(1) In *Alexander Grant's Sons v. Phoenix Assur. Co.*, 25 A.D.2d 93, 267 N.Y.S.2d 220 (4th Dep't 1966), the court held that death is not the only ground for unavailability. In this case, the court held that unavailability due to absence from jurisdiction, and unavailability due to a witness's refusal to testify on the ground of privilege against self-incrimination, satisfied the first element.
Accord People v. Shortridge, 65 N.Y.2d 309, 480 N.E.2d 1080, 491 N.Y.S.2d 298 (1985); *People v. Brown*, 26 N.Y.2d 88, 257 N.E.2d 16, 308

N.Y.S.2d 825 (1970).

b. The declaration must have been against proprietary, pecuniary, or penal interest when made.

(1) Prior to *People v. Brown*, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970) a declaration against penal interest, as distinguished from pecuniary or proprietary interest, did not fall within the declaration against interest exception. However, in *Brown*, the Court of Appeals modernized the New York rule, and held that a declaration against penal interest would be admissible "where material."

(2) A declaration which indicates that the declarant is liable for civil damages is against pecuniary interest.
Letendre v. Hartford Accid. & Indem. Co., 21 N.Y.2d 518, 236 N.E.2d 467, 289 N.Y.S.2d 183 (1968).

c. The declarant must have had competent knowledge of the facts (this was not a requirement for admissions).

d. The declarant must have had no motive to misrepresent the facts.
People v. Shortridge, 65 N.Y.2d 309, 312, 480 N.E.2d 1080, 1082, 491 N.Y.S.2d 298, 300 (1985) (presence of strong motivation to fabricate or absence of supporting evidence may, without more, be sufficient to render declaration against penal interest inadmissible as matter of law); *Mills v. Davis*, 113 N.Y. 243, 21 N.E. 68 (1889).

e. At least when the statement is against the declarant's penal interest, some proof is needed "independent of the declaration itself, which tends to confirm the truth of the facts asserted therein." *See People v. Shortridge*, 65 N.Y.2d 309, 312, 480 N.E.2d 1080, 1082, 491 N.Y.S.2d 298, 300 (1985); *People v. Riccardi*, 73 Misc. 2d 19, 21, 340 N.Y.S.2d 996, 998 (N.Y.C. Crim. Ct. Kings County 1972).

3. Comments:

   a. A declaration against interest is admissible even as against strangers. There is no requirement of privity between the declarant and the party against whom or in whose favor the evidence is being offered.
   People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970); *Thompkins v. Fonda Glove Co.*, 188 N.Y.261, 80 N.E. 933 (1907); *Livingston v. Arnoux*, 56 N.Y. 507 (1874).

   b. Collateral facts connected with the declaration against interest are also admissible.
   Livingston v. Arnoux, 56 N.Y. 507 (1874).

   c. Declarations against interest may be oral, written, or may consist of acts.
   People v. Kennedy, 122 A.D.2d 225, 504 N.Y.S.2d 756 (2d Dep't 1986).

   d. The declarant must be aware that the declaration is against interest at the time he makes the statement.
   People v. Maerling, 46 N.Y.2d 289, 298, 385 N.E.2d 1245, 1250, 413 N.Y.S.2d 316, 321 (1978); *Ellwanger v. Whiteford*, 15 A.D.2d 898, 225 N.Y.S.2d 734 (1st Dep't 1962), *aff'd*, 12 N.Y.2d 1037, 190 N.E.2d 24, 239 N.Y.S.2d 680 (1963).

F. *Dying Declarations*:

1. Dying declarations are admissible in homicide cases as an exception to the hearsay rule because they are believed reliable and necessary. Necessity flows from the unavailability of the declarant due to death. Reliability is found in the belief "that the fear of impending death is at least as conducive to producing the truth . . . as an oath is to tell the truth."
   People v. Nieves, 67 N.Y.2d 125, 132, 492 N.E.2d 109, 113, 501 N.Y.S.2d 1, 5 (1986); *People v. Liccione*, 63 A.D.2d 305, 314, 407 N.Y.S.2d 753, 758 (4th Dep't 1978), *aff'd*, 50 N.Y.2d 850, 407 N.E.2d 1333, 430 N.Y.S.2d 36 (1980).

2. Elements:
   a. The declarant must be in extremis.
   b. The declarant must have spoken under a sense of impending death and with no hope of recovery.
   c. The declarant must have been one who, if he were alive, would have been a competent witness.
3. Comments:
   a. A dying declaration is admissible only in prosecutions for homicide where the death of the declarant is the subject of the charge. Only those declarations which bear upon the facts and circumstances of the declarant's death are admissible.
   People v. Little, 83 Misc. 2d 321, 323, 371 N.Y.S.2d 726, 729 (Yates County Ct. 1975).
   b. The declaration may be made orally, by acts or in writing.
   In re Limberg, 277 N.Y. 129, 13 N.E.2d 605 (1938) (written declaration of testator admissible); *People v. Madas*, 201 N.Y. 349, 94 N.E. 857 (1911).
   c. It is for the jury to determine what weight will be given to the dying declaration. *See People v. Little*, 83 Misc. 2d 321, 329, 371 N.Y.S.2d 726, 734 (Yates County Ct. 1975). However, whether such a declaration was made under circumstances which entitle it to be admitted into evidence is a preliminary question for the court to decide. *See People v. Ludkowitz*, 266 N.Y. 233, 239, 194 N.E. 688, 690 (1935); *People v. Smith*, 104 N.Y. 491, 10 N.E. 873 (1887).
      (1) The trial court is required to charge, upon request, that the dying declaration is not regarded as having the same value as sworn testimony given in open court.
      People v. Mleczko, 298 N.Y. 153, 161, 81 N.E.2d 65, 69 (1948).

G. *Business Records*: CPLR 4518(a) provides that an entry of an act, transaction, occurrence, or event is admissible in evi-

dence if it was made in the regular course of any business, it was the regular course of such business to make such an entry, and the entry was made at the time of the 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."

N.Y. CIV. PRAC. L. & R. § 4518(a) (McKinney 1992).

1. The rationale for admissibility is that business records are generally reliable and trustworthy because businesses depend upon the accurate recording to function effectively. As the Court of Appeals expressed in *People v. Kennedy*, 68 N.Y.2d 569, 579, 503 N.E.2d 501, 507, 510 N.Y.S.2d 853, 859 (1986): "[R]ecords systematically made for the conduct of the business as a business are inherently trustworthy because they are routine reflections of day-to-day operations and because the entrant's obligation is to have them truthful and accurate for purposes of the conduct of the enterprise."

2. The term "business" includes a business, profession, occupation, and calling of any kind.

   N.Y. CIV. PRAC. L. & R. § 4518(a) (McKinney 1992); *see also People v. Kennedy*, 68 N.Y.2d 569, 503 N.E.2d. 501, 510 N.Y.S.2d 853 (1986); *People v. Mertz*, 68 N.Y.2d 136, 497 N.E.2d 657, 506 N.Y.S.2d 290 (1986); *People v. Farrel*, 58 N.Y.2d 637, 444 N.E.2d 978, 458 N.Y.S.2d 514 (1982).

   a. A purely private document is not considered a "business" document (*e.g.*, a personal diary is not a business record, no matter how regularly kept). *See People v. Kennedy*, 68 N.Y.2d 569, 577, 503 N.E.2d 501, 506, 510 N.Y.S.2d 853, 858 (1986) (writing falls outside scope of CPLR 4518(a) if it records purely personal acts or events); *Paretta v. Yuhas*, 298 N.Y. 756, 83 N.E.2d 155 (1948) (broker's diary inadmissible although he recorded business information therein). Also beyond the scope of the rule are business papers received from another business entity, even if the recipient regularly files

the papers. *See Standard Textile Co. v. National Equipment Rental, Ltd.*, 80 A.D.2d 911, 437 N.Y.S.2d 398 (2d Dep't 1981). *But see Prestige Fabrics v. Novik & Co.*, 60 A.D.2d 517, 399 N.Y.S.2d 680 (1st Dep't 1977).

3. If the requirements of CPLR 4518(a) are met, the fact that the records may be those of an illegal enterprise is itself of no consequence.

   People v. Kennedy, 68 N.Y.2d 569, 576, 503 N.E.2d 501, 505, 510 N.Y.S.2d 853, 857 (1986) (holding loan shark's records of his transactions could qualify for hearsay exception).

4. If the document qualifies as a business record, then it may be admitted without calling as a witness the person who made the record.

   Meiselman v. Crown Heights Hosp., 285 N.Y. 389, 34 N.E.2d 367 (1941).

   a. It makes no difference that the record is "self-serving."

      United States v. Dawson, 400 F.2d 194 (2d Cir. 1968), *cert. denied*, 393 U.S. 1023 (1969); *Publisher's Book Bindery, Inc. v. Ziegelheim*, 184 Misc. 2d 559, 560-61, 54 N.Y.S.2d 798, 800 (Sup. Ct. App. T. 1st Dep't 1945) (fact that business record is self-serving affects only weight, not admissibility).

   b. However, a self-serving record prepared by a party specifically for the purposes of litigation may be excluded. *See, e.g., People v. Foster*, 27 N.Y.2d 47, 261 N.E.2d 389, 313 N.Y.S.2d 384 (1970); *Galanek v. New York City Transit Auth.*, 53 A.D.2d 586, 385 N.Y.S.2d 62 (1st Dep't 1976). Accident reports have traditionally been excluded as business records, primarily because they are litigation oriented. *See Palmer v. Hoffman*, 318 U.S. 109 (1943). However, some more recent cases have accepted accident reports which are routinely kept. *See, e.g., Toll v. State*, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969); *Bishin v. New York Central R.R.*, 20 A.D.2d 921, 249 N.Y.S.2d 778 (2d Dep't 1964). Where the

accident report is prepared by a person or business unrelated to either of the parties to the litigation, there is little doubt that the report is admissible as a business record. *See Vaccaro v. Alcoa S.S. Co.*, 405 F.2d 1133 (2d Cir. 1968).

5. The record must have been made at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter. *See* N.Y. CIV. PRAC. L. & R. § 4518(a) (McKinney 1992). This requirement serves to protect the trustworthiness of the record by ensuring against inaccuracy due to lapse of memory. The Appellate Division, Third Department, has suggested that a record should be considered timely if it was made "while the memory of the event was still fresh enough to be fairly reliable." *See Toll v. State*, 32 A.D.2d 47, 50, 299 N.Y.S.2d 589, 592 (3d Dep't 1969) (report made 15 days after event held timely).

6. The statute presents no difficulty when applied to ordinary business transactions.

   Warner-Quinlan Co. v. Ben Charat, Inc., 143 Misc. 443, 257 N.Y.S. 722 (Sup. Ct. App. T. 2d Dep't 1932); *Publisher's Book Bindery v. Ziegelheim*, 184 Misc. 559, 54 N.Y.S.2d 798 (Sup. Ct. App. T. 1st Dep't 1945).

7. Difficulty of application is encountered when it is sought to be applied to noncommercial entries. The question in all such cases is whether there was a business obligation to record the specific matter which is being offered.

   a. A certified hospital record is admissible under CPLR 4518(c) to show the date of entry of the patient, date of discharge, symptoms observed, treatment given, and the diagnosis by the physician. *See People v. Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940). However, entries concerning the patients history come within the business records exception only if they were medically germane, *i.e.*, relevant to diagnosis or treatment. *See Williams v. Alexander*, 309 N.Y. 283, 129 N.E.2d 417 (1955); *People v. Conde*, 16 A.D.2d 327, 228

N.Y.S.2d 69 (3d Dep't 1962), *aff'd*, 13 N.Y.2d 939, 194 N.E.2d 130, 244 N.Y.S.2d 314 (1963).

b. If the requirements of CPLR 4518(c) are satisfied, the record is "prima facie evidence" of the truth of the facts contained therein. *See Laduke v. State Farm Ins. Co.*, 158 A.D.2d 137, 557 N.Y.S.2d 221 (4th Dep't 1990). "Prima facie evidence," under CPLR 4518(c), has been interpreted by the Court of Appeals as creating a permissive inference rather than a presumption. *See People v. Mertz*, 68 N.Y.2d 136, 148, 497 N.E.2d 657, 663, 506 N.Y.S.2d 290, 296-97 (1986). Thus, according to the Court of Appeals, the jury is permitted, but not required, to accept the truthfulness of the record, even in the absence of contradictory evidence. *Id.*

8. Where the person who made the record (the "recorder") has personal knowledge of the facts and records pursuant to business routine in which he is engaged, there is a problem of only simple hearsay, and the record will usually be admitted under CPLR 4518. However, where the recorder makes his entry based upon what a third person (the "informant") tells him, there is multiple hearsay. Under the general rule (*see* A. 4. a., *supra*), each link of hearsay must be separately justified. *See, e.g., Murray v. Donlan*, 77 A.D.2d 337, 346, 433 N.Y.S.2d 184, 189 (2d Dep't 1980).

a. If the informant and the recorder are part of the same business enterprise, they may be treated as one person.
Johnson v. Lutz, 253 N.Y. 124, 127, 170 N.E. 517, 518 (1930) (entry made by policeman in police blotter inadmissible where informant was unknown third person under no business obligation to present information to police officer).

(1) Although CPLR 4518(a) does not provide that an informant must be under a business duty to supply such information, such a requirement, however, was read into the statute by the Court of Appeals in *Johnson v. Lutz*, 253 N.Y. 124,

127, 170 N.E. 517, 518 (1930). *See* RICHARDSON ON EVIDENCE § 299 (10th ed. 1973). Thus, where the recorder makes his entry based upon what an informant tells him, it must be demonstrated that the informant had personal knowledge of the event, and that he was under a business duty to report it to the recorder. *See In re Leon R.R.*, 48 N.Y.2d 117, 123, 397 N.E.2d 374, 378, 421 N.Y.S.2d 863, 867 (1979); *Clark v. N.Y.C. Transit Auth.*, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992) (if maker of business record lacks personal knowledge but was acting pursuant to business duty, record may be admissible if it contains (1) statement made by another person with business duty to report to maker; or (2) statement that qualifies under a separate hearsay exception).

b. If the informant and the recorder are not business related and the informant is not under a business duty to impart the information, the statement in the business record may be separately justified under some other exception to the hearsay rule.
In re Leon R.R., 48 N.Y.2d 117, 122-23, 397 N.E.2d 374, 377-78, 421 N.Y.S.2d 863, 866-67 (1979); *Clark v. N.Y.C. Transit Auth.*, 174 A.D.2d 268, 580 N.Y.S.2d 221 (1st Dep't 1992); *Toll v. State*, 32 A.D.2d 47, 49-50, 299 N.Y.S.2d 589, 592 (3d Dep't 1969); *Zaulich v. Thompson Square Holding Co.*, 10 A.D.2d 492, 496, 200 N.Y.S.2d 550, 555 (1st Dep't 1960) (entry made by policeman in police blotter admissible where informant was party and statement was admission).

(1) However, if the informant is a party and the information imparted to the police officer is consistent with his in-court testimony, the police blotter is inadmissible.
Mahon v. Giordano, 30 A.D.2d 792, 792, 291 N.Y.S.2d 854, 854 (1st Dep't 1968).

9. CPLR 4518(b) provides that a certified hospital bill is

admissible in evidence except in an action in the Surrogate's Court or an action instituted by the hospital to recover payment for services or supplies furnished.
N.Y. CIV. PRAC. L. & R. § 4518(b) (McKinney 1992).

10. CPLR 4533-a makes any itemized bill of $2,000 or less admissible in any action, as prima facie evidence of the reasonable value and necessity of services or repairs itemized therein. The bill must be marked paid, be properly certified, and contain a statement that no part of the bill is to be refunded and the amount charged is the customary charge. Additionally, the bill must be served on the adversary at least ten days before trial.
N.Y. CIV. PRAC. L. & R. § 4533-a (McKinney 1992).

H. *Public Documents*: Where a public officer is required or authorized by law to make an entry concerning a fact ascertained by him in the course of his official work and to file or deposit it in a public office of the state, the entry is admissible as prima facie evidence of the fact stated.
N.Y. CIV. PRAC. L. & R. § 4520 (McKinney 1992).

1. It is not necessary that a public document be available for public inspection.
People v. Nissinoff, 293 N.Y. 597, 59 N.E.2d 420 (1944), *cert. denied*, 362 U.S. 745 (1945).

2. Common-law exception:

a. The common-law exception is much broader than CPLR 4520.
Consolidated Midland Corp. v. Columbia Pharmaceutical Corp., 42 A.D.2d 601, 601, 345 N.Y.S.2d 105, 106 (2d Dep't 1973) (although exhibits could not be admitted under CPLR 4520, they should have been admitted under common law hearsay exception rule for official written statements, often called "official entries" or "public documents" rule).

b. Trustworthiness of public records as an exception to the hearsay rule is found in the belief that such records are usually made by officials "having no motive to distort the truth or manufacture evidence, and are made in the discharge of a public

duty."
Chesapeake & Del Canal Co. v. United States, 240 F. 903, 907 (3d Cir. 1917), *aff'd*, 250 U.S. 123 (1919).

c. Most courts have agreed that the common-law rule has not been superseded by CPLR 4520.
Consolidated Midland Corp. v. Columbia Pharmaceutical Corp., 42 A.D.2d 601, 601, 345 N.Y.S.2d 105, 106 (2d Dep't 1973); *People v. Hoats*, 102 Misc. 2d 1004, 1009, 425 N.Y.S.2d 497, 501 (Monroe County Ct. 1980) (authorized reports by police officers, while inadmissible under CPLR 4520, may be admissible under the much broader common-law exception).

3. Absence of Public Record: CPLR 4521 creates a hearsay exception for a signed and certified statement under seal by an authorized public employee that after a diligent search of official records over which she has legal custody, she has found no record or entry of a specified nature. Once these requirements are satisfied, the statement is "prima facie evidence" that no such record or entry exists.
N.Y. CIV. PRAC. L. & R. § 4521 (McKinney 1992).

I. *Res Gestae*: Although this term has been rejected by the Court of Appeals, the so-called res gestae rule includes a number of separate doctrines which are outlined below:

1. *Declarations of Pain and Suffering*: Involuntary moans and groans are admissible whenever made. *See Roche v. Brooklyn City & Newton R.R.*, 105 N.Y. 294, 297, 11 N.E. 630, 631 (1887). Voluntary statements of pain and suffering are however, excluded under the hearsay rule unless:

a. The statement was made to a physician for purposes of treatment. *See Roche v. Brooklyn City & Newton R.R.*, 105 N.Y. 294, 11 N.E. 630 (1887). The trustworthiness of such statements is generally assured by the patient's belief that the treatment received may depend upon the accuracy of the

information provided.

(1) Even in this situation, only statements of present pain and suffering are admissible. *See Roche v. Brooklyn City & Newton R.R.*, 105 N.Y. 294, 11 N.E. 630 (1887). Declarations of past pain, as well as narrative statements as to the cause of illness or injury are not admissible, even though made to a physician for purposes of treatment. *See Davidson v. Cornell*, 132 N.Y. 228, 237, 30 N.E. 573, 576 (1892).

b. Or where the declarant is dead.
Rosenberg v. Equitable Life Assurance Soc'y, 148 A.D.2d 337, 538 N.Y.S.2d 551 (1st Dep't 1989); *Tromblee v. North American Accident Ins. Co.*, 173 A.D. 174, 158 N.Y.S. 1014 (3d Dep't 1916), *aff'd*, 226 N.Y. 615, 123 N.E. 892 (1919).

c. Or where the declaration falls under some other exception to the hearsay rule; *e.g.*, the spontaneous declaration doctrine.
Kennedy v. Rochester City & Brighton R.R., 130 N.Y. 654, 29 N.E. 141 (1891).

2. Declarations evidencing the declarant's present state of mind are also admissible whenever state of mind is relevant, *e.g.*, declarations showing reason, motive, feeling, intent.
People v. Lauro, 91 Misc. 2d 706, 709, 398 N.Y.S.2d 503, 504 (Sup. Ct. Westchester County 1977).

a. A declaration of intention is also admissible (even though intent is not an issue) as some evidence that the act intended was attempted or done.
Mutual Life Ins. Co. v. Hillmon, 145 U.S. 285, 295 (1892); *United States v. Annunziato*, 293 F.2d 373, 377 (2d Cir.), *cert. denied*, 368 U.S. 919 (1961).

3. *Spontaneous Declarations*: If a startling event precipitates an involuntary declaration, the declaration is admissible under this rule. *See People v. Del Vermo*, 192 N.Y. 470, 483, 85 N.E. 690, 695 (1908). The rationale underlying this exception is expressed in *People v. Cavi-*

ness, 38 N.Y.2d 227, 230-31, 379 N.Y.S.2d 695, 699, 342 N.E.2d 496, 499 (1975):

> It is established that spontaneous declarations made by a participant while he is under the stress of nervous excitement resulting from an injury or other startling event, while his reflective powers are stilled and during the brief period when considerations of self-interest could not have been brought fully to bear by reasoned reflection and deliberation, are admissible as true exceptions to the hearsay rule . . . They are admitted because, as the impulsive and unreflecting responses of the declarant to the injury or other startling event, they possess a high degree of trustworthiness, and, as thus, expressing the real tenor of said declarants belief as to the facts just observed by him, may be received as testimony of those facts.

Id.; *People v. Brown*, 70 N.Y.2d 513, 518, 517 N.E.2d 515, 517, 522 N.Y.S.2d 837, 839 (1987); *People v. Marks*, 6 N.Y.2d 67, 71-72, 160 N.E.2d 26, 27-28, 188 N.Y.S.2d 465, 467-68 (1959), *cert. denied*, 362 U.S. 912 (1960); *Taft v. New York City Transit Auth.*, 193 A.D.2d 503, 597 N.Y.S.2d 374 (1993).

a. The tendency in New York is to construe this doctrine narrowly.

People v. Boodle, 47 N.Y.2d 398, 404, 391 N.E.2d 1329, 1332, 418 N.Y.S.2d 352, 356 (1979), *cert. denied*, 444 U.S. 969 (1979) (depending on circumstances, even brief period of time may render a declaration unspontaneous); *Handel v. New York City Rapid Transit Corp.*, 252 A.D. 142, 297 N.Y.S. 216 (2d Dep't 1937), *aff'd*, 277 N.Y. 548, 13 N.E.2d 468 (1938).

b. The spontaneous declaration exception also applies to statements made by bystanders.

People v. Brown, 70 N.Y.2d 513, 517 N.E.2d 515, 522 N.Y.S.2d 837 (1987); *People v. Caviness*, 38 N.Y.2d 227, 231, 342 N.E.2d 496, 499, 379 N.Y.S.2d 695, 699 (1975); *Taft v. New York City Transit*

Auth., 193 A.D.2d 503, 597 N.Y.S.2d 374 (1993).

c. No narrative statements are permitted. The statement must concern the immediate facts of the startling occurrence.
Rosenberg v. Equitable Life Assurance Soc'y, 148 A.D.2d 337, 538 N.Y.S.2d 551 (1st Dep't 1989); *Waldele v. N.Y. Central R.R.*, 95 N.Y. 274 (1884).

d. A declaration made in response to a question may be regarded as spontaneous.
People v. Del Vermo, 192 N.Y. 470, 85 N.E. 690 (1908); *People v. Edwards*, 47 N.Y.2d 493, 392 N.E.2d 1229, 419 N.Y.S.2d 45 (1979) (since statements were uttered under stress of nervous excitement without opportunity for reasoned reflection, inadmissibility will not be judged on fact that questions were posed by person coming to victim's aid).

4. *Present Sense Impression*: This exception permits a court to admit hearsay testimony of a statement that describes or explains an event or condition that is made, while or immediately after the declarant observes or perceives the event.
People v. Brown, 80 N.Y.2d 729, 734, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 700 (1993); *Berger v. New York City*, 157 Misc. 2d 521, 597 N.Y.S.2d 555 (Sup. Ct. N.Y. County 1993).

a. The rationale for admissibility under the present sense impression exception to the hearsay rule is that the statement is reliable because it is contemporaneous in time with the event or occurrence and no time for reflection, faulty recollection or deliberate misrepresentation has elapsed.
Berger v. New York City, 157 Misc. 2d 521, 522, 597 N.Y.S.2d 555, 556 (Sup. Ct. N.Y. County 1993).

b. Under this exception, spontaneous descriptions of events made contemporaneously with the observations are admissible if the descriptions are sufficiently corroborated by other evidence.
People v. Brown, 80 N.Y.2d 729, 734, 610 N.E.2d

369, 373, 594 N.Y.S.2d 696, 700 (1993).

c. Present sense impression statements may be admitted even though the declarant was not a participant in the events and is an unidentified bystander.
People v. Brown, 80 N.Y.2d 729, 735, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 701 (1993).

d. Present sense impression evidence is admissible in civil as well as criminal actions.
Berger v. New York City, 157 Misc. 2d 521, 523, 597 N.Y.S.2d 555, 557 (Sup. Ct. N.Y. County 1993).

e. Difference between present sense impression and excited utterance: Present sense impression evidence differs from the traditional spontaneous declaration exception because the latter exception requires "the shock and/or excitement of an incident or event that triggered the outburst."
Berger v. New York City, 157 Misc. 2d 521, 522, 597 N.Y.S.2d 555, 556 (Sup. Ct. N.Y. County 1993) (citing *Rosenberg v. Equitable Life Assurance Soc'y*, 148 A.D.2d 337, 538 N.Y.S.2d 551 (1st Dep't 1989)).

J. *Pedigree Declarations*: Evidence admissible under the pedigree exception to the hearsay rule includes declarations relating to birth, death, marriage, or legitimacy, for example.
In re Esther T., 86 Misc. 2d 452, 382 N.Y.S.2d 916 (Sur. Ct. Nassau County 1976); *In re Hayden*, 176 Misc. 1078, 1080, 29 N.Y.S.2d 852, 854 (Sur. Ct. New York County 1941).

1. The admission of declarations pertaining to pedigree is subject to the following conditions:

a. The declarant is dead.
Aalholm v. People, 211 N.Y. 406, 412-13, 105 N.E. 647, 649-50 (1914); *In re Esther T.*, 86 Misc. 2d 452, 455, 382 N.Y.S.2d 916, 919 (Sur. Ct. Nassau County 1976).

b. The declarant must have been related by blood or affinity to the family of which he speaks.
Aalholm v. People, 211 N.Y. 406, 412-13, 105 N.E.

647, 649-50 (1914); *In re Esther T.*, 86 Misc. 2d 452, 382 N.Y.S.2d 916 (Sur. Ct. Nassau County 1976).

(1) This relationship must be established by independent evidence, although only slight evidence is necessary.
Aalholm v. People, 211 N.Y. 406, 413, 105 N.E. 647, 649-50 (1914); *In re Tim's Estate*, 6 Misc. 2d 47, 159 N.Y.S.2d 520 (Sur. Ct. N.Y. County 1956).

c. The declaration must have been made ante litem motam (at a time when there was no motive to distort the truth).
Aalholm v. People, 211 N.Y. 406, 412-13, 105 N.E. 647, 649-50 (1914); *In re Esther T.*, 86 Misc. 2d 452, 454-55, 382 N.Y.S.2d 916, 919 (Sur. Ct. Nassau County 1976).

(1) Pedigree declarations may be oral, written, or may consist of conduct.
In re Tim's Estate, 6 Misc. 2d 47, 159 N.Y.S.2d 520 (Sur. Ct. N.Y. County 1956) (oral pedigree declarations admissible as exception to hearsay rule); *In re Floyd-Jones Estate*, 154 N.Y.S.2d 668, 670 (Sur. Ct. Nassau County 1955) (written declaration in form of book admissible under pedigree exception to hearsay rule).

K. *Ancient Documents*:

1. Under the common law ancient documents rule, a record or document is sufficiently trustworthy to be admitted for the truth of its contents if it is found to be:

a. Thirty or more years old;

b. In the proper custody; and

c. Free from any indication of fraud or forgery.
Tillman v. Lincoln Warehouse Corp., 72 A.D.2d 40, 423 N.Y.S.2d 151 (1st Dep't 1979) (where certified inventory and appraisal was received as "some evidence" against defendant that collection was placed in its warehouse).

2. While all ancient documents are self-authenticating, it is unclear which ancient documents are also admitted as an exception to the hearsay rule.
3. CPLR 4522 provides that maps, surveys, and official records affecting real property on file for more than 10 years are "prima facie evidence" of their contents.

   N.Y. CIV. PRAC. L. & R. § 4522 (McKinney 1992).
4. Real Property Actions and Proceedings Law section 341 provides that "any instrument more than 10 years old, executed for the purpose of transferring title or interest in lands of this state, which contains recitals that the grantors or grantees, or either, or both, are the heirs at law of a prior owner of the title or interest described in such instrument, or a survivor of a tenancy by the entirety or joint tenancy, shall be presumptive evidence of said heirship or of such survivorship, as therein recited," if the document is executed and duly recorded in a certain manner.

   N.Y. REAL PROP. ACTS. LAW § 341 (McKinney 1979 & Supp. 1993).
5. Real Property Actions and Proceedings Law section 331 provides that real property sold by a sheriff for enforcement of a valid lien thereon, if the sale took place at least 10 years before trial, and if the execution or writ by virtue of which the sale was made cannot be found, then the recital or reference to the execution or writ in the sheriff's certificate of sale or in the conveyance is "prima facie evidence" of the execution or writ as against any party whose claim of title is not accompanied by peaceable possession of the premises in controversy for at least three years immediately preceding the commencement of the action.

   N.Y. REAL PROP. ACTS. LAW § 331 (McKinney 1979 & Supp. 1993).

VII. CIRCUMSTANTIAL EVIDENCE

A. *Definition*: Evidence of a collateral fact from which, either alone or with other collateral facts, the existence or nonexistence of the fact in issue may be inferred.

People v. Bretagna, 298 N.Y. 323, 325, 83 N.E.2d 537, 538 (1949) (since confession is direct acknowledgement of guilt, it is not circumstantial evidence).

B. *General Rule*: All relevant circumstantial evidence is admissible unless prohibited by some exclusionary rule.

1. Relevant circumstantial evidence will be excluded if its probative value is outweighed by the danger that its admission will unduly prejudice the adversary, or by the danger that its admission will create a collateral issue which will confuse the main issue, unduly prolong the trial, or will unfairly surprise the adversary.

People v. Harris, 209 N.Y. 70, 82, 102 N.E. 546, 550 (1913).

2. Lack of means to commit a crime (*e.g.*, D was not strong enough to strike the blow; D did not have the money to plan a flight to Europe) is always admissible. However, possession of the means (*e.g.*, D has a screwdriver which could be used to break into a house) is generally inadmissible unless the means are unique.

C. *Evidence of Other Crimes*: Evidence that a defendant in a criminal prosecution committed another or similar crime is inadmissible if offered solely to show a general criminal disposition. *People v. Zackowitz*, 254 N.Y. 192, 197, 172 N.E. 466, 468 (1930). Similarly, evidence that the defendant did not commit an uncharged crime is inadmissible. *People v. Lawson*, 71 N.Y.2d 950, 952-53, 524 N.E.2d 141, 142, 528 N.Y.S.2d 820, 821 (1988). Prior uncharged crimes may not be offered to show the defendant's bad character unless they help establish some element of the crime under consideration or are relevant because of some exception. *People v. Lewis*, 69 N.Y.2d 321, 325, 506 N.E.2d 915, 917, 514 N.Y.S.2d 205, 207 (1987).

1. The general rule is, of course, that any act of the accused relevant to show his guilt of the crime charged is admissible. Difficulty is encountered, however, when proof of the relevant act will also establish or suggest the commission of another crime. For a defendant's past crimes to be admissible for a present proceeding:

a. The evidence must be inextricably interwoven with some specific material issue in the case (not criminal disposition).
People v. Hudy, 73 N.Y.2d 40, 54-56, 535 N.E.2d 250, 258, 538 N.Y.S.2d 197, 205-06 (1988).

(1) Irrelevant or prejudicial parts of a pertinent conversation are not admissible and should be deleted if the essence of the event is not disturbed.
People v. Crandall, 67 N.Y.2d 111, 116-17, 491 N.E.2d 1092, 1095, 500 N.Y.S.2d 635, 638 (1986).

b. The evidence's probative value must substantially outweigh the danger of undue prejudice against the defendant. *People v. Ely*, 68 N.Y.2d 520, 529, 503 N.E.2d 88, 94, 510 N.Y.S.2d 532, 538 (1986). In view of the potential for prejudice, the prosecutor should obtain a ruling in the jury's absence, and the trial judge should exclude any part not directly probative to the crime charged. *People v. Ventimiglia*, 52 N.Y.2d 350, 356, 420 N.E.2d 59, 63-64, 438 N.Y.S.2d 261, 265-66 (1981).

2. In *People v. Molineux*, 168 N.Y. 264, 61 N.E. 286 (1901), the court said that evidence of the collateral crime—that is, evidence of the defendant's relevant collateral act which will also reveal or suggest the defendant's commission of another crime—is admissible if it tends to:

a. Establish a motive for the crime charged;

b. Establish intent for the crime charged;

(1) This exception is predicated on the theory that the duplication of the inculpatory conduct makes the innocent explanation improbable.
People v. Ingram, 71 N.Y.2d 474, 480, 522 N.E.2d 439, 441, 527 N.Y.S.2d 363, 366 (1988).

(2) Evidence of past crimes to prove intent should be precluded if intent is easily inferred from commission of the act itself.

People v. Crandall, 67 N.Y.2d 111, 117, 491 N.E.2d 1092, 1095, 500 N.Y.S.2d 635, 638 (1986).

(3) Issue of intent must be raised by the defendant. *People v. Alvino*, 71 N.Y.2d 233, 245, 519 N.E.2d 808, 814, 525 N.Y.S.2d 7, 13 (1987).

(4) *Amorous design*: Evidence of past sex crimes or sexual abuse is not admissible to display defendant's propensities or a victim's consent. *People v. Hudy*, 73 N.Y.2d 40, 55, 535 N.E.2d 250, 259, 538 N.Y.S.2d 197, 206 (1988);

c. Negate the actual or probable defense of mistake or accident;

d. Establish the identity of the perpetrator of the crime charged;

(1) If other crimes are to be admissible on the issue of identity, the identity of the defendant as the perpetrator of the other crimes, if not conceded or previously adjudicated, must be established by clear and convincing evidence.
People v. Robinson, 68 N.Y.2d 541, 544-45, 503 N.E.2d 485, 487, 510 N.Y.S.2d 837, 839 (1986).

(2) To invoke this exception the crimes must be unique, *e.g.*, "Jack the Ripper" murders. Defendant's robbery of a store with the same gun used in a prior robbery does not permit proof of the details of the second crime when defendant is tried for the prior robbery. *People v. Condon*, 26 N.Y.2d 139, 143, 257 N.E.2d 615, 616, 309 N.Y.S.2d 152, 155 (1970); *People v. Kennedy*, 27 N.Y.2d 551, 551, 261 N.E.2d 264, 264, 313 N.Y.S.2d 123, 123 (1970).

e. Establish a common scheme or plan. "If the court does not clearly perceive it (*i.e.*, the scheme), the accused should be given the benefit of the doubt, and the evidence rejected."
People v. Molineux, 168 N.Y. 264, 61 N.E. 286 (1901).

The categories in the *Molineaux* case must be regarded as illustrative and not exclusive. *Cf.* UNIFORM RULES OF EVIDENCE Rule 55 (evidence of other crimes admissible if relevant for any purpose other than to stigmatize defendant as bad actor).

D. *Character Evidence—Defendant in Criminal Case*

1. The choice is with defendant to either put his character in issue or keep it out of the case. The prosecution may not initially attack defendant's character.

2. Defendant puts his character in issue by calling a qualified witness to testify to his good reputation for the trait involved. Negative evidence is also permissible; that is, the character witness may testify that he never heard anything against the defendant in reference to the relevant trait. *People v. Van Gaasbeck*, 189 N.Y. 408, 414, 82 N.E. 718, 719 (1907); *People v. Colantone*, 243 N.Y. 134, 139, 152 N.E. 700, 702 (1926). The character witness is limited to reputation; he may not testify to specific acts of the defendant.

   a. If the defendant testifies as a witness, he puts his credibility in issue, but not his character. *People v. Hinksman*, 192 N.Y. 421, 432, 85 N.E. 676, 679 (1908); *People v. Pavao*, 59 N.Y.2d 282, 291, 451 N.E.2d 216, 221, 464 N.Y.S.2d 458, 462-63 (1983).

3. Once defendant places his character in issue, *People v. Jones*, 121 A.D.2d 398, 399, 503 N.Y.S.2d 109, 110 (2d Dep't 1986), the prosecution may rebut that character evidence by reputation evidence to the contrary and by showing previous convictions of defendant. But, N.Y. CRIM. PROC. LAW § 60.40 (2) (McKinney 1992) restricts the proof to convictions of offenses relevant to the trait in evidence. *For example*, if the witness states that D enjoys a good reputation for honesty, a conviction of forgery could be evidenced, but not a conviction for drunk driving.

4. Defendant's character witness may be asked on cross-examination whether he had heard reports derogatory

to defendant's reputation testified to by the witness. This is permissible to affect the credibility of the witness.

People v. Laudiero, 192 N.Y. 304, 309, 85 N.E. 132, 134 (1900); *Michelson v. United States*, 335 U.S. 469, 481 (1948).

E. *Character Evidence—Victim in Criminal Case*: Ordinarily the character of the victim is not relevant and, therefore, the general rule is that the victim's character cannot be shown. There are several exceptions:

1. In a homicide prosecution where the defense is self-defense, the defendant may show that the deceased committed specific violent acts or had a reputation for being violent provided the defendant knew of the acts or reputation at the time of the homicide. It is not admissible to raise the inference that the deceased was the aggressor.

   People v. Miller, 39 N.Y.2d 543, 549, 39 N.E.2d 841, 845, 384 N.Y.S.2d 741, 745 (1976).

   a. But on the issue of self-defense, and for the purpose of raising an inference that the deceased was the aggressor, the defendant may show that the deceased had uttered threats against him, even though the defendant was not aware of these threats.

      Stokes v. People, 53 N.Y. 164, 174 (1873).

2. New York has a "rape shield" law that restricts the use of evidence regarding the chastity of a sex offense victim. In a prosecution for a sex offense, evidence of the victim's sexual behavior is generally not admissible. Exceptions include evidence which proves or tends to prove instances of the victim's prior sexual conduct with the accused or rebuts evidence of the victim's failure to engage in sexual acts during a given period. N.Y. CRIM. PROC. LAW § 60.42 (McKinney 1992).

F. *Character Evidence—Civil Case*: Character evidence (*i.e.*, reputation evidence) may not, as a general rule, be used in a civil case to raise an inference that a person did or did not do

a particular act. *McKane v. Howard*, 202 N.Y. 181, 185, 95 N.E.2d 642, 643 (1911); *Beach v. Richtmyer*, 275 A.D. 466, 469, 90 N.Y.S.2d 332, 335 (3d Dep't 1942). There are exceptions:

1. In a civil case for assault and battery where the defendant pleads self-defense, defendant may show that plaintiff has a bad reputation for peacefulness.

   Silliman v. Sampson, 42 A.D. 623, 623, 59 N.Y.S. 923, 925 (4th Dep't 1899).

2. In an action for defamation or malicious prosecution, defendant may show that plaintiff has a bad reputation. The purpose is to minimize damages.

   Hart v. McLaughlin, 51 A.D. 411, 412, 64 N.Y.S. 827, 828 (1st Dep't 1900).

G. *Evidence of Similar Acts—Civil Cases*: Evidence that a party did the same or a similar act on another occasion is excluded unless the collateral act directly tends to establish the act in issue.

   McLoghlin v. N.M.V. Bank, 139 N.Y. 514, 523, 34 N.E.2d 1095, 1097 (1893). *Contra Altman v. Ozdoba*, 237 N.Y. 218, 224, 142 N.E.2d 591, 593 (1923).

1. In a negligence action, evidence of specific acts of negligence to create an inference that such conduct was repeated is excluded. *Warner v. New York Cent. R.R.*, 44 N.Y. 465, 472 (1871); *Feaster v. New York City Transit Auth.*, 172 A.D.2d 284, 566 N.Y.S.2d 380 (1st Dep't 1991). However, where the issue involves "proof of a deliberate and repetitive practice," evidence of such habit is admissible to allow the inference of negligence on a particular occasion. *Halloran v. Virginia Chemicals, Inc.*, 41 N.Y.2d 386, 392, 361 N.E.2d 991, 995-96, 393 N.Y.S.2d 341, 346 (1977).

   a. But to prove a dangerous condition or the defendant's notice thereof, plaintiff may show other acts on the property, provided he shows substantial similarity of conditions.

      Cole v. N.Y. Racing Ass'n, 24 A.D.2d 993, 996, 266 N.Y.S.2d 267, 272 (2d Dep't 1965), *aff'd*, 17 N.Y.2d

761, 217 N.E.2d 144, 270 N.Y.S.2d 421 (1966).

b. Defendant may not show that plaintiff has brought other actions for personal injury to support the inference that plaintiff is litigious or accident-prone.

Cf. Hartley v. Szadkowski, 32 A.D.2d 550, 550, 300 N.Y.S.2d 82, 85 (2d Dep't 1969).

2. On the issue of sanity, evidence of the conduct of the person in question on other occasions, if not too remote, is admissible.

People v. Santarelli, 49 N.Y.2d 241, 248, 401 N.E.2d 199, 203, 425 N.Y.S.2d 77, 81 (1980).

3. The condition or quality of an object may be evidenced circumstantially by its prior or subsequent condition, if not too remote. *Spiegel v. Saks 34th Street*, 26 A.D.2d 660, 272 N.Y.S.2d 972 (2d Dep't 1966).

4. To prove the market value of a piece of property, a party may show the sales price of other similar pieces of property in the same neighborhood at approximately the same time.

Village of Lawrence v. Greenwood, 300 N.Y. 231, 235, 90 N.E.2d 53, 55 (1949); *Rusciano & Son Corp. v. Roche*, 70 A.D.2d 953, 955, 417 N.Y.S.2d 769, 771 (2d Dep't 1979).

5. General habits are usually not admissible to show conduct upon a specific occasion. However, evidence of a particular habit may be admissible on the issue of the performance of the habitual act on a specific occasion. Halloran v. Virginia Chemicals, Inc., 41 N.Y.2d 386, 361 N.E.2d 991, 393 N.Y.S.2d 341 (1977). Evidence of a commercial habit is admissible. *Soltis v. State*, 188 A.D.2d 201, 203, 594 N.Y.S.2d 433, 434 (3d Dep't 1993).

6. The custom of a trade or business is admissible, though not conclusive, on the standard of care to be exercised in that trade or business.

Berman v. H.J. Enterprises, Inc., 13 A.D.2d 199, 201, 214 N.Y.S.2d 945, 947 (1st Dep't 1961) (custom for caring for terrazzo floors on rainy days).

a. The internal safety rules of the defendant are also admissible against the defendant if they prescribe only an ordinary, as opposed to extraordinary, degree of care.
Danbois v. N.Y. Central R.R., 12 N.Y.2d 234, 237, 189 N.E.2d 468, 469, 238 N.Y.S.2d 921, 923 (1963).

7. In a defamation action, evidence that defendant repeated the defamatory charge is admissible to show malice, but only if made before the commencement of the action. Repetition after action is excluded.
Enos v. Enos, 135 N.Y. 609, 610, 32 N.E. 123, 123 (1892).

H. *Miscellaneous Doctrines*:

1. Evidence that defendant made repairs subsequent to the accident is not admissible to show negligence. *Cacaolo v. Port Authority*, 186 A.D.2d 528, 530, 588 N.Y.S.2d 350, 352 (2d Dep't 1992). Such evidence is admissible for any other relevant purpose; *e.g.*, to show ownership or control.
Scudero v. Campbell, 288 N.Y. 328, 328, 43 N.E.2d 66, 66 (1942).

a. However, the Court of Appeals has held that evidence of manufacturer's subsequent modifications may be introduced to establish defectivness of product when made in strict products liability case.
Cover v. Cohen, 61 N.Y.2d 261, 270, 461 N.E.2d 864, 868, 473 N.Y.S.2d 378, 382 (1984).

2. An offer to compromise is not admissible. Difficulty is encountered when an admission of fact accompanies an offer to compromise. In such a case, the general rule is that, if the offer to compromise was made without prejudice or the admission of fact was made for the purpose of compromise, the admission must be excluded.
White v. Old Dominion S.S. Co., 102 N.Y. 660, 662, 6 N.E. 289, 291 (1886).

3. Plaintiff may not show that the defendant has insurance covering his loss as evidence that defendant did not care for his property or that defendant will not be hurt

by a judgment.

Rendo v. Schermerhorn, 24 A.D.2d 773, 773, 263 N.Y.S.2d 743, 743 (3d Dep't 1965).

a. But insurance is admissible to show that defendant owned or was in control of the property where ownership or control is in issue.

McGovern v. Oliver, 177 A.D. 167, 169, 163 N.Y.S. 275, 276 (1st Dep't 1917).

b. And, under CPLR 4110(a), a party is entitled, when selecting a jury, to inquire whether any of the veniremen work for or have stock in a liability insurance company.

4. Where a party destroys evidence, a jury may infer that the evidence would have been unfavorable. Where a defendant flees from custody, a jury may infer guilt. *People v. Yazum*, 13 N.Y.2d 302, 304, 196 N.E.2d 263, 264, 246 N.Y.S.2d 626, 628 (1963). Where a party fails to call an eyewitness who is available and apparently friendly to the party, the jury is entitled to construe the evidence most strongly against him. *People v. Gonzales*, 68 N.Y.2d 424, 431, 502 N.E.2d 583, 589, 509 N.Y.S.2d 796, 801 (1986). If the witness is equally favorable to both sides, no inference may be drawn. *Bromberg v. New York City*, 25 A.D.2d 885, 885, 270 N.Y.S.2d 425, 426 (2d Dep't 1966); *see also People v. Giallombardo*, 128 A.D.2d 547, 548, 512 N.Y.S.2d 481, 482 (2d Dep't 1987) (no presumption against prosecution for failure to call coperpetrator available to both sides).

5. Evidence of the possession of money is not admissible to raise an inference of payment. Lack of money may, however, be shown to negate defense of payment. And if evidence of lack of money is introduced, possession of money may then be shown in rebuttal.

Dick v. Marvin, 188 N.Y. 426, 428, 81 N.E.2d 162, 162 (1907).

VIII. Burden of Proof

A. *Nature*: There are two distinct burdens:

1. *Burden of going forward*: obligation of a party to create an issue of fact for the jury. With respect to plaintiff it means the obligation to make out a prima facie case. This burden, though initially on the plaintiff, may shift back and forth during the course of the trial. This burden is solely for the judge's attention, and should never be mentioned to the jury.
2. *Burden of proof*: sometimes called the burden of persuasion, this describes the obligation of a party to persuade the jury (the trier of fact) as to the correctness of his contentions.
    a. Each issue in a case must be defined, and the burden of proof assigned to a party on that issue.
    b. The burden of proof must always be on someone. Not so for the burden of going forward.

B. *Effect of Right to Open and Close*: If the plaintiff has the burden of proof with respect to any issue raised by his complaint, he has the right to open and close.

C. *Criminal Cases*: The prosecution has the burden of proof upon the issue of guilt or innocence. But N.Y. PENAL LAW § 25.00 (McKinney 1987) creates certain "affirmative defenses" as to which the defendant carries the burden of proof, although defendant need establish these only by a preponderance of the evidence. If matter is described as a "defense" in the Penal Law, the burden of disproving it (beyond a reasonable doubt) is upon the prosecution. N.Y. PENAL LAW § 25.00(1) (McKinney 1987); *People v. Butts*, 72 N.Y.2d 746, 748, 533 N.E.2d 660, 662, 536 N.Y.S.2d 730, 732 (1988).

1. Affirmative defenses: entrapment, duress, renunciation and several affirmative defenses to the crime of felony murder, which are set forth in N.Y. PENAL LAW § 125.25(3) (McKinney 1987).
    a. The affirmative defense of insanity is not an unconstitutional shifting of the burden of proof because the prosecution still must prove all of the elements of the crime beyond a reasonable doubt. *People v. Patterson*, 39 N.Y.2d 288, 301-02, 347 N.E.2d 898,

907, 383 N.Y.S.2d 573, 581 (1976), *aff'd*, 432 U.S. 197 (1977).

2. Defenses: infancy and justification.

D. *Will Probate Contests*: The proponents have the burden of proof with respect to the issues of due execution and testamentary capacity; the contestants have the burden with respect to all other issues. *In re Eno's Will*, 196 A.D. 131, 165, 187 N.Y.S. 756, 781 (1st Dep't 1921); *In re Kindberg*, 207 N.Y. 220, 229, 100 N.E. 789, 791 (1912).

E. *Contract Cases*: Under *Murray v. Narwood*, 192 N.Y. 172, 177, 84 N.E. 958, 959 (1908):

1. The party suing on the contract has the burden of proof with respect to all issues pertaining to the creation of the contract.

Paz v. Singer Co., 151 A.D.2d 234, 235, 542 N.Y.S.2d 10, 11 (1st Dep't 1989).

2. Matters of defense arising subsequent to the execution of the contract (*e.g.*, release) place the burden on the defendant.

Fleming v. Ponziani, 24 N.Y.2d 105, 110, 247 N.E.2d 114, 118, 299 N.Y.S.2d 134, 139 (1969); *Mix v. Neff*, 99 A.D.2d 180, 182, 473 N.Y.S.2d 31, 33 (3d Dep't 1984).

a. For the special rules as to burden of proof on the issue of payment. *See Conkling v. Weathermax*, 181 N.Y. 258, 261, 73 N.E. 1028, 1029 (1905). The burden of proving payment is on the person who claims payment. *In re Estate of Lurje*, 64 Misc. 2d 569, 570, 315 N.Y.S.2d 476, 477-78 (Sur. Ct. N.Y. County 1970).

F. *Contributory Negligence*: In an action for property damage, personal injury, or wrongful death the defendant must prove the plaintiff's contributory negligence or other culpable conduct to diminish damages. N.Y. CIV. PRAC. L. & R. § 1412 (McKinney 1976).

1. *Automobile Cases*: The defendant has the burden of proving that nonuse of the seat belt increased the extent

of plaintiff's injuries and damages.
Schrader v. Carney, 180 A.D.2d 200, 210, 586 N.Y.S.2d 687, 693 (4th Dep't 1992).

G. *Insurance Cases*: In an action on an ordinary life insurance policy where the defense is suicide, the defendant-insurer has the burden of proof to clearly establish that no conclusion other than suicide may reasonably be drawn. *Schelberger v. Eastern Sav. Bank*, 93 A.D.2d 188, 191, 461 N.Y.S.2d 785, 787 (1st Dep't 1983), *aff'd*, 60 N.Y.2d 918, 458 N.E.2d 1257, 470 N.Y.S.2d 458 (1983). In an action on an accidental death policy or for double indemnity in the case of death by accident, the plaintiff has the burden of proving that death was produced by accidental means. But even in these cases, by virtue of the presumption against suicide, the defendant-insurer appears to have the burden of proof with respect to the defense of suicide. *Begley v. Prudential Ins. Co.*, 1 N.Y.2d 530, 533, 136 N.E.2d 839, 841, 154 N.Y.S.2d 866, 868 (1956).

H. *Quantum of Burden of Proof*:

1. In a criminal case, the prosecution must prove guilt beyond a reasonable doubt. The concept of "reasonable doubt" is not susceptible to precise definition.

   a. A reasonable doubt is a doubt which jurors should be able to express or articulate.
   People v. Malloy, 55 N.Y.2d 296, 300, 434 N.E.2d 237, 238, 449 N.Y.S. 2d 168, 169, *cert. denied*, 459 U.S. 847 (1982).

   b. However, a jury instruction requiring jurors to give "concrete reasons" for their votes acquitting a criminal defendant unconstitutionally reverses the burden of proof.
   People v. Antommarchi, 80 N.Y.2d 247, 252, 604 N.E.2d 95, 98, 590 N.Y.S.2d 33, 36 (1992).

2. In most civil cases, the burden of proof may be described as a fair preponderance of the evidence. *People v. Mosley*, 112 A.D.2d 812, 814, 492 N.Y.S.2d 403, 405 (1st Dep't 1985), *aff'd*, 67 N.Y.2d 985, 494 N.E.2d 98, 502 N.Y.S.2d 993 (1986).

3. In some civil cases, clear and convincing evidence, a

higher standard of proof, is required as a matter of policy. *For example*, fraud, claims against estates, reformation, and causa mortis gifts.

a. In order to impress upon the fact-finder the importance of its decision, a clear and convincing evidence standard is required where it is claimed that an individual, now incompetent, left instructions to terminate life-sustaining systems when it appears that there is no hope for recovery.
In re Fosmire v. Nicoleau, 75 N.Y.2d 218, 225, 551 N.E.2d 77, 80, 551 N.Y.S.2d 876, 879 (1990).

b. Paternity must be established by the petitioning party through clear and convincing evidence that creates a genuine belief of fatherhood.
In re Commissioner of Social Services v. Philip De G., 59 N.Y.2d 137, 141-42, 450 N.E.2d 681, 683, 463 N.Y.S.2d 761, 763 (1983).

4. In an action for wrongful death, the executor is entitled to a charge that he is not held to as high a degree of proof as where an injured plaintiff can himself describe the occurrence.
Noseworthy v. New York City, 298 N.Y. 76, 80, 80 N.E.2d 744, 745 (1948); *Pierson v. Dayton*, 168 A.D.2d 173, 175, 572 N.Y.S.2d 142, 143 (4th Dep't 1991).

a. The court may limit this rule to the facts on which the dead party could testify, if available.
Holiday v. Huntington, 164 A.D.2d 424, 428, 563 N.Y.S.2d 444, 447 (2d Dep't 1990).

b. This lesser degree of proof is also accorded to the amnesiac plaintiff; but the jury must be charged to apply the lesser burden of proof only if it first determines that the amnesia is genuine, and that it was caused by the defendant.
Schechter v. Klanfer, 28 N.Y.2d 228, 230-31, 269 N.E.2d 812, 814, 321 N.Y.S.2d 99, 101-02 (1971); *Fasano v. State*, 113 A.D.2d 885, 888, 493 N.Y.S.2d 805, 807 (2d Dep't 1985).

IX. PRESUMPTIONS

A. *Definition*: A rule which requires a jury to conclude that certain facts are established once other basic facts have been proven, unless the conclusion has been rebutted.
Platt v. Elias, 186 N.Y. 374, 379, 79 N.E. 1, 2 (1906).

1. Distinguished from an inference (sometimes misleadingly called a presumption of fact) which *permits*, but does not *require*, the jury to infer that a conclusion has been established.

2. An inference or presumption will carry the burden of going forward. But a presumption, being stronger, will also shift the burden of going forward to the other side which must then rebut the presumption or suffer a directed verdict.

B. *Inferences*: The following are inferences, not presumptions:

1. *Res Ipsa Loquitur*: An inference of negligence is permissible where:

a. The event is of a kind which ordinarily does not occur in the absence of negligence;

b. It is caused by an agency or instrumentality within the exclusive control of the defendant;

c. It is not due to any voluntary action or contribution on the part of the plaintiff.
Ebanks v. New York City Transit Auth., 70 N.Y.2d 621, 623, 512 N.E.2d 297, 298, 518 N.Y.S.2d 776, 777 (1989). *Dermatossian v. New York City Transit Auth.*, 67 N.Y.2d 219, 226, 492 N.E.2d 1200, 1203, 501 N.Y.S.2d 784, 788 (1986).

2. *Guilty from Possession of Fruits*: Recent and exclusive possession of the fruits of the crime, if unexplained or falsely explained, will justify inference of guilt.
People v. Adams, 163 A.D.2d 481, 481, 558 N.Y.S.2d 167, 168 (2d Dep't 1990); *People v. Abney*, 162 A.D.2d 372, 373, 558 N.Y.S.2d 493, 494 (1st Dep't 1990).

a. Normally the permissible inference is that the possessor is guilty of whatever crime was committed.

People v. Colon, 28 N.Y.2d 1, 9, 267 N.E.2d 577, 580, 318 N.Y.S.2d 929, 933, *cert. denied*, 402 U.S. 905 (1971); *People v. Donaldson*, 107 A.D.2d 758, 759, 484 N.Y.S.2d 123, 125 (2d Dep't 1985).

(1) The possession of a loaded firearm is presumptive evidence of possessing the weapon with the intent to use it unlawfully against another.
N.Y. PENAL LAW § 265.15(4) (McKinney 1989); *People v. Bumburg*, 194 A.D.2d 735, 736, 599 N.Y.S. 826, 826 (2d Dep't 1993).

(2) *The Automobile Rule*: Unless possession is attributed to an individual occupant, all vehicle occupants are presumed to possess a gun found in an automobile.
N.Y. PENAL LAW § 265.15(3) (McKinney 1989); *People v. Verez*, 191 A.D.2d 378, 379, 595 N.Y.S.2d 446, 448 (1st Dep't), *appeal granted*, 82 N.Y.2d 728 (1993).

b. But other evidence in the case may direct the inference towards another crime; *e.g.*, may point to the possessor as merely an accessory after the fact. *People v. Galbo*, 218 N.Y. 283, 290, 112 N.E. 1041, 1044-45 (1916); *see also People v. Baskerville*, 60 N.Y.2d 374, 383, 457 N.E.2d 752, 757, 469 N.Y.S.2d 646, 651 (1983) (reasonable probability that defendant acquired property after theft must be reflected in jury instructions); *People v. Everett*, 10 N.Y.2d 500, 508, 180 N.E. 556, 559, 225 N.Y.S.2d 193, 198 (1962) (jury may consider inference that possessor of stolen property was merely receiver only when there is evidence in the case that theft was committed by someone else).

c. The recent and exclusive possession may be shown by circumstantial evidence. In such cases, however, "the circumstances must be established by clear and convincing evidence and must be of such a character as, if true, to exclude to a moral certainty every other inference but that of recent and exclusive possession by defendants."

People v. Johnson, 65 N.Y.2d 556, 562, 483 N.E.2d 120, 124, 493 N.Y.S.2d 445, 449 (1985); *People v. Foley*, 307 N.Y. 490, 492-93, 121 N.E.2d 516, 517 (1954).

3. *Undue influence*: Where an attorney is the draftsman of a will which makes him the principal beneficiary to the exclusion of the natural objects of the testator's bounty, the trier of facts may find undue influence.
   In re Putnam, 257 N.Y. 140, 142, 117 N.E.2d 399, 400 (1931); *In re Delorez*, 141 A.D.2d 540, 541, 529 N.Y.S.2d 153, 154 (2d Dep't 1988).
   a. Once the contestant establishes a special relationship between the attorney and the testator, the nature of the transaction, and the position occupied by the attorney regarding the will or trust, the burden shifts to the attorney to establish that no deception or undue influence was exerted.
   In re Nicoll, 191 A.D.2d 444, 445, 594 N.Y.S.2d 296, 297 (2d Dep't 1993).

C. *Presumptions*: The following are presumptions:

1. *Sanity*: Everyone is presumed sane.
2. *Continuance*: Proof that a person, object or condition existed at a given moment raises the presumption that it continued to exist for its normal life span. *In re Huss*, 126 N.Y. 537, 542, 27 N.E. 784, 785 (1891). However, proof of the existence of a state of facts does not generally raise a presumption that the same facts existed previously. *Hanna v. Stedman*, 230 N.Y. 326, 338, 130 N.E. 566, 570 (1921).
3. *Death from Absence*: A presumption of death from absence arises if the following elements are satisfied:
   a. Person absent for three or more years (N.Y. EST. POWERS & TRUSTS LAW § 2-1.7 (McKinney Supp. 1994));
   b. Not heard from by those with whom he would naturally be expected to communicate;
   c. A diligent search for him has been conducted in

vain; and

d. There is no reasonable explanation for his absence and silence save death.
Butler v. Mutual Life Ins. Co., 225 N.Y. 197, 203, 121 N.E. 758, 760 (1919); *Kutner v. New England Mut. Life Ins. Co.*, 57 A.D.2d 697, 698, 395 N.Y.S.2d 540, 541 (4th Dep't 1977).

4. *Mail-delivery*: A properly-addressed envelope is presumed to have been delivered in due course.
Union Trust Co. v. Barnhardt, 270 N.Y. 350, 352, 1 N.E.2d 459, 460 (1936); *Allstate Ins. Co. v. Patrylo*, 144 A.D.2d 243, 247, 533 N.Y.S.2d 436, 439 (1st Dep't 1988).

5. *Bailments*: There is a presumption of negligence if a bailee does not come forward with a satisfactory explanation of his failure to deliver the chattel. *Ellish v. Airport Parking Co.*, 42 A.D.2d 174, 176, 345 N.Y.S.2d 650, 652 (2d Dep't 1973).

6. *Legitimacy*: Every person is presumed to be legitimate, and this presumption, although not conclusive, is so strong that it "will not fail unless common sense and reason are outraged by a holding that it abides."
In re Findlay, 253 N.Y. 1, 8, 170 N.E. 471, 473 (1930).

a. The strong and persuasive presumption of legitimacy may be rebutted where not to do so "would outrage common sense and reason."
In re Estate of Fay, 44 N.Y.2d 137, 142, 375 N.E.2d 735, 737, 404 N.Y.S.2d 554, 556 (1978).

b. Paternity: Results of a blood-grouping test can be admitted in evidence, but only in cases where definite exclusion of paternity is established. Results of the human leucocyte antigen test, however, may be received as affirmative evidence of paternity except in cases where exclusion has already has been established by other blood-grouping tests. FAMILY COURT ACT § 532(a) (McKinney 1983).

7. *Intestacy*: When a person dies, he is presumed to die

intestate.

a. If it be established that the decedent once made a will, and the will cannot be found after his death, the presumption is that the decedent destroyed the will with the intention of revoking it. *In re Kennedy's Will*, 167 N.Y. 163, 168, 60 N.E. 442, 443 (1901).

8. *Solvency*: Every person is presumed solvent and every debt is presumed collectible.

9. *Regularity*: There is a presumption that when an official does an act, he does it properly.

a. Similarly, there is a presumption that corporate officials perform their duties.
Price v. Standard Oil Co., 55 N.Y.S.2d 890, 896 (Sup. Ct. N.Y. County 1945).

D. *Operation of a Presumption*: Once the basic facts are proven, the presumption arises, calling upon the party against whom the presumption works to rebut it by substantial evidence. If that party rebuts the presumption by producing substantial evidence to the contrary of the presumed fact, the presumption leaves the case entirely. All that remains of it is the possibility that the jury *may* treat the basic facts as some evidence pointing towards the presumed fact (as in the case of an inference). But the conclusion will have to be reached without the aid of any artificial crutch like the presumption.
Fleming v. Ponziani, 24 N.Y.2d 105, 111, 247 N.E.2d 114, 118, 298 N.Y.S.2d 134, 140 (1969).

1. Most presumptions are rebutted by "substantial evidence" to the contrary of the presumed fact. The term "substantial" has never been adequately defined, although it appears to mean sufficient evidence, which if believed, would support a finding of the non-existence of the presumed fact.

2. There are, however, five presumptions which are not rebutted by mere "substantial evidence," but which abide until rebutted by a higher standard of proof. In these cases the net effect of the presumption is to cast the burden of proof on the party against whom the pre-

sumption operates. The five are:

a. The presumption of innocence in a criminal case. Rebuttable only by proof establishing guilt beyond a reasonable doubt.

b. The presumption of sanity. Rebuttable only by clear and convincing evidence.

c. The presumption in favor of legitimacy. Rebuttable only by clear and convincing evidence.

d. The presumption against suicide. Rebuttable only by clear and convincing evidence. *Begley v. Prudential Ins. Co.*, 1 N.Y.2d 530, 532, 136 N.E.2d 839, 841, 154 N.Y.S.2d 866, 868 (1956).

e. The presumption in favor of the validity of a marriage. Rebuttable only by clear and convincing evidence. *In re Estate of Brown*, 40 N.Y.2d 938, 939, 358 N.E.2d 883, 884, 390 N.Y.S.2d 59, 59 (1976).

E. *Conflict of Presumptions*: The stronger presumption prevails. *Palmer v. Palmer*, 162 N.Y. 130, 133, 56 N.E. 501, 502 (1900); UNIFORM RULES OF EVIDENCE Rule 301(b) (when two presumptions conflict, the one founded on weightier considerations of policy and logic prevails.)

X. PROVINCE OF COURT AND JURY

A. *Powers of Judge*:

1. Although the judge may (and in a complicated case must) marshal the evidence, he may not comment thereon.

   People v. Curatalo, 7 A.D.2d 996, 996-97, 184 N.Y.S.2d 81, 81-82 (2d Dep't 1959).

2. While a judge may call a witness as the court's witness and examine all witnesses who testify, he may not impart to the jury the court's opinion of the facts.

   People v. Mendez, 3 N.Y.2d 120, 143 N.E.2d 806, 164 N.Y.S.2d 401 (1957).

3. Requests to exclude witnesses are addressed to the discretion of the court.

   People v. Cooke, 292 N.Y. 185, 190, 54 N.E.2d 357,

360 (1944).

a. If the witness disobeys the court's order he may, nevertheless, testify, but his failure to leave the courtroom as directed may be commented upon in summation, and the witness may also be punished for contempt.
People v. Gifford, 2 A.D.2d 634, 635, 151 N.Y.S.2d 980, 981 (3d Dep't 1956).

B. *Questions of Fact Versus Questions of Law*: Generally, questions of law are for the judge while questions of fact are for the jury.

C. *Exceptions—Questions of Fact for Court*: The court passes on:

1. Preliminary questions of fact concerning the competency of witnesses and admissibility of evidence;
People v. Marks, 6 N.Y.2d 67, 75, 160 N.E.2d 26, 30, 188 N.Y.S.2d 465, 470 (1959); *Peppe v. Peppe*, 3 N.Y.2d 312, 315, 144 N.E.2d 72, 73-74, 165 N.Y.S.2d 99, 101-02 (1957).

2. Foreign Law;
N.Y. CIV. PRAC. L. & R. § 4511(c) (McKinney 1992).

3. Facts judicially noted;

4. Furthermore, in any civil case, if the facts are undisputed and only one inference can be drawn, the question is for the court, not the jury. Thus the court may direct a verdict in favor of one party when by "no rational process could the trier of facts base a finding in favor of" the adversary.
Blum v. Fresh Grown Preserve Corp., 292 N.Y. 241, 245, 54 N.E.2d 809, 811 (1944); N.Y. CIV. PRAC. L. & R. § 4401 (McKinney 1992).

a. In a criminal case, the court may direct an acquittal, but not a verdict of guilt.

D. *Corroboration of Witness's Testimony Required in Criminal Case*:

1. Of a confession. "A person may not be convicted of any offense solely upon evidence of a confession or admission made by him [or her] without additional proof that the

offense charged has been committed."
N.Y. CRIM. PROC. LAW § 60.50 (McKinney 1992);

a. This requires proof only of corpus delicti (*i.e.*, that said crime has been committed by someone). Defendant's participation in the crime may be proven by the confession.

2. Of an accomplice. "A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."
N.Y. CRIM. PROC. LAW § 60.22 (McKinney 1992).

3. Of testimony of the victim in certain sexual offenses. *For example*, consensual sodomy, N.Y. PENAL LAW § 130.16 (McKinney 1992); adultery and incest, N.Y. PENAL LAW § 255.30 (McKinney 1992); promoting prostitution, N.Y. PENAL LAW § 230.15 (McKinney 1992).

4. Of a minor or mentally impaired individual permitted to testify without being sworn.
N.Y. CRIM. PROC. LAW § 60.20 (McKinney 1992).

5. In actions to annul marriages, admissions of the parties must be corroborated.
N.Y. DOM. REL. LAW § 144 (McKinney 1992).

XI. OBJECTIONS AND EXCEPTIONS

A. *Generally*: The court will ordinarily admit offered evidence, unless there is a timely objection.

1. The objection must be made at the earliest possible moment.

B. *Forms of Objections*: Objections may be general (*e.g.*, "I object.") or specific (*e.g.*, "I object on the ground of hearsay.").

C. *Effect on Appeal Where Objection Sustained or Overruled*: The party who argues that the trial judge erred must have made clear to the judge precisely why he was in error. Thus:

1. If a general objection is sustained, the ruling on appeal will be upheld if there was any ground for the objection. *Tooley v. Bacon*, 70 N.Y. 34, 37 (1877).

2. If a general objection is overruled, unless specific grounds for said objection were given at trial, the objection is not available on appeal. This rule does not apply where evidence objected to was by its nature incompetent.

   People v. Vidal, 26 N.Y.2d 249, 254, 257 N.E.2d 886, 889, 309 N.Y.S.2d 336, 340 (1970).

3. Where a specific objection is sustained, the ruling on appeal will be upheld only if the ground stated was the correct one, unless the evidence excluded was not competent and could not be made so.

   Bloodgood v. Lynch, 293 N.Y. 308, 312, 56 N.E.2d 718, 719 (1944).

D. *Exceptions*: A party need not take exception to a ruling on an evidentiary objection in either civil or criminal cases.

1. In civil cases, formal exceptions are not necessary so long as "at the time a ruling or order of the court is requested or made a party shall make known the action which he requests the court to take or, if he has not already indicated it, his objection to the action of the court." Also, an objection to the charge to the jury or a failure or refusal to charge must be made prior to the retiring of the jury.

   N.Y. CIV. PRAC. L. & R. § 4017 (McKinney 1992).

2. In a criminal case, the rule is substantially similar, with the exception that a party need not specifically object to the judge's failure to give a requested charge.

   N.Y. CRIM. PROC. LAW § 470.05 (2).

XII. CONFESSIONS AND ADMISSIONS

A. *Generally*: A confession is an acknowledgment of guilt of a crime. An admission is an inculpatory statement which does not constitute an acknowledgement of guilt of the crime, but from which guilt may be inferred by the jury. Both are admissible as exceptions to the hearsay rule, and both create the same evidentiary problems. The term "confession" as hereinafter used will also refer to admissions.

1. If confession alludes to other crimes for which defendant

is not being tried, the confession must be redacted to eliminate references to the irrelevant crimes.

People v. Chaffee, 42 A.D.2d 172, 174, 346 N.Y.S.2d 30, 32 (3d Dep't 1973); *People v. Carey*, 120 Misc. 2d 862, 865, 466 N.Y.S.2d 887, 890 (Suffolk County Ct. 1983).

2. Where X and Y are tried together, and X alone has confessed, but such confession implicates Y, the confession is inadmissible hearsay as to Y. The confession must be redacted, if feasible, to eliminate all references to Y. *People v. Boone*, 22 N.Y.2d 476, 484, 239 N.E.2d 885, 889, 293 N.Y.S.2d 287, 293-94 (1968), *cert. denied*, *Brandon v. New York*, 393 U.S. 991 (1968). If the confession cannot be practically redacted, there must be a severance or the confession is inadmissible at the joint trial. *People v. Jackson*, 22 N.Y.2d 446, 450, 239 N.E.2d 869, 871, 293 N.Y.S.2d 265, 268 (1968). The confession cannot be admitted with the instruction that the jury is to limit it to X. *Bruton v. United States*, 391 U.S. 123, 124-25 (1968).

   a. Said rules are retroactive.
   Roberts v. Russell, 392 U.S. 293, 294 (1968).

   b. The theory underlying the Bruton rule is that X has implicated Y while Y does not have the opportunity to cross-examine X. There is no *Bruton* problem and X's confession is admissible (with the limiting instruction) when:

      (1) X testifies at trial.
      Nelson v. O'Neil, 402 U.S. 622, 626 (1971); *People v. Anthony*, 24 N.Y.2d 696, 249 N.E.2d 747, 301 N.Y.S.2d 961 (1969).

      (2) Note: formerly, a confession by X was admissible where X testified at a pretrial hearing though not at the principal criminal trial. However, such a policy was found to violate the confrontation clause.
      People v. Berzups, 49 N.Y.2d 417, 402 N.E.2d 1155, 426 N.Y.S.2d 253 (1980).

Also, formerly, a confession was admissible where Y had confessed in a manner substantially similar to X's confession. This policy, however, was later changed and held to be in violation of the confrontation clause. *Cruz v. New York*, 481 U.S. 186, 190-91 (1987). *See generally People v. Jones*, 139 A.D.2d 272, 276, 531 N.Y.S.2d 906, 909-10 (1st Dep't 1988); *People v. West*, 137 A.D.2d 855, 856, 525 N.Y.S.2d 319, 321 (2d Dep't 1988), *aff'd*, 72 N.Y.2d 941, 529 N.E.2d 418, 533 N.Y.S.2d 50 (1988).

B. *Constitutional Issues*: In addition to traditional common law evidentiary problems generally associated with confessions, constitutional issues have also become relevant. Constitutional limitations upon the admissibility of confessions have been imposed by:

1. XIV Amendment (due process);
2. VI Amendment (right to counsel);
3. V Amendment (self-incrimination).

C. *XIV Amendment*: The fundamental elements of a fair trial are extended to state prisoners by virtue of the due process clause, and the admission of involuntary confessions are in violation of this principle.

Brown v. Mississippi, 297 U.S. 278, 287 (1936). Noncompliance with this right requires reversal, regardless of the extent of additional admissible evidence of guilt. *Payne v. Arkansas*, 356 U.S. 560, 567-68 (1958).

1. Under the due process test, the question is whether the confession was voluntarily made. "If an individual's 'will was overborne' or if his confession was not 'the product of a rational intellect and free will,' his confession is inadmissible because coerced." *Townsend v. Sain*, 372 U.S. 293, 307 (1963), *overruled on other grounds*, *Keeney v. Tomayo-Reyes*, 112 S. Ct. 1715 (1992). The Supreme Court reserves the right to review the facts and make an independent determination of voluntariness.

Lisenba v. California, 314 U.S. 219, 237 (1941).

a. To facilitate its review, the Supreme Court will find

certain confessions per se involuntary without considering the character of the defendant. A confession is per se involuntary when made following:

(1) Physical abuse or threats of violence by officials or civilians.

(2) Continuous interrogation. *Cf. Davis v. North Carolina*, 384 U.S. 737, 745-46 (1966) (one hour a day for sixteen days is continuous).

(3) The administration of a drug or truth serum. *Townsend v. Sain*, 372 U.S. 293 (1963).

(4) Any promise or statement by a law enforcement officer which creates a substantial risk that defendant might falsely incriminate himself or herself.

N.Y. CRIM. PROC. LAW § 60.45 (McKinney 1992); *People v. Keene*, 148 A.D.2d 977, 978, 539 N.Y.S.2d 214, 214 (4th Dep't 1989); *People v. Hilliard*, 117 A.D.2d 969, 970, 499 N.Y.S.2d 283, 284 (4th Dep't 1986).

b. In all other cases, the Court must consider the "totality of the circumstances" to determine whether defendant's will was overborne. This requires consideration of numerous factors including:

(1) Prolonged interrogations;
People v. Holland, 48 N.Y.2d 861, 862, 400 N.E.2d 293, 294, 424 N.Y.S.2d 351, 352 (1979).

(2) Psychological coercion;
People v. Silverman, 100 Misc. 2d 697, 700, 420 N.Y.S.2d 89, 91 (Crim. Ct. Suffolk County 1979); *see also People v. Leyra*, 302 N.Y. 353, 362, 98 N.E.2d 553, 558 (1951), *cert. denied*, 345 U.S. 918 (1953); *cf. Spano v. New York*, 360 U.S. 315, 321-24 (1959).

(3) Lack of food and sleep;
People v. Adenon, 42 N.Y.2d 35, 39-40, 364 N.E.2d 1318, 1321, 396 N.Y.S.2d 625, 628

(1977).

(4) Shuttling the defendant from jail to jail;
Fikes v. Alabama, 352 U.S. 191, 196-97 (1957).

(5) Delay in arraignment;
N.Y. CRIM. PROC. LAW § 120.90; *People v. Zehner*, 112 A.D.2d 465, 466, 490 N.Y.S.2d 879, 880 (3d Dep't 1985); *People v. Bernacet*, 108 A.D.2d 921, 922, 485 N.Y.S.2d 810, 811 (2d Dep't 1985).

(6) Failure to recognize defendant's counsel rights; and
People v. Boodie, 26 N.Y.2d 779, 781, 257 N.E.2d 657, 658, 309 N.Y.S.2d 212, 213 (1970).

(7) Mental stability, age, health and education of defendant;
People v. Brown, 63 A.D.2d 584, 585, 404 N.Y.S.2d 617, 618 (1st Dep't 1978) (mental health of defendant relevant).

D. *VI Amendment*: Even though the confession is otherwise voluntary, it is inadmissible if obtained in violation of defendant's right to counsel. This Sixth Amendment right attaches at any "critical" stage of the criminal proceedings. *Hamilton v. Alabama*, 368 U.S. 52, 53-55 (1961). The evolution of this right has seen it attach progressively earlier in the criminal proceeding. Thus, a defendant has a right to counsel at both "the defendant stage" and "the suspect stage" of the proceeding. The implications of the right, however, differ at both stages.

The *Defendant* Stage—Indicted or Arraigned.

1. After defendant is indicted he may no longer be interrogated in absence of counsel. *Massiah v. United States*, 377 U.S. 201, 205-07 (1964); *People v. Waterman*, 9 N.Y.2d 561, 565, 175 N.E.2d 445, 447, 216 N.Y.S.2d 70, 75 (1961). This rule does not depend upon defendant's request for counsel. *People v. DiBiasi*, 7 N.Y.2d 544, 550-51, 166 N.E.2d 825, 828, 200 N.Y.S.2d 21, 25 (1960) (defendant had a lawyer, but did not ask for him during interrogation).

a. In this situation, it has been held that defendant cannot waive his right to counsel and submit to interrogation until counsel arrives.
People v. Miles, 23 N.Y.2d 527, 542, 245 N.E.2d 688, 696, 297 N.Y.S.2d 913, 924 (1969), *cert. denied*, 395 U.S. 948 (1969).

b. But the rigid principle of non-waivability has been rejected. *Faretta v. California*, 422 U.S. 806, 812 (1975) (a criminal defendant may reject counsel and try his own case).

2. After the defendant is arraigned: he may no longer be interrogated without the presence of counsel. *People v. Meyer*, 11 N.Y.2d 162, 165, 182 N.E.2d 103, 104, 227 N.Y.S.2d 427, 428-29 (1962).

a. In this situation, defendant cannot waive his right to counsel and submit to interrogation until counsel arrives. *People v. Vella*, 21 N.Y.2d 249, 251, 234 N.E.2d 422, 422, 287 N.Y.S.2d 369, 370 (1967).

3. During arraignment: Where defendant is interrogated without counsel during arraignment, the confession is inadmissible.
People v. Rodriguez, 11 N.Y.2d 279, 284, 183 N.E.2d 651, 652, 229 N.Y.S.2d 353, 355 (1962).

4. An arraignment or indictment for one crime does not bar interrogation, in the absence of counsel, about another crime based on different acts. *People v. Taylor*, 27 N.Y.2d 327, 329-32, 266 N.E.2d 630, 631-33, 318 N.Y.S.2d 1, 3-5 (1971) (where defendant is arraigned for robbery and officer notices similar pattern for other robberies, officer may interrogate defendant about other robberies without counsel present).

a. The officer must act in good faith. If defendant is arrested and arraigned on a sham charge just to facilitate interrogation on another charge, the interrogation violates the right to counsel.
Cf. People v. Stanley, 15 N.Y.2d 30, 32-33, 203 N.E.2d 475, 477, 255 N.Y.S.2d 74, 76 (1964), *cert. dismissed*, 382 U.S. 802 (1965).

The *Suspect* Stage—Not Yet Indicted or Arraigned—Request Necessary.

5. The right to counsel attaches when either the defendant requests counsel or counsel requests to see defendant. If this demand is ignored, any statements taken thereafter are inadmissible.

   People v. Donovan, 13 N.Y.2d 148, 151, 193 N.E.2d 628, 629, 243 N.Y.S.2d 841, 843 (1963) (*Donovan* rule).

   a. The *Donovan* rule applies to any person taken into police custody, regardless of whether the police consider him an accused, a suspect, or merely a witness.

      People v. Sanchez, 15 N.Y.2d 387, 207 N.E.2d 356, 259 N.Y.S.2d 409 (1965).

   b. The *Donovan* rule applies to a case where a retained attorney, not physically present at the place where the client is in custody, informs the police that he represents the defendant and does not wish him to be questioned per the *Donovan* rules.

      People v. Gunner, 15 N.Y.2d 226, 231-32, 205 N.E.2d 852, 855, 257 N.Y.S.2d 924, 928 (1965).

   c. Right to counsel attaches upon attorney's demand to see defendant, regardless of whether defendant has requested counsel or is aware of the attorney's demand. Police may not question defendant absent affirmative waiver in counsel's presence.

      People v. Arthur, 22 N.Y.2d 325, 328-29, 239 N.E.2d 537, 539, 292 N.Y.S.2d 663, 665 (1968); *People v. Howland*, 62 A.D.2d 1094, 1095, 405 N.Y.S.2d 131, 133 (3d Dep't 1978) (holding defendant's refusal of counsel invalid when refusal was made in the absence of counsel and counsel had contacted police); *People v. Settles*, 40 N.Y.2d 154, 165-66, 385 N.E.2d 612, 617, 412 N.Y.S.2d 814, 880 (1978).

   d. Traditionally the right to counsel has applied only to custodial interrogations. However, it is now the

law that one who has retained counsel specifically on the matter under investigation may be questioned in neither custodial nor noncustodial circumstances.

People v. Skinner, 52 N.Y.2d 24, 31, 417 N.E.2d 501, 505, 436 N.Y.S.2d 207, 211 (1980).

6. Once suspect has requested counsel, he may not then waive the right unless in the presence of counsel.

   People v. Cunningham, 49 N.Y.2d 203, 400 N.E.2d 360, 424 N.Y.S.2d 421 (1981); *People v. Hobson*, 39 N.Y.2d 479, 484, 348 N.E.2d 894, 897, 384 N.Y.S.2d 419, 422 (1976).

7. Statements made voluntarily and not the result of interrogations are still admissible.

   People v. Gonzales, 75 N.Y.2d 938, 940, 554 N.E.2d 1269, 1270, 555 N.Y.S.2d 681, 682 (1990).

8. Defendant's request to speak to family is generally not a request for counsel within the meaning of the *Donovan* rule. *People v. Taylor*, 16 N.Y.2d 1038, 1039-40, 213 N.E.2d 321, 265 N.Y.S.2d 913 (1965). Neither is a request by the family to speak to the defendant. *People v. Hocking*, 15 N.Y.2d 973, 974, 207 N.E.2d 529, 530, 259 N.Y.S.2d 859, 860 (1965). *But see People v. Townsend*, 33 N.Y.2d 37, 41, 300 N.E.2d 722, 724, 347 N.Y.S.2d 187, 190 (1973) (where the court excluded a statement because the police lied to the family about even having defendant in custody).

E. *V Amendment* (*Miranda* rule): The Fifth Amendment right against self-incrimination attaches when the defendant is questioned "by law enforcement officers after [he] has been taken into custody or otherwise deprived of his freedom in any significant way . . . ." In this situation no statements by the defendant are admissible unless the defendant has been warned that he has a right to remain silent; that anything he says may be used against him in evidence; that he has a right to the presence of counsel, and that counsel will be provided should he not be able to afford one. After the warnings are given, the defendant may waive such rights if done voluntarily, knowingly, and intelligently, but may withdraw the

waiver at any time. The prosecution carries the "heavy burden" of proving the defendant's waiver. These rules apply to all statements by the defendant, including confessions, admissions, and exculpatory statements. The rule forbids questioning by police prior to such warnings, but nothing bars the defendant from volunteering information where there has been no questioning.

Miranda v. Arizona, 384 U.S. 436, 444 (1966); *People v. McIntyre*, 138 A.D.2d 634, 636, 526 N.Y.S.2d 217, 219 (2d Dep't 1988).

1. While *Miranda* warnings should be given in substantially the same manner prescribed by the *Miranda* case, courts hold that as long as the officer conveys to the defendant his substantive rights as represented by *Miranda*, strict adherence to the *Miranda* format is not required.

   People v. Evans, 162 A.D.2d 702, 702, 557 N.Y.S.2d 120, 121 (2d Dep't 1990).

   a. Advising the defendant of his right to counsel should he not be able to afford one may be disregarded if it is apparent that defendant can afford counsel.

      People v. Post, 23 N.Y.2d 157, 160, 242 N.E.2d 830, 832, 295 N.Y.S.2d 665, 667 (1968).

2. The *Miranda* doctrine applies only to custodial interrogations by law enforcement officials. The rules are applicable when:

   a. Defendant has been arrested or physically detained.

      Orozco v. Texas, 394 U.S. 324, 326-27 (1968); *People v. Shivers*, 21 N.Y.2d 118, 121, 233 N.E.2d 836, 839, 286 N.Y.S.2d 827, 830 (1967) (policeman spots defendant near scene of crime, draws gun, and calls defendant over); *see Mathis v. United States*, 391 U.S. 1, 4-5 (there is custody when the defendant is in jail for another offense); *People v. Moore*, 79 A.D.2d 619, 620, 433 N.Y.S.2d 473, 475 (2d Dep't 1980); *People v. Harris*, 48 N.Y.2d 208, 213, 397 N.E.2d 733, 735, 422 N.Y.S.2d 43, 45 (1979). *But*

see People v. Mack, 131 A.D.2d 784, 784, 517 N.Y.S.2d 72, 73 (2d Dep't 1987).

b. The defendant is in psychological custody. If all the circumstances would lead a reasonable person to believe that his freedom of movement has been significantly restricted, there is custody. *People v. Phinney*, 22 N.Y.2d 288, 291, 239 N.E.2d 515, 516-17, 292 N.Y.S.2d 632, 634 (1968) (where a policeman finds a car on the highway and then goes to a hospital and asks defendant whether he drove the car, there is no custodial interrogation); *People v. Rodney P.*, 21 N.Y.2d 1, 11, 233 N.E.2d 255, 260, 286 N.Y.S.2d 225, 233 (1967) (no custody where defendant is interrogated for four minutes on the front steps of his house); *People v. Kulis*, 18 N.Y.2d 318, 322, 221 N.E.2d 541, 543, 274 N.Y.S.2d 873, 874 (1966) (routine interrogation at the scene of the crime is permitted); *see also People v. Yukl*, 25 N.Y.2d 585, 589, 256 N.E.2d 172, 174, 307 N.Y.S.2d 857, 860 (1969), *cert. denied*, 400 U.S. 851 (1970) (if the atmosphere is not custodial, no warnings need be given even though the interrogation occurs inside a police station); *People v. Paulin*, 25 N.Y.2d 445, 450, 255 N.E.2d 164, 167, 306 N.Y.S. 2d 929, 933 (1969) (the atmosphere may be custodial even in the defendant's home).

3. The question as to what constitutes a valid, effective waiver of *Miranda* rights has been given considerable attention. Generally, silence alone will not constitute waiver.

People v. Breland, 145 A.D.2d 639, 640, 536 N.Y.S.2d 479, 480 (2d Dep't 1988); *People v. Bretts*, 111 A.D.2d 864, 865, 490 N.Y.S.2d 266, 267 (2d Dep't 1985). *But see People v. Norris*, 75 A.D.2d 650, 651, 427 N.Y.S.2d 442, 444 (2d Dep't 1980).

a. A knowing and intelligent understanding of one's substantive rights, combined with facts and circumstances demonstrating defendant's intent to relinquish such rights, generally constitute an

effective waiver.
People v. Moore, 114 A.D.2d 595, 494 N.Y.S.2d 440 (3d Dep't 1985).

b. Defendant's condition, intelligence, and capacities are relevant factors.
People v. Zeluaga, 148 A.D.2d 480, 481, 538 N.Y.S.2d 628, 629 (2d Dep't 1989).

c. Traditionally, reserving one's rights did not bar officials from later repeating warnings to determine whether defendant had changed his or her attitude and was willing to talk. Recently, however, it has been held that once silence or right to counsel rights have been reserved, presence of counsel is required before defendant can effectively waive his rights.
People v. Cunningham, 49 N.Y.2d 203, 205, 400 N.E.2d 360, 361, 424 N.Y.S.2d 421, 422 (1980).

d. Under *Miranda* the focus has shifted from whether the confession was made voluntarily to whether the waiver was voluntary. Thus, Sixth Amendment inquiries are still applicable in determining the voluntariness of the confession. The following should be noted:

(1) Generally, no excuse will be accepted for failure to give *Miranda* warnings. *But see People v. Latshaw*, 123 A.D.2d 479, 480, 506 N.Y.S.2d 489, 490 (3d Dep't 1986) (defendant, not officer, recited *Miranda* rights).

(2) With respect to minors, the totality of circumstances, including intelligence, age, and understanding of defendant, a minor, may effectuate valid *Miranda* warnings absent parental presence.
People v. Bevilacqua, 45 N.Y.2d 508, 513, 382 N.E.2d 1326, 1328, 410 N.Y.S.2d 549, 552 (1978); *People v. Green*, 147 A.D.2d 955, 957, 537 N.Y.S.2d 702, 703 (4th Dep't 1989).

(3) No trickery, deceit, or promise of leniency may

be used to solicit a waiver.

4. *Miranda* does not alter the *Massiah*, *Waterman*, and *DiBiasi* rules (*See* D.1., *supra*). Those rules are independent constitutional limitations upon police interrogation, bottomed on the sixth amendment, and must also be complied with.

   a. Accordingly, the *Donovan* rule (D.5., *supra*) is viable after *Miranda*. *People v. Sturnialo*, 42 A.D.2d 721, 721, 345 N.Y.S.2d 628, 630 (2d Dep't 1973).

5. *Miranda* rules do not apply in civil cases. *Terpstra v. Niagra Fire*, 26 N.Y.2d 70, 73, 256 N.E.2d 536, 537, 308 N.Y.S.2d 378, 380 (1970).

6. While a statement obtained in violation of the *Miranda* rules is inadmissible in the prosecution's case-in-chief, the statement may, nonetheless, be used to impeach the defendant as to matters discussed by him on direct examination.

   People v. Washington, 51 N.Y.2d 214, 219, 413 N.E.2d 1159, 1161, 433 N.Y.S.2d 745, 747 (1980); *see also Harris v. New York*, 401 U.S. 222, 224 (1971).

7. The admission into evidence of a confession in violation of the *Miranda* rules may be deemed harmless if there is overwhelming proof of defendant's guilt or no reasonable connection between the confession and conviction.

   People v. Parler, 30 A.D.2d 681, 291 N.Y.S.2d 890, 891 (2d Dep't 1968); People v. Williford, 63 Misc. 2d 408, 409, 311 N.Y.S.2d 461, 461 (Sup. Ct. App. T. 2d Dep't 1970).

F. *Poison Fruit Doctrine*: Where a confession is obtained in violation of the defendant's constitutional rights (due process, right to counsel, or right against self-incrimination), leads obtained by exploiting that information are also inadmissible. *People v. Robinson*, 13 N.Y.2d 296, 301, 196 N.E.2d 261, 262, 246 N.Y.S.2d 623, 625 (1963) (where the defendant in an inadmissible confession stated that the gun was in the culvert, the gun could not be admitted); *Brown v. Illinois*, 422 U.S. 590, 603-04 (1975) (confession made after an unconstitu-

tional arrest was inadmissible, even though *Miranda* warnings were given).

1. And the taint is difficult to dissipate. Where the defendant made a second confession after a first confession was obtained without the *Miranda* warnings, the second was excluded on the ground, among others, that it was infected by the first one. *United States ex rel. Stephen J.B. v. Shelly*, 430 F.2d 215, 218-19 (2d Cir. 1970) (defendant was sixteen years old). Whether the taint has been dissipated depends on whether the "accused believes himself so committed by a prior statement that he feels bound to make another . . . ." This is a question of fact; but there is no rule that requires the defendant to be told that his prior statement is inadmissible. *People v. Tanner*, 30 N.Y.2d 102, 106, 282 N.E.2d 98, 99-100, 331 N.Y.S.2d 1, 4 (1972).

G. *Confessions & Admissions Procedure*: In *Jackson v. Denno*, 378 U.S. 368, 376-77 (1964), the Supreme Court held that a confession claimed by a defendant to be involuntary is not admissible at trial unless there has been a prior determination that the confession was given voluntarily. New York then ruled that in all future trials there must be a separate ruling by a judge finding the confession voluntary beyond reasonable doubt. *People v. Huntley*, 15 N.Y.2d 72, 78-80, 204 N.E.2d 179, 183, 255 N.Y.S.2d 838, 843-44 (1965). Thereafter, N.Y. Criminal Procedure Law §§ 710.10-710.70 was enacted to establish a uniform practice for the resolution of all questions concerning the admissibility of a confession or an admission. The procedure is as follows:

1. If the prosecution intends to offer a confession or admission which was given to the police, it must so notify the defendant before trial or, if good cause is shown, at trial. If no such notice is given, the statement is inadmissible at trial.

   People v. Ross, 21 N.Y.2d 258, 263, 234 N.E.2d 427, 429-30, 287 N.Y.S.2d 376, 379-80 (1967).

   a. No advance notice is required where the statement was made to a private person having no connection with the police. N.Y. CRIM. PROC. LAW § 710.30

(McKinney 1992); *People v. Miranda*, 23 N.Y.2d 439, 448, 245 N.E.2d 194, 198, 297 N.Y.S.2d 532, 538 (1969).

b. Nor is notice required where the statement is used only to impeach defendant
People v. Harris, 25 N.Y.2d 175, 177, 250 N.E.2d 349, 351, 303 N.Y.S.2d 71, 72 (1969).

c. Notice is required even in nonjury cases. *People v. Artis*, 27 N.Y.2d 847, 847-48, 265 N.E.2d 463, 463-64, 316 N.Y.S.2d 640, 640-41 (1970).

2. The defendant then has the choice of making an immediate motion to suppress the statement or he may wait until trial to object to the statement. N.Y. CRIM PROC. LAW § 710.70 (McKinney 1992).

3. If the defendant demands an immediate hearing (called a *Huntley* hearing), the following rules govern:

   a. The prosecution carries the burden of proof beyond reasonable doubt.

   b. Defendant may testify at the hearing and confine his testimony to the facts and circumstances when the defendant gave the statement.

   c. If the defendant testifies at the *Huntley* hearing, he may be impeached like any other witness.

   d. It is probably the rule that nothing which the defendant testifies to at the hearing may be used against him at the subsequent trial unless he elects to testify at the trial.

4. If the defendant succeeds in suppressing the statement, it may not be used against him at trial.

5. If the defendant fails to suppress the statement, it may be admitted at trial, but the trial judge must permit the defendant to offer evidence of inadmissibility; and the jury must be charged that it is the final arbiter of admissibility. N.Y. CRIM. PROC. LAW § 710.70 (McKinney 1992). The jury may not be told that a judge has already passed on the admissibility of the statement. *People v. Cornell*, 28 A.D.2d 1166, 1168, 284 N.Y.S.2d 599, 600

(3d Dep't 1967).

a. But if, at trial, the defendant does not offer any evidence attacking the admissibility of the statement, the issue of admissibility need not be sent to the jury.
People v. Cefaro, 23 N.Y.2d 283, 285-86, 244 N.E.2d 42, 44-45, 296 N.Y.S.2d 345, 347-49 (1968).

XIII. LINEUPS

A. *The Wade-Gilbert Rule*: Although a defendant has no Fifth Amendment protection against appearing in a lineup, such a confrontation between victim and suspect may be a critical stage at which the right to counsel attaches. If a defendant has been indicted or arraigned, the lineup is a critical stage and he has right to counsel. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *People v. Chipp*, 75 N.Y.2d 327, 335, 552 N.E.2d 608, 612, 553 N.Y.S.2d 72, 76 (1990), *cert. denied*, *Chipp v. New York*, 498 U.S. 833 (1990) (right to counsel did not attach because lineup occurred before filing of accusatory instrument); *People v. Wicks*, 76 N.Y.2d 128, 131, 556 N.E.2d 409, 410, 566 N.Y.S.2d 970, 971 (1990). In such a case, if a pretrial lineup is conducted in the absence of the accused's counsel, evidence of the lineup identification is inadmissible at trial. Subsequent identification of the accused at trial is also inadmissible unless the prosecution establishes by clear and convincing evidence that the in-court identification is not the fruit of the improper lineup identification. *People v. Ballot*, 20 N.Y.2d 600, 606, 233 N.E.2d 103, 107, 286 N.Y.S.2d 1, 6 (1967).

Wade v. United States, 388 U.S. 218, 224 (1967); *Gilbert v. California*, 388 U.S. 263, 266 (1967).

1. The *Wade-Gilbert* rule is not retroactive. It applies only to lineups occurring after June 12, 1967. A defendant who is not entitled to the new rule is, however, entitled to relief if the confrontation conducted in his case was "so unnecessarily suggestive and conducive to irreparable mistaken identification" that due process of law was denied. *Stovall v. Denno*, 388 U.S. 293, 302 (1967); *People v. Owens*, 74 N.Y.2d 677, 678, 541 N.E.2d 400, 401,

543 N.Y.S.2d 371, 372 (1989) (defendant was the only person wearing the distinctive clothing, a tan vest and blue snorkel jacket, which fit the description of the clothing worn by the perpetrator of the crime).

2. 18 U.S.C. § 3502 purports to eliminate the *Wade-Gilbert* Rule in federal practice.

3. There is no right to counsel when the police are taking handwriting exemplars, analyzing specimens, or taking fingerprints because these are not critical stages.

Gilbert v. California, 388 U.S. 263, 267 (1967); *People v. Craft*, 28 N.Y.2d 274, 278, 270 N.E.2d 297, 299, 321 N.Y.S.2d 566, 568 (1971).

B. If the prosecution intends to have a witness, who has already identified defendant at a lineup, repeat the identification at trial, the prosecution must apprise defendant of this within 15 days after arraignment and before trial. Otherwise, no such testimony will be permitted, unless the court, for cause, permits notice thereafter.

N.Y. CRIM. PROC. LAW § 710.30 (McKinney 1984); *People v. McMullin*, 70 N.Y.2d 855, 856, 517 N.E.2d 1341, 1342, 523 N.Y.S.2d 455, 456 (1987) (lack of prejudice to defendant resulting from delay in serving notice did not obviate need for People to meet statutory requirements of good cause before they could be permitted to serve late notice). There is a "confirmatory identification" exception to the notice requirement of N.Y. Criminal Procedure Law § 710.30 (McKinney 1984). In cases in which the defendant's identity is not in issue, or those in which the protagonists are known to one another, "suggestiveness" is not a concern and hence N.Y. Criminal Procedure Law § 710.30 does not come into play. *People v. Rodriquez*, 79 N.Y.2d 445, 449, 593 N.E.2d 268, 271, 583 N.Y.S.2d 814, 817 (1992); *People v. Gissendanner*, 48 N.Y.2d 543, 552, 399 N.E.2d 924, 930, 423 N.Y.S.2d 893, 898 (1979); *see also People v. Overton*, 192 A.D.2d 624, 624, 596 N.Y.S.2d 155, 156 (2d Dep't 1993).

1. Defendant must then move to suppress the identification or waive his constitutional objection. N.Y. CRIM.

PROC. LAW § 710.40 (McKinney 1984); *People v. Rivera*, 73 A.D.2d 528, 529, 422 N.Y.S.2d 687, 689 (1st Dep't 1979) *aff'd*, 53 N.Y.2d 1005, 425 N.E.2d 863, 442 N.Y.S.2d 475 (1981).

2. At the hearing the prosecution carries the burden of proving by clear and convincing evidence that the identification is not tainted by a prior unconstitutional lineup.

Cf. People v. Rahming, 26 N.Y.2d 411, 417, 259 N.E.2d 727, 731, 311 N.Y.S.2d 292, 297 (1970); *People v. Archer*, 155 Misc. 2d 601, 604, 589 N.Y.S.2d 987, 990 (Bronx County Ct. 1992).

XIV. ILLEGALLY OBTAINED EVIDENCE SEARCH AND SEIZURE—EAVESDROPPING

A. *Constitutional Safeguards*: the Fourth Amendment of the United States Constitution guarantees the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures.

B. *Unconstitutional Search and Seizure*: Evidence obtained by or through an unreasonable search and seizure by a state or federal officer is inadmissible.

Mapp v. Ohio, 367 U.S. 643, 654 (1961).

1. The *Mapp* rule is not retroactive.

Linkletter v. Walker, 381 U.S. 618, 637 (1965).

C. *Poison Fruit Doctrine*: Any testimony or other evidence obtained by exploiting evidence which was unconstitutionally seized is equally inadmissible.

People v. Rodriquez, 11 N.Y.2d 279, 357, 183 N.E.2d 651, 653, 229 N.Y.S.2d 353, 356 (1962); *People v. Oneill*, 11 N.Y.2d 148, 153, 182 N.E.2d 95, 98, 227 N.Y.S.2d 416, 420 (1962) (subsequent arrest based upon illegal seizure cannot be the basis of a search incident to a lawful arrest; arrest must be validated without any resort to fruits of search); *see also People v. Castillo*, 80 N.Y.2d 578, 582, 607 N.E.2d 1050, 1051, 592 N.Y.S.2d 945, 946 (1992), *cert. denied*, 123 L. Ed. 2d 477 (1993); *People v. Lifrieri*, 157 Misc. 2d 598, 602, 597 N.Y.S.2d 580, 583

(Sup. Ct. Kings County 1993) (only where constitutionally protected right is implicated that violation of statute warrants suppression of fruits of that violation).

1. The fruit of the poisonous tree will be inadmissible as long as its connection to the illegal search and seizure is not too remote or attenuated. *People v. Dentine*, 21 N.Y.2d 971, 971, 237 N.E.2d 361, 361, 290 N.Y.S.2d 199, 200 (1968). However, not all evidence illegally obtained will be inadmissible. The exclusionary rule's basic goal is to deter unlawful police activity. *People v. Chennault*, 20 N.Y.2d 518, 521, 232 N.E.2d 324, 325, 285 N.Y.S.2d 289, 291 (1967) (fruits of poisonous tree rule designed to punish law enforcement officers rather than having any bearing on guilt or innocence). Therefore, where suppression will have little or no deterrent benefit, the evidence will not be excluded. *People v. Drain*, 73 N.Y.2d 107, 109, 535 N.E.2d 630, 632, 538 N.Y.S.2d 500, 502 (1989) (defendant's perjury before grand jury concerning illegally obtained evidence did not warrant suppression).

2. The burden of proving that the evidence was not obtained from the tainted source rests upon the prosecution.

   People v. Rodriguez, 11 N.Y.2d 279, 286-87, 183 N.E.2d 651, 653-54, 229 N.Y.S.2d 353, 356-57 (1962).

3. The taint is dissipated if the prosecution shows that it discovered the evidence through independent inquiry or that it would inevitably have discovered the evidence even without the poisonous source. *Nix v. Williams*, 467 U.S. 431, 442 (1984); *Murray v. United States*, 487 U.S. 533, 537 (1988) (federal agents became aware of the presence of marijuana in a warehouse because of an unlawful entry. Subsequently, the agents obtained a search warrant without mentioning prior entry. The Court held that the evidence obtained through the use of the warrant was admissible, notwithstanding the fact that initially the evidence was obtained through unlawful means); *People v. Alexander*, 189 A.D.2d 189, 195,

595 N.Y.S.2d 279, 284 (4th Dep't 1993); *People v. White*, 190 A.D.2d 768, 769, 593 N.Y.S.2d 298, 299 (2d Dep't 1993). However, had the knowledge unlawfully obtained been used as a basis for obtaining the warrant, the evidence obtained might be suppressed. *See People v. Burr*, 70 N.Y.2d 354, 360, 514 N.E.2d 1363, 1366, 520 N.Y.S.2d 739, 742 (1987), *cert. denied*, 485 U.S. 989 (1988).

a. The independent source rule applies only to secondary evidence indirectly discovered. Primary evidence initially seized must be suppressed even if it would have been inevitably discovered. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963); *People v. Stith*, 69 N.Y.2d 313, 318, 506 N.E.2d 911, 914, 514 N.Y.S.2d 201, 204 (1987).

4. Where a witness, whose identity is discovered through an illegal wiretap, voluntarily agrees to testify, the evidence is admissible. *People v. McGrath*, 46 N.Y.2d 12, 27, 385 N.E.2d 541, 548, 412 N.Y.S.2d 801, 808 (1978); *People v. Mendez*, 28 N.Y.2d 94, 100-01, 268 N.E.2d 778, 781-82, 320 N.Y.S.2d 39, 44-45, *cert. denied*, 404 U.S. 911 (1971).

D. *Private Searches*: Because the Fourth Amendment bars only official search and seizure, evidence obtained by a private person through an illegal search is admissible in both civil (*Sackler v. Sackler*, 15 N.Y.2d 40, 41, 203 N.E.2d 481, 483, 255 N.Y.S.2d 83, 85 (1964)) and criminal cases (*People v. Carlisle*, 187 A.D.2d 319, 319, 589 N.Y.S.2d 879, 879 (1st Dep't 1992); *People v. Crank*, 155 Misc. 2d 762, 766, 590 N.Y.S.2d 149, 151 (Sup. Ct. Monroe County 1992)). However, where the police actively participate in assisting the private person, this creates the type of custodial atmosphere that calls for the observance of a suspect's constitutional rights, and such evidence would thus be inadmissible. *People v. Jones*, 47 N.Y.2d 528, 533, 393 N.E.2d 443, 445, 419 N.Y.S.2d 447, 450 (1979).

1. In civil cases (which are not quasi-criminal, or in which penalties or forfeitures are not sought) evidence illegally obtained by a public official is admissible when the victim of the search makes an affirmative claim for relief

against the government body. *Herndon v. City of Ithaca*, 43 A.D.2d 634, 635, 349 N.Y.S.2d 227, 231 (3d Dep't 1973). *But see Terpstra v. Niagara Fire Ins. Co.*, 26 N.Y.2d 70, 74, 256 N.E.2d 536, 538, 308 N.Y.S.2d 378, 381 (1970); *contra United States v. Janis*, 428 U.S. 433, 446 (1976) ("silver platter" doctrine applies in civil litigation but not in criminal cases).

E. *Protected Areas*: The Fourth Amendment protects "persons, houses, papers, and effects." While it has been held that the amendment "protects people, not places" (*Katz v. United States*, 389 U.S. 347, 351 (1967)), it is traditional to refer to the areas which are protected by the Fourth Amendment.

1. These include homes and their appurtenances (*e.g.*, a garage), hotel rooms, hospital rooms, stores, and automobiles. The protection of privacy extends to commercial buildings as well as private residences. However, open-ended or general warrants are constitutionally prohibited. *Ybarra v. Illinois*, 444 U.S. 85, 92 (1979) (a warrant to search a place cannot normally be construed to authorize a search of each individual in that place). Accordingly, a warrant to search an automobile does not authorize breaking into a garage to get it. *People v. Sciacca*, 45 N.Y.2d 122, 127, 379 N.E.2d 1153, 1155, 408 N.Y.S.2d 22, 25 (1978); *see also People v. Knapp*, 52 N.Y.2d 689, 696, 422 N.E.2d 531, 535, 439 N.Y.S.2d 871, 875 (1981) (where undercover officer was brought into a house by an informer, the purchase of contraband therein did not justify the warrantless entry by other officers to search other parts of the premises); *People v. Caruso*, 174 A.D.2d 1051, 1051, 572 N.Y.S.2d 216, 217 (4th Dep't 1991) (search of shed at defendant's residence exceeded the authorized scope of search warrant which authorized search of residence).

a. Where there is no expectation of privacy which society considers reasonable, governmental intrusion does not constitute a search within the meaning of the Fourth Amendment, and thus there is no constitutional violation.

United States v. Jacobsen, 466 U.S. 109, 113 (1984);

People v. Rodriguez, 69 N.Y.2d 159, 162, 505 N.E.2d 586, 588, 513 N.Y.S.2d 75, 77 (1987); *see also People v. Reed*, 148 Misc. 2d 539, 541, 561 N.Y.S.2d 622, 624 (Sup. Ct. Kings County 1990).

F. *Standing*: Only a victim of the illegal search and seizure has standing to move to suppress or to object on that ground. *Alderman v. United States*, 394 U.S. 165, 171 (1969); *People v. Henley*, 53 N.Y.2d 403, 408, 425 N.E.2d 816, 818, 442 N.Y.S.2d 428, 430 (1981) (movant must show a personal constitutional infringement); *People v. Rodriguez*, 69 N.Y.2d 159, 161-62, 505 N.E.2d 586, 587-88, 513 N.Y.S.2d 75, 77-78 (1987). To have standing, the defendant must own, occupy, or control either the place searched or the objects seized. *See People v. Varacalli*, 154 Misc. 2d 805, 808, 596 N.Y.S.2d 346, 348 (Sup. Ct. Kings County 1993).

1. The place searched. It is "sufficient that (the defendant) be legitimately on the premises when the search occurs."

   Simmons v. United States, 390 U.S. 377, 390 (1968); *People v. Reid*, 148 Misc. 2d 539, 542, 561 N.Y.S.2d 622, 624 (Sup. Ct. Kings County 1990); *People v. Bandera*, 166 A.D.2d 657, 658, 561 N.Y.S.2d 81, 81 (2d Dep't 1990).

2. The objects which are seized. If A's goods are seized from B's home, both A and B have standing. If A's goods are seized from A's home, only A has standing.

   People v. Estrada, 23 N.Y.2d 719, 720, 244 N.E.2d 57, 57, 296 N.Y.S.2d 364, 365 (1968), *cert. denied*, 394 U.S. 953 (1969).

3. Doctrine of "automatic standing," which allowed a defendant charged with a possessory offense to have standing without demonstrating an interest in the premises searched or the property seized, has been abrogated. *United States v. Salvucci*, 448 U.S. 83, 89 (1980) (overruling *Jones v. United States*, 362 U.S. 257 (1960)); *People v. Ponder*, 54 N.Y.2d 160, 165, 429 N.E.2d 735, 737, 445 N.Y.S.2d 57, 59 (1981) (abrogating *People v. Hansen*, 38 N.Y.2d 17, 339 N.E.2d 873, 377 N.Y.S.2d 461 (1975)).

4. Defendant has the burden of demonstrating sufficient privacy interest. The relevant factors include: (1) number of times person stays in place, (2) length and nature of stay, (3) indicia of connectedness to place and of privacy, such as changes of clothes or sharing household expenses and burdens. *People v. Rodriguez*, 69 N.Y.2d 159, 162, 505 N.E.2d 586, 588, 513 N.Y.S.2d 75, 78 (1987); *People v. Whitfield*, 81 N.Y.2d 904, 906, 613 N.E.2d 547, 548, 597 N.Y.S.2d 641, 642 (1993) (mere surrender of property to a third party will not always terminate legitimate expectation of privacy, for purposes of standing to contest search or seizure).

G. *Suppression Procedure*: N.Y. Criminal Procedure Law § 710 (McKinney 1984) states that a defendant's pretrial motion to suppress any evidence, which he is aware has been unconstitutionally seized, must be made after the commencement of the criminal action and within the time for pretrial motions generally. *People v. McCall*, 19 A.D.2d 630, 631, 241 N.Y.S.2d 439, 441 (2d Dep't 1963); *see also People v. Woodward*, 156 A.D.2d 225, 228-229, 548 N.Y.S.2d 489, 491 (1st Dep't 1989); *see also People v. Allen*, 146 Misc. 2d 701, 702, 550 N.Y.S.2d 997, 999 (Sup. Ct. Seneca County 1990).

1. The defendant bears the burden of proving by a fair preponderance of the evidence that the Fourth Amendment has been violated. *People v. Berrios*, 28 N.Y.2d 361, 367, 270 N.E.2d 709, 712, 321 N.Y.S.2d 884, 888 (1971); *People v. Merola*, 30 A.D.2d 963, 964, 294 N.Y.S.2d 301, 305 (2d Dep't 1968); The prosecution bears the initial burden of going forward with the evidence. *Nardone v. United States*, 308 U.S. 338, 342 (1939); *People v. Whitehurst*, 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674 (1969); *People v. Malinsky*, 15 N.Y.2d 86, 91, 209 N.E.2d 694, 698, 262 N.Y.S.2d 65, 71, n.2 (1965); *People v. Sanchez*, 151 Misc. 2d 431, 433, 579 N.Y.S.2d 825, 827 (Sup. Ct. Kings County 1991).

a. However, if the prosecution contends that the search was legal due to defendant's consent, then the burden of going forward with the evidence and the burden of proof rests on the prosecution.

People v. Whitehurst, 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674 (1969).

2. Nothing which the defendant says at the suppression hearing may be used at trial. *Simmons v. United States*, 390 U.S. 377, 389 (1968). However, such testimony is admissible for impeachment purposes if the defendant testifies at trial. *Harris v. New York*, 401 U.S. 222, 226 (1971); *People v. Faulkner*, 195 A.D.2d 384, 385, 600 N.Y.S.2d 231, 232 (1st Dep't 1993).

H. *Unreasonable Searches*: The Constitution permits a reasonable search. Whether a search and seizure by a state officer is reasonable is to be judged by the same standards as are applied to a federal officer. *Ker v. California*, 374 U.S. 23, 34 (1963). A search and seizure is reasonable if conducted:

1. Pursuant to a properly issued search warrant;
2. As an incident of a lawful arrest;
3. As a limited frisk for a weapon;
4. With consent;
5. As an incident of hot pursuit.

I. *Search Warrants*: A search warrant may not be issued except "upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and . . . things to be seized." U.S. CONST. amend XIV. The statutory requirements must be complied with for the search warrant to be valid. *People v. Taylor*, 73 N.Y.2d 683, 688, 541 N.E.2d 386, 388, 543 N.Y.S.2d 357, 359 (1989).

1. An application for a search warrant must contain "a statement that there is reasonable cause to believe that property [which may be seized] may be found in or upon a designated or described place, vehicle or person . . . ." N.Y. CRIM. PROC. LAW § 690.35(3)(b) (McKinney 1984).

   a. "Personal property is subject to seizure pursuant to a search warrant if there is reasonable cause to believe that it (1) is stolen, or (2) is unlawfully possessed, or (3) has been used, or is possessed for the purpose of being used, to commit or conceal the commission of an offense, or (4) constitutes evi-

dence or tends to demonstrate that an offense was committed or that a particular person participated in the commission of an offense." N.Y. CRIM. PROC. LAW § 690.10 (McKinney 1984).

b. Probable cause may be supplied by an informer. *People v. Hayes*, 191 A.D.2d 644, 644, 595 N.Y.S.2d 239, 239 (2d Dep't 1993). But, unless informer himself executes the affidavit, the police may not act thereon without corroboration. Corroboration may be supplied either by proof that the informer has proven reliable in the past or by independent verification of the information supplied by him. *People v. Roberson*, 186 A.D.2d 1014, 1015, 588 N.Y.S.2d 469, 470 (4th Dep't 1992).

(1) Where an informer is involved, the search warrant may not be issued unless the magistrate is apprised of some facts from which the informant concluded that the things to be seized are located in the premises and some of the facts upon which the police based their conclusion that the informant was reliable. *People v. Hanlon*, 36 N.Y.2d 549, 556, 330 N.E.2d 631, 635, 369 N.Y.S.2d 677, 682 (1975); *see also People v. Bigelow*, 66 N.Y.2d 417, 423, 488 N.E.2d 451, 455, 497 N.Y.S.2d 630, 634 (1985).

c. The Fourth Amendment requires the suppression of evidence seized pursuant to the warrant if a preponderance of the evidence shows perjury or reckless disregard of the truth on behalf of the officer, and a determination that, without the false statement, the affidavit fails to establish probable cause. *Franks v. Delaware*, 438 U.S. 154, 155 (1978); *see also People v. Tambe*, 71 N.Y.2d 492, 504, 522 N.E.2d 448, 454, 527 N.Y.S.2d 372, 378 (1988).

d. The Supreme Court now uses a "totality of the circumstances" analysis. The magistrate must make a practical decision whether, given all the facts and circumstances found in the affidavit, including the "veracity" and "basis of knowledge" of persons sup-

plying the hearsay information, there is a fair probability that evidence of the crime will be found in a particular place.
Illinois v. Gates, 462 U.S. 213, 238 (1983).

e. If a reliable informer is lying, there may be probable cause if the evidence shows that the police relied in good faith on credible information.
McCray v. Illinois, 386 U.S. 300, 304 (1967). But where the officer who seeks the warrant is lying, there is no probable cause. *People v. Alfinito*, 16 N.Y.2d 181, 186, 211 N.E.2d 644, 646, 264 N.Y.S.2d 243, 246 (1965).

2. The place to be searched and the things to be seized must be described with particularity. *People v. Rothenberg*, 20 N.Y.2d 35, 38, 228 N.E.2d 379, 380, 281 N.Y.S.2d 316, 318 (1967); *People v. Guerrero*, 181 A.D.2d 1030, 1031, 582 N.Y.S.2d 576, 577 (4th Dep't 1992). Here, the officer has no discretion. *Marron v. United States*, 275 U.S. 192, 196 (1927), *overruled by Harris v. United States*, 331 U.S. 145 (1947), *overruled by Chimel v. California*, 395 U.S. 752 (1969).

a. The right to search for and seize an item does not allow an inference that there is probable cause to search for or seize another. *People v. Baker*, 23 N.Y.2d 307, 320, 244 N.E.2d 232, 237, 296 N.Y.S.2d 745, 752 (1968); *see also People v. Sciacca*, 45 N.Y.2d 122, 127, 379 N.E.2d 1153, 1155, 408 N.Y.S.2d 22, 25 (1978).

b. If the place to be searched is a multiple dwelling, the warrant is void if it describes the entire building. *People v. Rainey*, 14 N.Y.2d 35, 37, 197 N.E.2d 527, 529, 248 N.Y.S.2d 33, 35 (1964); *People v. Henley*, 135 A.D.2d 1136, 523 N.Y.S.2d 258 (4th Dep't 1987); *People v. Lawrence*, 31 A.D.2d 712, 714, 296 N.Y.S.2d 849, 853 (3d Dep't 1968).

c. The things to be seized may be contraband, fruits of a crime, instrumentalities of a crime, or the evidence of a crime.

N.Y. CRIM PROC. LAW § 690.10 (McKinney 1993); *Warden v. Hayden*, 387 U.S. 294, 300 (1967).

3. Where the search warrant lists one thing (*e.g.*, a gun) and the officer executing the warrant discovers another thing (*e.g.*, narcotics), the second object may be seized if it is contraband (*cf. Alderman v. United States*, 394 U.S. 165 (1968)) or if the defendant is immediately arrested for the crime of possessing it (*People v. Schwartz*, 54 Misc. 2d 34, 37, 281 N.Y.S.2d 246, 249 (Sup. Ct. Kings County 1967)). But if the collateral object is merely evidence of another crime, and no contemporaneous arrest is made, the object may not be seized.

   People v. Baker, 23 N.Y.2d 307, 320, 244 N.E.2d 232, 237, 296 N.Y.S.2d 745, 753 (1968).

4. When executing a warrant, an officer must give or make a reasonable effort to give notice of his authority and purpose to an occupant thereof upon request, unless it is a "no knock" warrant. If the officer is refused admittance, he may forcibly enter. N.Y. CRIM. PROC. LAW § 690.50. However, if there is a danger that the objects he is to seize may be destroyed or if there is a danger to himself, the warrant may expressly exempt him from the notice requirement. N.Y. CRIM. PROC. LAW § 690.40.

5. It may be the rule that if there is time to get a search warrant, one must be gotten. *United States v. United States District Court*, 407 U.S. 297, 318; *People v. Spinelli*, 35 N.Y.2d 77, 81, 315 N.E.2d 792, 795, 358 N.Y.S.2d 743, 747 (1974); *see also People v. Knapp*, 52 N.Y.2d 689, 694, 422 N.E.2d 531, 534, 439 N.Y.S.2d 871, 874 (1981). *But see United States v. Watson*, 423 U.S. 411, 423 (1976) (may arrest without a warrant even if there is time to get one); *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975); *People v. Hanlon*, 36 N.Y.2d 549, 558, 330 N.E.2d 631, 636, 369 N.Y.S.2d 677, 684 (1975).

J. *Incident to Arrest*: A complete search of the person arrested (*United States v. Robinson*, 414 U.S. 218, 224 (1973)) and of the immediate vicinity where the arrest took place may be made as an incident to a lawful arrest. *Chimel v. California*, 395 U.S. 752, 765-768 (1969); *People v. Weintraub*, 35 N.Y.2d

351, 353, 320 N.E.2d 636, 638, 361 N.Y.S.2d 897, 898 (1974); *People v. Brenfield*, 188 A.D.2d 477, 478, 590 N.Y.S.2d 536, 537 (2d Dep't 1992). A lawful arrest may be made pursuant to an arrest warrant (N.Y. CRIM. PROC. LAW § 120 (McKinney 1984)) or, in proper instances, without an arrest warrant (N.Y. CRIM. PROC. LAW § 140.10 (McKinney 1984)).

1. A search incidental to a justifiable arrest, with or without a search warrant, must be confined to the defendant and his immediate surroundings. *Chimel v. California*, 395 U.S. 752, 754-760 (1969); *Von Cleef v. New Jersey*, 395 U.S. 814, 814-815 (1969); *Matter of Marrhonda G.*, 151 Misc. 2d 149, 153, 575 N.Y.S.2d 425, 429 (Family Ct. N.Y. County 1991). However, the Supreme Court expanded the scope of the permissible search allowed in a house pursuant to a valid arrest. *Maryland v. Buie*, 494 U.S. 325, 334 (1990) (search of basement from which defendant came from was permissible; police may search an area of the house if there is reasonable suspicion based on specific evidence that the area harbors an individual posing danger to the police). The Court stated that the search, in this case, was more limited than the one in *Chimel*, which was a full blown search of a house.
2. A policeman may never arrest without a warrant unless there is probable cause that the defendant has committed an offense.

   Brinegar v. United States, 338 U.S. 160, 164 (1949); *Veras v. Truth Verification Corp.*, 87 A.D.2d 381, 384, 451 N.Y.S.2d 761, 764 (1st Dep't 1982), *aff'd*, 57 N.Y.2d 947, 443 N.E.2d 989, 457 N.Y.S.2d 241 (1982).

   a. There is no probable cause where the police receive an anonymous tip that the defendant will be found at a certain location in possession of the fruits of a crime.

      People v. Horowitz, 21 N.Y.2d 55, 58, 233 N.E.2d 453, 454, 286 N.Y.S.2d 473, 474 (1967); *see also People v. Elwell*, 50 N.Y.2d 231, 238, 406 N.E.2d 471, 475, 428 N.Y.S.2d 655, 660 (1980).

   b. The constitutional requirements for a search with-

out a warrant are even more stringent than the requirements for a search with a warrant.
People v. Verrecchio, 23 N.Y.2d 489, 492, 245 N.E.2d 222, 224, 297 N.Y.S.2d 573, 575 (1969); *see also United States v. Place*, 660 F.2d 44, 47 (2d Cir. 1981).

c. People on probation exception. The Supreme Court held that a search of a probationer's home where the officer had his supervisor's approval and "reasonable grounds" to believe there was contraband in the house did not violate the Fourth Amendment.
Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987).

d. Probable cause for a warrantless arrest may be supplied through hearsay information.
People v. Roberson, 186 A.D.2d 1014, 1015, 588 N.Y.S.2d 469, 470 (4th Dep't 1992).

e. If a radio bulletin or fellow officer provides probable cause for arrest, police may act on it and arrest the suspect. *People v. Lypka*, 36 N.Y.2d 210, 213, 326 N.E.2d 294, 296, 366 N.Y.S.2d 622, 623 (1975); *People v. Allen*, 146 Misc. 2d 701, 709, 550 N.Y.S.2d 997, 1003 (Seneca County Ct. 1990). However, presumption of probable cause disappears once defendant challenges the police action, and the People must then demonstrate that the sending agency possessed the requisite knowledge to justify police conduct. *People v. Weddington*, 192 A.D.2d 750, 750, 596 N.Y.S.2d 179, 179 (3d Dep't 1993).

3. If the probable cause for the arrest is obtained unconstitutionally, the arrest is poisoned and any incidental search is void.
People v. Perlman, 12 N.Y.2d 89, 95, 187 N.E.2d 550, 552, 236 N.Y.S.2d 945, 948 (1962); *People v. Corley*, 91 Misc. 2d 255, 257, 397 N.Y.S.2d 875, 876 (N.Y.C. Crim. Ct. Bronx County 1977). Evidence is inadmissible if obtained pursuant to an invalid search warrant under circumstances that do not justify seizure without a warrant. *People v. Fino*, 14

N.Y.2d 160, 163-64, 199 N.E.2d 151, 153, 250 N.Y.S.2d 47, 51 (1964); *People v. Williams*, 37 N.Y.2d 206, 207, 333 N.E.2d 160, 371 N.Y.S.2d 880, 881 (1975).

4. With the exception of collateral objects seized under a search warrant, the arrest must be valid before the search is made. The arrest cannot be a pretext to justify the search.

   Henry v. United States, 361 U.S. 98 (1959); *People v. Melendez*, 195 A.D.2d 856, 857, 600 N.Y.S.2d 776, 777 (3d Dep't 1993).

5. If the arrest is valid and the search produces evidence revealing the commission of other crimes, the fact that the defendant is acquitted of the crime for which he was arrested does not bar the use of the evidence in a prosecution for the other crimes.

   People v. Molloy, 17 N.Y.2d 431, 433, 213 N.E.2d 801, 801, 266 N.Y.S.2d 520, 521 (1965).

6. The search is limited to arrestee's body and the area from which he might obtain a weapon or evidence that could be destroyed. *Chimel v. California*, 395 U.S. 752, 764-65 (1969); *see also People v. Blasich*, 73 N.Y.2d 673, 678, 541 N.E.2d 40, 43, 543 N.Y.S.2d 40, 43 (1989) (where the circumstances give rise to probable cause for the police to believe that the car contains contraband, a weapon, or evidence of a crime, the police may conduct a warrantless search of the car pursuant to the "automobile exception").

7. If defendant is arrested on the street, the police may not enter an apartment to conduct a search. *Vale v. Louisiana*, 399 U.S. 30, 33-34 (1970); *People v. Williams*, 37 N.Y.2d 206, 208, 333 N.E.2d 160, 161, 371 N.Y.S.2d 880, 881 (1975).

8. Where there is no expectation of privacy which society considers reasonable, the requirement that the search be incidental is relaxed. *See People v. Natal*, 75 N.Y.2d 379, 383, 553 N.E.2d 239, 241, 553 N.Y.S.2d 650, 652 (1990). Under the "open fields" doctrine, an "individual

may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home." *Oliver v. United States*, 466 U.S. 170, 178 (1984); *see also People v. Reynolds*, 71 N.Y.2d 552, 558, 523 N.E.2d 291, 294, 528 N.Y.S.2d 15, 18 (1988). *But see People v. Scott*, 79 N.Y.2d 474, 484, 593 N.E.2d 1328, 1334, 583 N.Y.S.2d 920, 926 (1992) (where landowners post "no trespassing" signs or indicate that entry is not permitted, the expectation that their privacy rights will be respected and that they will be free from unwanted intrusion is reasonable).

9. Although New York has held that there may be no search of defendant or his automobile when the defendant is arrested for a traffic infraction unless there is reasonable grounds to suspect that the policeman is in danger of assault with a weapon, (*People v. Marsh*, 20 N.Y.2d 98, 101, 228 N.E.2d 783, 785-86, 281 N.Y.S.2d 789, 792-93 (1967)), the Supreme Court has held that the person of the defendant may be searched even when arrested for a traffic violation. *United States v. Robinson*, 414 U.S. 218, 230-36 (1973); *Gustafson v. Florida*, 414 U.S. 260, 263-66 (1973). Although under *Robinson* defendant's constitutional rights may not have been violated, states may apply stricter standards. A search is allowed of a person in a traffic violation case to seize fruits, instrumentalities and other evidence of crime in order to prevent their destruction or concealment or to remove weapons a defendant may use to resist arrest. *People v. Gonzalez*, 109 Misc. 2d 448, 452, 439 N.Y.S.2d 970, 973 (N.Y.C. Crim. Ct. Bronx County 1980); *see also People v. Jackson*, 111 A.D.2d 412, 413, 489 N.Y.S.2d 375, 376 (2d Dep't 1985).

   a. In some situations, New York seems to follow *Robinson*. *See People v. Troiano*, 35 N.Y.2d 476, 478, 323 N.E.2d 183, 184-85, 363 N.Y.S.2d 943, 944-45 (1974) (court sustained the frisking of a motorist when arrested for the misdemeanor of driving after the forfeiture of his license, on the ground that one who is taken into custody loses

whatever interest of privacy he had before the arrest). *But see People v. Adams*, 32 N.Y.2d 451, 454, 299 N.E.2d 653, 655, 363 N.Y.S.2d 229, 231 (1973) (court denied policeman's right to search an automobile driver arrested for traffic misdemeanor).

b. When defendant is arrested in his car for a crime, the car may generally be searched under the *Chimel* doctrine. Because of the mobility of cars, the requirement that the search be contemporaneous is relaxed. *See Chimel v. California*, 395 U.S. 752, 755 n.1 (1969); *People v. Bacalocostantis*, 121 A.D.2d 812, 815, 504 N.Y.S.2d 560, 562 (3d Dep't 1986) (where defendant was stopped and arrested while driving a vehicle, and there was probable cause for his arrest as a suspect in shooting incident, police could conduct warrantless search of defendant's vehicle for evidence of that crime at scene of arrest, or police could secure vehicle in their custody and take it back to police station for search). *But see People v. Adams*, 32 N.Y.2d 451, 454, 299 N.E.2d 653, 655, 346 N.Y.S.2d 229, 231 (1973).

c. And even if defendant is not present and no arrest is being made, a car may be searched when police have probable cause to believe that there is something in the car which the police have the right to seize, at least when there is no time to get a search warrant. *Compare Chambers v. Maroney*, 399 U.S. 42 (1970) *with Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

d. If there is a police regulation which requires that the contents of an impounded car be "inventoried," the search conducted pursuant thereto is constitutional. *South Dakota v. Opperman*, 428 U.S. 364, 372-73 (1976).

10. Objects that fall in plain view of police officer who is rightfully in such position that provides that view are subject to seizure and may be introduced into evidence.

Michigan v. Long, 463 U.S. 1032, 1050 (1983); *Harris v. United States*, 390 U.S. 234, 236 (1968); *People v. Rowell*, 27 N.Y.2d 691, 262 N.E.2d 217, 314 N.Y.S.2d 10 (1970); *In re Marrhonda G.*, 151 Misc. 2d 149, 154, 575 N.Y.S.2d 425, 429 (Family Ct. N.Y. County 1991). However, the object must have fallen into view "inadvertently." *People v. Spinelli*, 35 N.Y.2d 77, 80, 315 N.E.2d 792, 794, 358 N.Y.S.2d 743, 747 (1974).

K. *Stop and Frisk*: a police officer has the right to take investigatory action and frisk a person by patting his outer garments for a dangerous weapon as an incident to lawful inquiry, where (1) he suspects that such person—abroad in a public place—is committing, has committed or is about to commit a felony or a class A misdemeanor and (2) he suspects that he is exposing himself to danger of life or limb when he stops to question such person. N.Y. CRIM. PROC. LAW § 140.50 (McKinney 1984); *Peters v. New York*, 392 U.S. 40, 59-62 (1968); *People v. Benjamin*, 51 N.Y.2d 267, 270, 414 N.E.2d 645, 647, 434 N.Y.S.2d 144, 145 (1980); *People v. Marine*, 142 A.D.2d 368, 370, 536 N.Y.S.2d 425, 426 (1st Dep't 1989).

1. The police officer must point to "specific and articulable facts which taken together with rational inferences from those facts reasonably warrant that intrusion."

   Terry v. Ohio, 392 U.S. 1, 21 (1968); *People v. Taggart*, 20 N.Y.2d 335, 337, 229 N.E.2d 581, 582, 283 N.Y.S.2d 1, 3-4 (1967); *People v. Cornelius*, 113 A.D.2d 666, 670, 497 N.Y.S.2d 16, 19 (1st Dep't 1986).

2. *See People v. De Bour*, 40 N.Y.2d 210, 352 N.E.2d 562, 386 N.Y.S.2d 375 (1976) for a complete summary of a policeman's powers in face-to-face street encounters.

L. *Consent*: A defendant may waive his constitutional protection and consent to a search. The prosecution has the burden of proving consent by clear and convincing evidence.

   United States v. Smith, 308 F.2d 657, 663 (2d Cir. 1962), *cert. denied*, 372 U.S. 906 (1963); *People v. Whitehurst*, 25 N.Y.2d 389, 391, 254 N.E.2d 905, 906, 306 N.Y.S.2d 673, 674 (1969); *People v. Pena*, 156 Misc. 2d 791, 792, 594 N.Y.S.2d 586, 587 (Schenectady County Ct. 1993).

However, consent by coercion or duress is not consent. *People v. Gonzalez*, 39 N.Y.2d 122, 124, 347 N.E.2d 575, 577, 383 N.Y.S.2d 215, 217 (1976).

1. If A and B have equal right of possession, either one may permit police to search the premises.
   United States v. Botsch, 364 F.2d 542, 549 (2d Cir. 1966), *cert. denied*, 386 U.S. 937 (1967); *People v. Winograd*, 68 N.Y.2d 383, 390, 502 N.E.2d 189, 193, 509 N.Y.S.2d 512, 516 n.2 (1986) (police officers obtained permission from landlord to install video surveillance); *People v. Overton*, 24 N.Y.2d 522, 525, 249 N.E.2d 366, 368, 301 N.Y.S.2d 479, 482 (1969) (high school principal may permit search of student's locker).

   a. A search is considered reasonable where a mother, aunt, wife, paramour or other person who shares premises with the suspect permits the police to enter and conduct a search.
      United States v. Matlock, 415 U.S. 164, 167 (1974); *People v. Cosme*, 48 N.Y.2d 286, 290, 397 N.E.2d 1319, 1321, 422 N.Y.S.2d 652, 654 (1979).

   b. A hotel manager does not have an equal right with a guest to possession of a hotel room.
      Stoner v. California, 376 U.S. 483, 489 (1964).

   c. Where the owner of an automobile consented to its search, evidence seized during the search could be used against a passenger. *People v. Lane*, 10 N.Y.2d 347, 353, 179 N.E.2d 339, 340, 223 N.Y.S.2d 197, 198 (1961).

   d. There is no requirement that a *Miranda* warning be given before defendant consents to the search or that he be aware of his right to refuse to consent. *Schneckloth v. Bustamonte*, 412 U.S. 218, 231 (1973); *People v. Bennet*, 70 N.Y.2d 891, 894, 519 N.E.2d 289, 291, 524 N.Y.S.2d 378, 380 (1987) (officer's investigatory questioning of suspect concerning plastic baggies and black pouch observed in suspect's car did not constitute "custodial interro-

gation," for purposes of determining necessity for *Miranda* warnings); *People v. Baker*, 188 A.D.2d 1012, 1012, 592 N.Y.S.2d 161, 162 (4th Dep't 1992).

M. *Hot Pursuit*: When the police are in hot pursuit of a suspect who has entered a house, they may search the house to locate the suspect and to seize any weapons which might be used to effect an escape. Evidence seized during such a search is admissible even though the evidence is not a weapon.

Warden v. Hayden, 387 U.S. 294, 300-10 (1967); *People v. Henderson*, 107 A.D.2d 469, 470, 487 N.Y.S.2d 425, 427 (4th Dep't 1985).

1. Where police enter private premises because it is their duty to do so, they are privileged to seize any evidence of crime which is in plain view. *People v. Gallmon*, 19 N.Y.2d 389, 393, 227 N.E.2d 284, 287, 280 N.Y.S.2d 356, 361 (1967), *cert. denied*, 390 U.S. 911 (1968); *People v. Hanley*, 188 A.D.2d 423, 423, 591 N.Y.S.2d 1011, 1011 (1st Dep't 1992) (drugs found after officer placed himself in position to peer into safe and remove money inadmissible).

2. Fire officials may remain in building without a warrant for a reasonable time or return the next morning to investigate the cause of the fire. *Michigan v. Tyler*, 436 U.S. 499, 509-510 (1978). However, the official's return must be a continuation of the earlier entry. *Michigan v. Clifford*, 464 U.S. 287, 293 (1984).

3. The hot pursuit doctrine is not limited by *Chimel*. *People v. Fitzpatrick*, 32 N.Y.2d 499, 507, 300 N.E.2d 139, 142, 346 N.Y.S.2d 793, 797 (authorized warrantless search of a closet after suspect had already been handcuffed), *cert. denied*, 414 U.S. 1033, *cert. denied*, 414 U.S. 1050 (1973).

N. *Eavesdropping*: Eavesdropping includes both bugging (use of an instrument to overhear a nontelephonic communication) and wiretapping (use of an instrument to overhear telephonic communication). N.Y. Penal Law § 250.05 forbids unlawful wiretapping or mechanical overhearing of a conversation. Both are felonies if there is neither consent from one party to

the conversation nor a properly issued eavesdropping warrant.

1. Private Eavesdropping: is done by a private person, who is not a working government agent. Private eavesdropping creates no constitutional problems. However, it is a crime, and all evidence obtained through or as a result of a violation of N.Y. PENAL LAW § 250.05 (McKinney 1989) is inadmissible.

   N.Y. CIV. PRAC. L. & R. § 4506 (McKinney 1992)

   a. The evidence obtained is admissible where one party to a conversation conceals a microphone on himself and transmits or records what is said. *Osborn v. United States*, 385 U.S. 323, 330 (1966); *Lopez v. United States*, 373 U.S. 427, 437 (1963); *Lee v. United States*, 343 U.S. 747, 752 (1952). Notice need not be given to the other party of the conversation. *People v. Hickey*, 182 A.D.2d 883, 582 N.Y.S.2d 517, 518 (3d Dep't 1992). A third person with permission by one party to the conversation may record conversation without notice to the other party. *United States v. White*, 401 U.S. 745, 750 (1971).

   b. A subscriber has the right to record his own telephone conversations in which he participates, and such recordings are admissible in evidence. *N.V. Simons' Metaalhandel v. Hyman-Michaels Co.*, 7 A.D.2d 840, 841, 181 N.Y.S.2d 267, 268 (1st Dep't 1959); N.Y. PENAL LAW § 250.00(2) (McKinney 1989).

2. Official Eavesdropping: is done by a government agent. Official eavesdropping invades the right of privacy. Although there is no general constitutional protection of privacy, there is a Fourth Amendment violation where the government unreasonably eavesdrops upon a defendant's words thereby intruding "upon the privacy upon which he justifiably relied. . . ."

   Katz v. United States, 389 U.S. 347, 353 (1967) (attaching an electronic listening and recording device to the outside of a public telephone booth,

enabling federal agents to listen to and record defendant's end of telephone conversation, held as a Fourth Amendment violation, even though device did not penetrate the booth); *Berger v. New York*, 388 U.S. 41, 59 (1967) (bugging of home or office violates the Fourth Amendment; former CODE OF CRIMINAL PROCEDURE 813-a, authorizing court order for eavesdropping, was invalid because it did not comply with requirements of Fourth Amendment); *People v. Basilicato*, 64 N.Y.2d 103, 110, 474 N.E.2d 215, 217, 485 N.Y.S.2d 7, 9 (1984) (wiretap warrant did not authorize use of nontelephonic conversations which police were able to overhear whenever the receiver in suspect bookmaking operation was left off hook so as to hold off incoming calls).

3. The use of a "pen register," which reveals numbers called but intercepts no conversation, does not involve Fourth Amendment rights. *People v. Guerra*, 65 N.Y.2d 60, 64, 478 N.E.2d 1319, 1321, 489 N.Y.S.2d 718, 720 (1985); *Smith v. Maryland*, 442 U.S. 735, 742 (1979); N.Y. CRIM. PROC. LAW § 700.05 (McKinney 1984) ("eavesdropping" does not include the use of a pen register or trap and trace device). The regulations regarding the use of such devices are proscribed by N.Y. CRIM. PROC. LAW § 705. However, pen register having the capacity to monitor conversations would be treated as an eavesdropping device under N.Y. CRIM. PROC. LAW; *People v. Bialostok*, 80 N.Y.2d 738, 744, 610 N.E.2d 374, 377, 594 N.Y.S.2d 701, 704 (1993).

   a. *Katz v. United States*, 389 U.S. 347, 354-59 (1967), recognizes that under proper circumstances, and with appropriate safeguards, a warrant may be issued authorizing eavesdropping.

      (1) The court in *Katz* also cautioned that "whether safeguards other than prior authorization by a magistrate would satisfy the fourth amendment in a situation involving the national security is a question not presented by this case." How-

ever, in *United States v. United States District Court*, 407 U.S. 297, 314-21 (1972), the Court held that in domestic (as distinct from international) security cases, a warrant must be obtained.

4. N.Y. CRIM. PROC. LAW § 700 permits a Supreme Court, County or Appellate Court judge to authorize an eavesdropping warrant for either a bug or a wiretap based upon the showing of reasonable cause to believe that the eavesdrop will produce evidence of the commission of a particular offense. The application must be made by a district attorney, or the State Attorney General, or the official designated by such officer to act during his absence or disability. It must also appear that normal investigatory procedures would be futile or too dangerous. Particularity is required in the application, including the facts establishing probable cause, identity of persons, description of the premises, and the type of communication sought.
   a. The warrant is good for thirty days but the eavesdropping must stop upon hearing the desired conversation. Extension orders up to thirty days may be obtained upon a new showing of probable cause.
   b. Within ninety days after termination of the warrant, the person whose conversations were seized must be informed thereof. This can be extended.
   c. The relationship between the New York statute and the subsequently enacted federal eavesdropping statute (18 U.S.C. §§ 2510-2520) is obscure. The statutes are inconsistent in some respects.
5. N.Y. CIV. PRAC. L. & R. § 4506 (McKinney 1992) prohibits the admission of all evidence and leads obtained by an illegal official eavesdrop.
6. Suppression Procedure: in a criminal case, intercepted communication may not be admitted into evidence unless the prosecution gives the defendant notice thereof within fifteen days after arraignment unless the judge decides otherwise; defendant then must make a

pretrial motion to suppress the evidence. In a civil case, if the defendant knows about the illegal eavesdrop, he must also make a pretrial motion to suppress. If no motion is made, the defendant waives his right to object to its admission at trial. N.Y. CRIM. PROC. LAW §§ 700.70, 710.10-.70 (McKinney 1984); N.Y. CIV. PRAC. L. & R. § 4506 (McKinney 1992).

a. Where there has been an unconstitutional eavesdrop, the transcript of all obtained conversations must be turned over to the defendant to help him prepare his defense. *Alderman v. United States*, 394 U.S. 165, 184 (1969).

b. Only a person whose rights have been invaded has standing to complain. Illegally or unconstitutionally seized conversations are admissible except upon objection by a party to the conversation or by a person whose privacy was invaded. *Alderman v. United States*, 394 U.S. 165, 171, 175 (1969).

c. Where conversation between A and B incriminates C, the evidence is generally admissible against C. *People v. Morhouse*, 21 N.Y.2d 66, 79, 233 N.E.2d 705, 712, 286 N.Y.S.2d 657, 667 (1967); *People v. Dolan*, 172 A.D.2d 68, 72, 576 N.Y.S.2d 901, 903 (3d Dep't 1991).

XV. SELF-INCRIMINATION

A. *In General*: No witness, party or nonparty, may be compelled to answer a question which will tend to expose him to a criminal prosecution or subject him to a penalty or forfeiture.

U.S. CONST. amend. V; applicable to states *resultant of Malloy v. Hogan*, 378 U.S. 1, 6 (1964); N.Y. CONST. art. I, § 6; N.Y. CIV. PRAC. L. & R. § 4501 (McKinney 1993); *Levine v. Bornstein*, 13 Misc. 2d 161, 163, 174 N.Y.S.2d 574, 576 (Sup. Ct. Spec. T. Kings County), *aff'd*, 7 A.D.2d 995, 183 N.Y.S.2d 868 (2d Dep't), *aff'd*, 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1958) (ordering that, because plaintiff refused to answer pertinent questions after bringing action for affirmative relief, plaintiff *could* claim privilege against self-incrimination).

1. A party or nonparty may assert the privilege against self-incrimination in civil proceedings, as well as in criminal prosecutions.

   In re Kenneth M., 130 Misc. 2d 217, 218-20, 495 N.Y.S.2d 131, 132-33 (Sup. Ct. Monroe County 1985) (citing *In re Gault*, 387 U.S. 1, 47 (1966)).

B. *Incrimination*: The forfeiture or penalty must be punitive or concern a criminal intent for the privilege to be applicable. The witness may not refuse to answer a question on the ground that it would tend to subject him to civil liability.

   N.Y. CIV. PRAC. L. & R. § 4501 (McKinney 1993); *McDermott v. Manhattan Eye, Ear & Throat Hosp.*, 15 N.Y.2d 20, 28, 203 N.E.2d 469, 474, 255 N.Y.S.2d 65, 72 (1964).

1. Privileged information does not have to directly incriminate the accused. The privilege also extends to answers which may indirectly lead to evidence as to the witness's guilt in the commission of a crime. Such evidence is often referred to as providing a "link in the chain of evidence."

   People ex rel. Taylor v. Forbes, 143 N.Y. 219, 230, 38 N.E. 303, 306 (1894) (privilege must be asserted in cases of good faith fear of *personal* incrimination, not that of friends or associates); *Doyle v. Hofstader*, 257 N.Y. 244, 251, 177 N.E. 489, 491 (1931) (stating that questions suggesting extraordinary fees are for purposes of bribery and corruption imply "chain of guilt" against which privilege may be asserted); *see also Hoffman v. United States*, 341 U.S. 479, 486 (1951) (holding that series of questions leading to inference of involvement in racketeering, in aggregate, may allow assertion of privilege).

2. The fear of conviction cannot merely be a remote possibility, but it must be a real danger.

   Rogers v. United States, 340 U.S. 367, 374-75 (1951) ("mere imaginary possibility of prosecution" is insufficient to invoke privilege against self-incrimination (citing *Mason v. United States*, 244 U.S. 362, 366 (1917))); *Slater v. Slater*, 78 Misc. 2d

13, 15, 355 N.Y.S.2d 943, 945 (Sup. Ct. Spec. T. Queens County 1974) (holding that right to inquire about former spouse's financial status overrides witness's fear of being found guilty of perjury regarding tax returns).

a. The claim of privilege will be upheld unless the answer could not possibly incriminate the witness. Basically, a witness is the judge as to whether or not the answer could incriminate him, unless the court finds his claim to be without substance.
People v. Arroyo, 46 N.Y.2d 928, 930, 388 N.E.2d 342, 343, 415 N.Y.S.2d 205, 206 (1979); *Flushing Nat'l Bank v. Transamerica Ins. Co.*, 135 A.D.2d 486, 487, 521 N.Y.S.2d 727, 728 (2d Dep't 1987) ("when the danger of incrimination is not readily apparent, the witness may be required to establish a factual predicate").

3. *Records, Books, and Documents*: The privilege against self-incrimination may be extended to the witness's books and papers.
Fisher v. United States, 425 U.S. 391, 406-07 (1975) (tax returns); *People v. Laino*, 10 N.Y.2d 161, 172, 176 N.E.2d 571, 578, 218 N.Y.S.2d 647, 656 (accounts receivable ledger), *cert. denied*, 374 U.S. 104 (1961); *Henry v. Lewis*, 102 A.D.2d 430, 433, 478 N.Y.S.2d 263, 266 (1st Dep't 1984) (acknowledging potential application of privilege to sole practitioner psychiatrist's business records and patient's personal documents).

a. The privilege may not be asserted in response to a request for records, unless the papers are the private property of the one asserting the right.
In re Cappetta, 42 N.Y.2d 1066, 1067, 369 N.E.2d 1172, 1173, 399 N.Y.S.2d 638, 639 (1977) (holding that school records are property of board of education, and employee may not assert privilege); *Norkin v. Hoey*, 181 A.D.2d 248, 253, 586 N.Y.S.2d 926, 930 (1st Dep't 1992) (stating that if personal financial information of loan applicant is in posses-

sion of bank, applicant cannot assert right).

b. The privilege may not be extended to records which are required to be kept by law.
People v. Doe, 59 N.Y.2d 655, 656, 450 N.E.2d 211, 212, 463 N.Y.S.2d 405, 406 (1983) (medical records not privileged).

c. The privilege is not applicable when a person is ordered by the government to produce an object (does not apply to real or physical evidence).
Baltimore City Dep't of Social Services v. Bouknight, 493 U.S. 549, 554 (1990) (in child abuse case mother cannot assert privilege when requested to produce child).

C. *Parties and Witnesses*: There are two branches to the privilege—the defendant privilege, and the witness privilege, which includes that of the plaintiff.

1. *Defendant Privilege*: A defendant cannot be compelled to testify in a criminal case. One defendant cannot compel a codefendant to take the stand.
DeLuna v. United States, 308 F.2d 140, 141 (5th Cir. 1962).

a. If the testimony of the codefendant is necessary to defendant, a severance should be granted.
People v. Owens, 22 N.Y.2d 93, 97, 238 N.E.2d 715, 718, 291 N.Y.S.2d 313, 316 (1968) (must be showing of intent and need to call codefendant as witness).

2. *Witness Privilege*: Any witness, party or nonparty, in a civil or criminal action, can be compelled to take the witness stand and then invoke his privilege as the incriminating questions arise.
Levine v. Bornstein, 13 Misc. 2d 161, 163, 174 N.Y.S.2d 574, 576 (Sup. Ct. Spec. T. Kings County), *aff'd*, 7 A.D.2d 995, 183 N.Y.S.2d 868 (2d Dep't), *aff'd*, 6 N.Y.2d 892, 160 N.E.2d 921, 190 N.Y.S.2d 702 (1958) (since plaintiff refused to answer pertinent questions after bringing action for affirmative relief, plaintiff *could* claim privilege against self-

incrimination).

D. *Assertion of the Privilege*:

1. *When the privilege must be asserted*: The privilege must be asserted when the question is asked.

   Figueroa v. Figueroa, 160 A.D.2d 390, 391, 553 N.Y.S.2d 753, 754 (1st Dep't 1990); 8 JOHN WIGMORE, WIGMORE ON EVIDENCE § 2268, at 402-03 (McNaughton rev. 1961) ("Privilege . . . is merely an option of refusal, not a prohibition of inquiry.").

   a. The privilege can also be asserted when the documents are to be produced or contents revealed.

      United Bhd. of Carpenters & Joiners v. Langemyr, 25 A.D.2d 534, 534-35, 267 N.Y.S.2d 778, 779 (2d Dep't 1966).

2. *How the privilege must be asserted*: The privilege must be asserted in good faith.

   Taylor v. Forbes, 143 N.Y. 219, 231, 38 N.E 303, 306 (1894) (stating that privilege must be asserted in case of good faith fear of *personal* incrimination, not that of friends or associates); *see also In re Grae*, 282 N.Y. 428, 433, 26 N.E.2d 963, 966 (1940) (determination of good faith usually left to witness's discretion unless flagrantly uncooperative); *Agnello v. Corbisiero*, 177 A.D.2d 445, 446, 576 N.Y.S.2d 541, 542 (1st Dep't 1991) (holding that petitioner in action for harness owner's license cannot testify if he refuses to answer questions on adversary's case).

3. *Point in proceedings when privilege may be asserted*: This privilege may be asserted throughout pretrial stages, as well as during the trial itself.

   Garcia v. New York City Transit Auth., 121 Misc. 2d 1012, 1014, 469 N.Y.S.2d 843, 845 (Sup. Ct. Spec. T. N.Y. County 1983) (privilege asserted to avoid pretrial disclosure).

4. *Who may assert the privilege*: The privilege is a personal right that may only be asserted on one's own behalf.

   In re Vanderbilt, 57 N.Y.2d 66, 75, 439 N.E.2d 378,

383, 453 N.Y.S.2d 662, 668 (1982) (attorney cannot assert privilege on behalf of client if documents in attorney's possession are subpoenaed).

a. To assert the right in response to a request for documents, the person asserting the privilege must have possession of the materials requested.
Big Apple Concrete Corp. v. Abrams, 103 A.D.2d 609, 613, 481 N.Y.S.2d 335, 338 (1st Dep't 1984); *see also Couch v. United States*, 409 U.S. 322, 333 (1973) (constructive possession may be sufficient).

5. *Corporations*: A corporation cannot invoke the privilege.
Braswell v. United States, 487 U.S. 99, 102 (1988); *Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609, 613, 481 N.Y.S.2d 335, 339 (1st Dep't 1984) (holding that particular employee cannot answer on behalf of corporation because of own right to privilege against self-incrimination, corporation must produce someone who *can* respond).

a. *Test of applicability*: The test to determine the applicability of the privilege by noncorporate associations or entities, such as partnerships, is discretionary for the court. If the character and nature of the organization is deemed of a more impersonal nature, the privilege may apply to the organization as an entity. But if the organization is deemed more personal in nature, the privilege may *not* apply to the organization.
Sigety v. Hynes, 38 N.Y.2d 260, 268, 342 N.E.2d 518, 523, 379 N.Y.S.2d 724, 731-32, *cert. denied*, 425 U.S. 974 (1975) (allowing assertion of privilege by organization only when organization's character is so impersonal in scope, *not* in the case of a family run nursing home, that it could not be said to embody private, personal interests of members).

b. Even a corporation with a sole shareholder may not assert the privilege.
Grant v. United States, 227 U.S. 74, 79-80 (1913); *New York v. Carey Resources, Inc.*, 97 A.D.2d 508, 508, 467 N.Y.S.2d 876, 877 (2d Dep't 1983).

c. If the custodian of a corporation's custodial records would incriminate himself by producing the records, he may assert the privilege against self-incrimination.
In re Grand Jury Subpoena v. Kuriansky, 69 N.Y.2d 232, 242, 505 N.E.2d 925, 930, 513 N.Y.S.2d 359, 365, *cert. denied*, 482 U.S. 928 (1987).

(1) However, the corporation is still under an obligation to produce such subpoenaed records, and must appoint another employee to perform such production.
Kent Nursing Home v. Office of Special State Prosecutor for Health & Social Servs., 49 A.D.2d 616, 616, 370 N.Y.S.2d 669, 670 (2d Dep't), *aff'd*, 38 N.Y.2d 260, 342 N.E.2d 518, 379 N.Y.S.2d 724 (1975), *cert. denied*, 425 U.S. 974 (1976); *Big Apple Concrete Corp. v. Abrams*, 103 A.D.2d 609, 613, 481 N.Y.S.2d 335, 339 (1st Dep't 1984) (holding that if particular employee cannot answer on behalf of corporation because of own right to privilege against self-incrimination, corporation must produce someone who *can* respond).

d. This applies to one-man corporations, and one-man organizations for which the privilege is inapplicable.
Grant v. United States, 227 U.S. 74, 79-80 (1913); *People v. Carassavas*, 103 Misc. 2d 562, 563, 426 N.Y.S.2d 437, 438 (Saratoga County Ct. 1980).

E. *Immunity*: If the witness is already protected from potential incrimination, or liability based on any testimony he may give, the privilege against self-incrimination disappears.
In re Anonymous, 121 A.D.2d 417, 417, 504 N.Y.S.2d 6, 7 (2d Dep't 1986).

1. If the witness's existing protection is in the form of an immunity statute, he may only be compelled to testify if the statute's protection is as extensive as the constitutional protection against self-incrimination.
Pillsbury Co. v. Conboy, 459 U.S. 248, 253 n.8

(1983).

2. If there is an immunity statute applicable, the witness must first claim his privilege against self-incrimination. Then, if he is ordered by "competent authority" to testify or produce evidence, he must do so. If the witness complies with the order and if, but for the immunity statute, he would have been privileged to withhold the evidence, he obtains immunity.

   N.Y. CRIM. PROC. LAW § 50.20 (McKinney 1992).

3. Anyone subpoenaed before a grand jury automatically gets immunity, unless it is waived effectively.

   N.Y. CRIM. PROC. LAW § 190.40 (McKinney 1993).

4. A witness testifying under immunity may, nonetheless, be prosecuted for perjury.

   People v. Tomasello, 21 N.Y.2d 143, 147, 234 N.E.2d 190, 192, 287 N.Y.S.2d 1, 3 (1967).

   a. A witness may be prosecuted for contempt committed before a grand jury. N.Y. CRIM. PROC. LAW § 50.10 (McKinney 1992); *People v. Ianiello*, 21 N.Y.2d 418, 421, 235 N.E.2d 439, 441, 288 N.Y.S.2d 462, 465, *cert. denied*, 393 U.S. 827 (1968).

   b. And his testimony may be used against him in a subsequent civil action. *In re Beck*, 24 N.Y.2d 839, 840, 248 N.E.2d 599, 599, 300 N.Y.S.2d 850, 850, *cert. denied*, 396 U.S. 850 (1969).

5. The witness must be informed, when he is offered immunity, that it is in the place of his right against self-incrimination. *People v. Masiello*, 28 N.Y.2d 287, 291, 270 N.E.2d 305, 308, 321 N.Y.S.2d 577, 581 (1971).

F. *Testimonial Compulsion*: The privilege protects a person "only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature" and has no application to "compulsion which makes a suspect or accused the source of 'real or physical evidence.'"

   Gilbert v. California, 388 U.S. 263, 266 (1967) (taking of handwriting exemplar from defendant not violation of privilege); *Schmerber v. California*, 384 U.S. 757, 761

(1966) (taking blood sample from defendant not violation of privilege).

G. *Waiver of the Privilege*

1. *Waiver by Criminal Defendant*: When a criminal defendant voluntarily takes the witness stand on his own behalf, he waives the privilege against self-incrimination.

   Brown v. United States, 356 U.S. 148, 155 (1958); *People v. Bagby*, 65 N.Y.2d 410, 413, 482 N.E.2d 41, 43, 492 N.Y.S.2d 562, 564 (1985).

2. *Waiver by Witness*: Once a witness, party or nonparty, has voluntarily disclosed incriminating matters, he waives his privilege against self-incrimination.

   Southbridge Finishing Co. v. Golding, 208 Misc. 846, 850, 143 N.Y.S.2d 911, 915 (Sup. Ct. Spec. T. N.Y. County 1955) (stating that voluntary testimony is *not* enough, unless incriminating information is actually disclosed), *aff'd*, 2 A.D.2d 882, 157 N.Y.S.2d 898 (1st Dep't 1956); *People v. Bell*, 127 Misc. 2d 43, 47, 485 N.Y.S.2d 416, 420 (N.Y.C. Crim. Ct. Queens County 1985), *aff'd*, 131 A.D.2d 859, 517 N.Y.S.2d 219 (2d Dep't 1987); *see also Taber v. Herlihy*, 174 A.D.2d 777, 779, 570 N.Y.S.2d 723, 725 (3d Dep't 1991).

3. Once a witness discloses incriminating matter, he must complete the story even though this further incriminates him.

   Southbridge Finishing Co. v. Golding, 208 Misc. 846, 850, 143 N.Y.S.2d 911, 915 (Sup. Ct. Spec. T. N.Y. County 1955), *aff'd*, 2 A.D.2d 882, 157 N.Y.S.2d 898 (1st Dep't 1956).

H. *Penalties for Invoking Privilege*: Various statutes and charters require public officers to waive the immunity they would ordinarily get when testifying before the grand jury. If they refuse, they may be removed from office or lose their jobs. Such penalties, inflicted for the mere invocation of a constitutional privilege, are unconstitutional.

   Uniformed Sanitation Men v. Commissioner, 392

U.S. 280, 284 (1968).

1. If a public officer executes the waiver of immunity out of fear of losing his position, the testimony given under this waiver may not be used against him in any criminal proceeding.

   Garrity v. New Jersey, 385 U.S. 493, 496-98 (1967).

2. If the official refuses to waive immunity, he cannot be removed from office solely for invoking his rights.

   Gardner v. Broderick, 392 U.S. 273, 277-79 (1968).

   a. If the officer is then offered immunity and he accepts it, his testimony may not be used against him in a criminal prosecution; but it may be used as the basis of a proceeding to remove him from office.

      Gardner, 392 U.S. at 277-79.

   b. If the officer is offered immunity and he still refuses "to answer questions specifically, directly, and narrowly relating to the performance of his official duties," he may be removed from office.

      Gardner, 392 U.S. at 278.

3. An attorney cannot be disbarred for invoking his privilege.

   Spevack v. Klein, 385 U.S. 511, 514 (1967).

   a. If an attorney is accorded immunity from criminal prosecution, he may then be forced to testify. And his testimony may thereafter be used to disbar him.

      Zuckerman v. Greason, 20 N.Y.2d 430, 438, 231 N.E.2d 718, 721, 285 N.Y.S.2d 1, 6 (1967), *cert. denied*, 390 U.S. 925 (1968).

I. *Comment by Prosecution*: The defendant need not testify at the trial; his failure to do so creates no inference of guilt; and no comment to the jury may be made on his failure to testify.

   Carter v. Kentucky, 450 U.S. 288, 305 (1981); *People v. Forte*, 277 N.Y. 440, 441, 14 N.E.2d 783, 784 (1938); N.Y. CRIM. PROC. LAW § 300.10(2) (McKinney 1993) (only if defendant requests, judge must charge jury that silence does not create inference of guilt).

1. The no-comment rule is not retroactive.
   Tehan v. United States, 382 U.S. 406, 419 (1966).

XVI. Privileged Communications

A. *Attorney-Client Privilege*

1. Any confidential communication made between an attorney (or his employee) and the client, which is incident to the professional legal relationship, is privileged information not to be disclosed.
   N.Y. Civ. Prac. L. & R. § 4503(a) (McKinney 1992); *People v. Mitchell*, 58 N.Y.2d 368, 373, 448 N.E.2d 121, 123, 461 N.Y.S.2d 267, 269-70 (1983); *Spectrum Sys. Int'l Corp. v. Chemical Bank*, 78 N.Y.2d 371, 377, 581 N.E.2d 1055, 1059, 575 N.Y.S.2d 809, 814 (1991).

   a. The purpose of the attorney-client privilege is to promote candor between the client and his attorney by guaranteeing confidentiality of disclosures made between them.
      People v. Mitchell, 58 N.Y.2d 368, 373, 448 N.E.2d 121, 123, 461 N.Y.S.2d 267, 269 (1983).

2. *Elements of the Attorney-Client Privilege*:

   a. There is no attorney-client privilege unless there is, in fact, an attorney-client relationship.
      People v. Mitchell, 58 N.Y.2d 368, 373, 448 N.E.2d 121, 123, 461 N.Y.S.2d 267, 269 (1983).

   b. The communication has to have been made for the purpose of obtaining legal advice.
      Hoopes v. Carota, 74 N.Y.2d 716, 717, 543 N.E.2d 73, 73, 544 N.Y.S.2d 808, 809 (1989) (holding that information regarding whether attorney was consulted and who paid legal fees not privileged); *Rossi v. Blue Cross & Blue Shield of Greater New York*, 73 N.Y.2d 588, 593-94, 540 N.E.2d 703, 705-06, 542 N.Y.S.2d 508, 510-11 (1989) (communications regarding imminent litigation generally privileged).

      (1) Although business advice is not usually

included in the privilege, if such advice is predominantly legal in nature, the privilege will still apply.
Rossi v. Blue Cross & Blue Shield of Greater New York, 73 N.Y.2d 588, 594, 540 N.E.2d 703, 706, 542 N.Y.S.2d 508, 511 (1989) (holding that business advice for purpose of facilitating legal advice privileged).

c. The communication has to have been confidential, or intended to have been confidential.
People v. Harris, 57 N.Y.2d 335, 343, 442 N.E.2d 1205, 1208, 456 N.Y.S.2d 694, 697, *cert. denied*, 460 U.S. 1047 (1982) (holding that spontaneous statements not product of interrogation not privileged).

d. Underlying factual information, not included in a confidential communication, is not protected by the attorney-client privilege.
Niesig v. Team I, 76 N.Y.2d 363, 372, 558 N.E.2d 1030, 1034, 559 N.Y.S.2d 493, 497 (1990) (finding that disclosures made by attorney to adversary or adversary's counsel not privileged); *Miranda v. Miranda*, 184 A.D.2d 286, 286, 584 N.Y.S.2d 818, 818 (1st Dep't 1992) (finding that information about relationship with prior attorney not privileged).

3. Determination of whether attorney-client privilege applies is to be determined on a case-by-case basis.
Rossi v. Blue Cross & Blue Shield of Greater New York, 73 N.Y.2d 588, 593, 540 N.E.2d 703, 705, 542 N.Y.S.2d 508, 510 (1989) ("fact-specific" determination); WIGMORE ON EVIDENCE § 2296, at 566-67.

a. The attorney-client privilege applies to communications of the attorney as well as to those of the client.
Spectrum Systems v. Chemical Bank, 78 N.Y.2d 371, 377, 581 N.E.2d 1055, 1060, 575 N.Y.S.2d 809, 814 (1991) (investigative facts included in report as foundation for legal advice privileged); *Rossi*, 73 N.Y.2d at 593, 540 N.E.2d at 706, 542 N.Y.S.2d at 511 (holding entire memorandum, which included

attorney's conversations with adversary's counsel and third parties, privileged because attorney's purpose in conducting conversations was to convey legal advice to client).

b. The privilege extends after termination of the attorney-client relationship.
In re Hof, 102 A.D.2d 591, 595, 478 N.Y.S.2d 39, 42 (2d Dep't 1984) (holding that attorney cannot breach duty to former client in interests of current client).

c. The scope of the privilege is measured by the client's reasonable expectations of confidentiality under the exigent circumstances.
People v. Osorio, 75 N.Y.2d 80, 84-85, 549 N.E.2d 1183, 1185, 550 N.Y.S.2d 612, 614-15 (1989) (statements made by codefendants in each other's presence not privileged unless for purpose of common defense).

d. Corporations in New York are entitled to the attorney-client privilege.
Rossi v. Blue Cross & Blue Shield of Greater New York, 73 N.Y.2d 588, 591-92, 540 N.E.2d 703, 704-05, 542 N.Y.S.2d 508, 509-10 (1989); Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of the Participants*, 63 ST. JOHN'S L. REV. 191, 220-66 (1989).

4. *Exceptions to Attorney-Client Privilege*:

a. Legal advice given or sought in furtherance of a criminal act is not privileged.
People ex rel. Vogelstein v. Warden of Cty. Jail, 150 Misc. 714, 720, 720 N.Y.S. 362, 370 (1934) (disclosure of name of client suspected of criminal act not privileged); *In re Stewart*, 144 Misc. 2d 1012, 1020, 545 N.Y.S.2d 974, 979 (Sup. Ct. N.Y. County 1989) (attorney's accounts regarding fees of client suspected of narcotics offense not privileged); *see also* Note, *The Future Crime or Tort Exception to Communication Privileges*, 77 HARV. L. REV. 730, 731

(1964).

b. In any action involving preparation, execution, or revocation of any will or instrument concerning the probate, validity or construction of a will, the attorney-client privilege is not granted.
N.Y. CIV. PRAC. L. & R. § 4503(b) (McKinney 1993).

c. Communications made in the presence of a third party whose presence serves no legal purpose are not protected by the attorney-client privilege.
People v. Harris, 57 N.Y.2d 335, 343, 442 N.E.2d 1205, 1208, 456 N.Y.S.2d 694, 697 (statements made by defendant over phone to her attorney, heard inadvertently by third party, not privileged), *cert. denied*, 460 U.S. 1047 (1982).

d. Clients who jointly seek legal counsel, and subsequently are involved in litigation against each other involving a related matter, do not obtain the benefit of the attorney-client privilege.
Cardinale v. Golinello, 43 N.Y.2d 288, 295, 32 N.E.2d 26, 29, 401 N.Y.S.2d 191, 195 (1977) (setting forth test that current litigation must concern "matters related to the subject matter of the second representation"); *Hazlett v. Fusco*, 177 A.D.2d 813, 814, 576 N.Y.S.2d 427, 428 (3d Dep't 1991) (holding that if all interested parties in contract dispute present at time of contract, information disclosed at meeting not privileged). *But see People v. Osorio*, 75 N.Y.2d 80, 85, 549 N.E.2d 1183, 1186, 550 N.Y.S.2d 612, 615 (1989) (stating that coparty's presence does not necessarily indicate joint consultation).

5. *Waiver of Attorney-Client Privilege*: The attorney-client privilege may be waived if the holder of the privilege voluntarily discloses a significant portion of the privileged information (*People v. Shapiro*, 308 N.Y. 453, 458, 126 N.E.2d 559, 561 (1955)), or if he fails to object to the introduction of such privileged evidence (*Jones v. Gelles*, 167 A.D.2d 636, 639, 562 N.Y.S.2d 992, 995 (3d Dep't 1990)).

a. The privilege belongs to the client and cannot be waived by anyone representing him.
People v. Ali, 146 A.D.2d 636, 637, 536 N.Y.S.2d 541, 542 (2d Dep't 1989) (defendant did not waive privilege by his attorney contacting officials about defendant's anticipated surrender or confession). *But see Rosenzweig v. Bank of New York*, 64 A.D.2d 599, 600, 407 N.Y.S.2d 153, 154 (1st Dep't 1978) (holding that conservator may waive privilege for client).

b. The privilege may also be waived by the client if good faith reliance on his attorney is asserted as a defense for the client's actions.
Village of Pleasantville v. Rattner, 130 A.D.2d 654, 655, 515 N.Y.S.2d 585, 586 (2d Dep't 1987).

B. *Doctor-Patient Privilege*

1. The basis of the doctor-patient privilege is that the prevention of embarrassment resulting from disclosure will keep people from hesitating when seeking medical advice and treatment. In addition, the privilege protects the privacy interests of the patient.
Dillenbeck v. Hess, 73 N.Y.2d 278, 284, 536 N.E.2d 1126, 1130, 539 N.Y.S.2d 707, 711 (1989).

a. The confidential disclosures of both the physician and the patient are considered privileged communications.
Hughson v. Francis Hosp. of Port Jervis, 93 A.D.2d 491, 498, 463 N.Y.S.2d 224, 229 (2d Dep't 1983). *But see Williams v. Roosevelt Hosp.*, 66 N.Y.2d 391, 396, 488 N.E.2d 94, 97, 497 N.Y.S.2d 348, 351 (1985) (general medical history not privileged).

2. Anyone licensed to practice medicine shall not be permitted to disclose any information, which was necessary for treatment, and was obtained from the patient while attending to such treatment.
N.Y. CIV. PRAC. L. & R. § 4504 (McKinney 1993); *Dillenbeck v. Hess*, 73 N.Y.2d 278, 280, 536 N.E.2d 1126, 1128, 539 N.Y.S.2d 707, 709 (1989) (privilege

granted unless particular medical condition, which is subject of information sought to be protected, at issue); *People v. Figueroa*, 173 A.D.2d 156, 156, 568 N.Y.S.2d 957, 958 (1st Dep't 1991), *appeal denied*, 78 N.Y.2d 1075, 583 N.E.2d 951, 577 N.Y.S.2d 239 (1991) (privilege is creature of statute and may be abrogated by other statutes).

a. Since the privileged information must have been necessary for the physician's treatment of the patient (*People v. Bostic*, 121 A.D.2d 459, 459, 503 N.Y.S.2d 421, 422 (2d Dep't 1986)), basic facts of the patient's general medical history are not covered by the privilege (*Williams v. Roosevelt Hosp.*, 66 N.Y.2d 391, 396, 488 N.E.2d 94, 97, 497 N.Y.S.2d 348, 351 (1985)).

3. Facts which would be plain to a lay person, not only those with medical training, are not privileged.

Dillenbeck v. Hess, 73 N.Y.2d 278, 284 n.4, 536 N.E.2d 1126, 1130 n.4, 539 N.Y.S.2d 707, 711 n.4 (1989) (applications of privilege in negligent automobile accident situation); *People v. Beneway*, 148 Misc. 2d 177, 178, 560 N.Y.S.2d 96, 97 (Columbia County Ct. 1990) (hospital records concerning defendant's intoxication not privileged in "driving-while-intoxicated" negligence situation).

4. For any communication between doctor and patient to be privileged, it must have been intended to be confidential.

People v. Christopher, 101 A.D.2d 504, 513, 476 N.Y.S.2d 640, 646 (4th Dep't 1984), *rev'd on other grounds*, 65 N.Y.2d 417, 482 N.E.2d 45, 492 N.Y.S.2d 566 (1986).

5. *Waiver*: If a patient fails to object to a physician's testimony regarding allegedly privileged communications, he is presumed to have waived his physician-patient privilege.

Steinberg v. New York Life Ins. Co., 263 N.Y. 45, 50, 188 N.E. 152, 153 (1933).

a. Any communication which is privileged remains privileged until it is waived by the patient.
Yaron v. Yaron, 83 Misc. 2d 276, 284, 372 N.Y.S.2d 518, 525 (Sup. Ct. Spec. T. N.Y. County 1975).

b. Disclosure to third parties constitutes waiver of the physician-patient privilege.
People v. Hawkrigg, 138 Misc. 2d 764, 765, 525 N.Y.S.2d 752, 753 (Suffolk County Ct. 1988) (medical condition publicly disclosed not privileged).

c. Death of the patient does not terminate the physician-patient privilege.
Prink v. Rockefeller Ctr., Inc., 48 N.Y.2d 309, 314, 398 N.E.2d 517, 520, 422 N.Y.S.2d 911, 914 (1979) (psychiatrist's communications to medical examiner in presence of decedent's spouse not privileged).

6. *Psychologist-Patient Privilege*

a. Any disclosure made by a patient to his psychologist, while the psychologist is engaged in the diagnosis or treatment of the patient's condition, is also privileged information.
N.Y. CIV. PRAC. L. & R. § 4507 (McKinney 1993); *People v. Wilkins*, 65 N.Y.2d 172, 178, 480 N.E.2d 373, 376, 490 N.Y.S.2d 759, 762 (1985) (no privilege unless particular medical condition at issue). *See generally Koump v. Smith*, 25 N.Y.2d 287, 250 N.E.2d 857, 303 N.Y.S.2d 858 (1969).

7. *Social Worker-Client Privilege*

a. A certified social worker may not disclose communications made by clients to him in the course of his employment as a social worker.
N.Y. CIV. PRAC. L. & R. § 4508 (McKinney 1993); *People v. Tissois*, 72 N.Y.2d 75, 77, 526 N.E.2d 1086, 1086, 531 N.Y.S.2d 228, 228 (1988). *But see People v. Alaire*, 148 A.D.2d 731, 737, 539 N.Y.S.2d 468, 474 (2d Dep't 1989) (no privilege if communication made in presence of third party).

b. Under statute a confidential communication

exchanged between a "rape crisis counselor" and "client" who is seeking counseling or assistance concerning any sexual offense.
N.Y. CIV. PRAC. L. & R. § 4510 (McKinney 1994); *see also* N.Y. CIV. PRAC. L. & R. § 4510 (commentary).

c. An individual's privilege may not be asserted by a party suspected of having committed a crime against the individual.
Application to Quash a Subpoena Duces Tecum, 56 N.Y.2d 348, 352, 437 N.E.2d 1118, 1120, 452 N.Y.S.2d 361, 363 (1982) (hospital suspected of committing crimes against patients may not assert privilege of patients).

8. *Exceptions*:

a. No privileges are recognized in cases involving crimes against children.
N.Y. CIV. PRAC. L. & R. § 4504(b) (McKinney 1993); N.Y. FAM. CT. ACT § 1046 (McKinney 1993); *Perry v. Fuimano*, 61 A.D.2d 512, 518-19, 403 N.Y.S.2d 415, 416 (2d Dep't 1985) (no privilege in child abuse cases); *People v. Easter*, 90 Misc. 2d 748, 751, 395 N.Y.S.2d 926, 929 (Albany County Ct. 1977).

b. If the medical condition of the patient is in issue as an element of a legal claim or defense, no privilege will be recognized.
People v. Al-Kanani, 33 N.Y.2d 260, 264, 307 N.E.2d 43, 44, 351 N.Y.S.2d 969, 971 (1973), *cert. denied*, 417 U.S. 916 (1974) (no privilege for information on sanity when insanity is asserted as defense for murder). *But see Dillenbeck v. Hess*, 73 N.Y.2d 278, 280, 536 N.E.2d 1126, 1128, 539 N.Y.S.2d 707, 709 (1989) (privilege existed because defendant did not affermatively place her medical condition in issue).

C. *Privileged Confidences to Clergy*

1. Confessions or confidences made to clergymen in their professional capacity are privileged.

N.Y. CIV. PRAC. L. & R. § 4505 (McKinney 1993); *Keenan v. Gigante*, 47 N.Y.2d 160, 166, 390 N.E.2d 1151, 1154, 417 N.Y.S.2d 226, 229 (1979) (recognizing urgent need for people to confide in clergymen for spiritual guidance), *cert. denied*, 444 U.S. 887 (1979); *Ziske v. Luskin*, 138 Misc. 2d 38, 39, 524 N.Y.S.2d 145, 146 (Sup. Ct. Queens County 1987) (marriage counseling from spiritual leader privileged).

a. Such communications must be voluntary to be privileged.
In re N & G Children, 176 A.D.2d 504, 504, 574 N.Y.S.2d 696, 697 (1st Dep't 1991).

b. For communications to be privileged they must be made with the purpose of seeking religious counsel, advice, solace, absolution, or ministration.
People v. Johnson, 115 A.D.2d 973, 973, 497 N.Y.S.2d 539, 540 (4th Dep't 1985) (conversation motivated by Muslim brother not privileged); *In re Fuhrer*, 100 Misc. 2d 315, 320, 419 N.Y.S.2d 426, 431 (Sup. Ct. Richmond County 1979) (communications with rabbi concerning future criminal act not privileged).

D. *Spousal Privilege*

1. Conversations between husband and wife during their marriage are privileged. The communication must have been made in confidence and induced by the marital relation.
People v. Fediuk, 66 N.Y.2d 881, 883, 489 N.E.2d 732, 734, 498 N.Y.S.2d 763, 765 (1985) (phone conversation by husband regarding loving feelings toward wife after he killed her lover held privileged).

a. In order for these communications to be privileged, they must be prompted by the affection, confidence, and loyalty derived from the marital relationship.
People v. D'Amato, 105 Misc. 2d 1048, 1051, 430 N.Y.S.2d 521, 523 (Sup. Ct. Bronx County 1980) (no

privilege in poor or abusive marital relationship); *People v. Edwards*, 151 A.D.2d 987, 987, 542 N.Y.S.2d 425, 426 (4th Dep't 1989) (threats made between spouses not privileged communications), *appeal denied*, 74 N.Y.2d 808, 545 N.E.2d 880, 546 N.Y.S.2d 566 (1989).

2. *Exceptions*:

   a. The spousal privilege is eliminated if the communication is made in the presence of a third party.
   People v. McCormack, 278 A.D. 191, 193, 104 N.Y.S.2d 139, 143 (1st Dep't 1951) (confessions to wife in front of wife's cousin not privileged), *aff'd*, 303 N.Y. 782, 103 N.E.2d 895 (1952).

      (1) For the privilege to be inapplicable, the substance of the communication, and not the mere fact of its occurrence, must be revealed to a third party. *In re Vanderbilt*, 57 N.Y.2d 66, 74, 439 N.E.2d 378, 383, 453 N.Y.S.2d 662, 667 (1982).

   b. There is no spousal privilege in child abuse or neglect proceedings.
   N.Y. FAM. CT. ACT § 1046 (McKinney 1993).

   c. No spousal privilege is recognized in civil actions in which the spouses are adversaries.
   Poppe v. Poppe, 3 N.Y.2d 312, 314, 144 N.E.2d 72, 73, 165 N.Y.S.2d 99, 101 (1957).

   d. No spousal privilege will be recognized if the communication sought to be protected was made in the furtherance of crime.
   People v. Watkins, 89 Misc. 2d 870, 874, 393 N.Y.S.2d 283, 286 (Sup. Ct. Crim. T. Suffolk County 1977) (conspiracy through phone conversations not privileged), *aff'd*, 63 A.D.2d 1033, 406 N.Y.S.2d 343 (2d Dep't), *cert. denied*, 439 U.S. 984 (1978); *People v. Mohammed*, 122 Misc. 2d 504, 505, 470 N.Y.S.2d 997, 998 (Sup. Ct. N.Y. County 1984) (husband's letters to wife threatening to kill her if she did not lie to officials about his actions

not privileged).

3. *Waiver of Spousal Privilege*: The spousal privilege may be waived only if both spouses waive the privilege.

   People v. Fediuk, 66 N.Y.2d 881, 883, 489 N.E.2d 732, 734, 498 N.Y.S.2d 763, 765 (1985); *People v. McCormack*, 278 A.D. 191, 193, 104 N.Y.S.2d 139, 142 (1st Dep't 1951), *aff'd*, 303 N.Y. 782, 103 N.E.2d 895 (1952).

E. *Governmental Privilege*

1. *Balancing Test*: The governmental privilege permits the courts to prohibit disclosure of official information if they find that the public interest in maintaining confidentiality outweighs the need for disclosure.

   Cirale v. 80 Pine Street Corp., 35 N.Y.2d 113, 117, 316 N.E.2d 301, 303, 359 N.Y.S.2d 1, 4 (1974) ("official information" includes confidential communications to and between public employees in performance of their duties).

F. *Communications Heard Through Eavesdropping*: Evidence obtained by illegal eavesdropping as defined in sections 250.00 and 250.05 of the New York Penal Law is privileged information.

   N.Y. CIV. PRAC. L. & R. § 4506 (McKinney 1993); *Pica v. Pica*, 70 A.D.2d 931, 931, 417 N.Y.S.2d 528, 530 (2d Dep't 1979) (information obtained by wiretaps privileged).

G. *Library Materials*: Any library materials, which would reveal the user of such materials, is confidential and shall not be disclosed.

   N.Y. CIV. PRAC. L. & R. § 4509 (McKinney 1993).

XVII. PAROL OR EXTRINSIC EVIDENCE AFFECTING WRITINGS

A. *In General*: The parol evidence rule precludes a party from introducing prior or contemporaneous extrinsic evidence for the purpose of altering unambiguous terms of a valid written agreement.

   Happy Dack Trading Co. v. Agro-Industries, Inc., 602 F. Supp. 986, 991 (S.D.N.Y. 1984); *Adler & Shaykin C.*

Wachner, 721 F. Supp. 472, 476 (S.D.N.Y. 1988); *Mastrangelo v. Kidder, Peabody & Co.*, 722 F. Supp. 1126, 1131 (S.D.N.Y. 1989); *Thomson McKinnon Sec. Inc. v. Harris*, 139 B.R. 267, 273 (Bankr. S.D.N.Y. 1992) (defining "integrated writing" as writing which completely and accurately embodies all mutual rights and obligations of parties).

1. The main purpose of the rule is to avoid potential misevaluation of extrinsic evidence by the jury.

   W.W.W. Assoc. v. Giancontieri, 77 N.Y.2d 157, 162, 566 N.E.2d 639, 642, 565 N.Y.S.2d 440, 443 (1990) (several objectives of parol evidence rule presented as stability of commercial transactions against fraudulent claims, perjury, death of witness, infirmity of memory, and fear of jury error).

2. The determination of whether an ambiguity exists is a question of law for the court to decide.

   Giancontieri, 77 N.Y.2d at 162, 566 N.E.2d at 642, 565 N.Y.S.2d at 443.

B. *When Parol Evidence Rule Applies:*

1. The parol evidence rule applies if the writing or instrument causes a change in legal relations and obligations of the parties. *See DiCostanzo v. Allstate Ins.*, 68 A.D.2d 834, 835, 414 N.Y.S.2d 517, 518 (1st Dep't 1979) (change in insurance policy), *aff'd*, 50 N.Y.2d 832, 407 N.E.2d 1347, 430 N.Y.S.2d 51 (1980); *Matthew Bender & Co. v. Jaiswal*, 93 A.D.2d 969, 970, 463 N.Y.S.2d 78, 79 (3d Dep't 1983) (change in "return policy" of sales contract); *Battista v. Radesi*, 112 A.D.2d 42, 42, 491 N.Y.S.2d 81, 82 (4th Dep't 1985) (change in time of payment in sales contract); *Lazansky v. Lazansky*, 148 A.D.2d 501, 502, 539 N.Y.S.2d 24, 25 (2d Dep't 1989) (change in amount agreed upon for maintenance and child support); *Neiman v. Backer*, 167 A.D.2d 403, 404, 561 N.Y.S.2d 811, 813 (2d Dep't 1990) (change in partnership agreement).

2. If an agreement is partly oral and partly written, parol evidence may only be admitted to complete the written portion of the agreement as long as it does not contra-

dict the original writing.

Laskey v. Rubel Corp., 303 N.Y. 69, 71, 100 N.E.2d 140, 141 (1951) (oral portion of employment contract provided for one year's employment at weekly salary and expenses; and written portion provided terminable at will, held that oral portion permissible, but not to extent duration provision contradicted written agreement).

3. The rule protects the rights of all who depend on the writing, even those who were not a party to the contract.

Oxford Commercial Corp. v. Landau, 12 N.Y.2d 362, 365-66, 190 N.E. 230, 231, 239 N.Y.S.2d 865, 867 (1963) (corporate settlement in which director specifically agreed not to sue "any person except . . .," and proceeded to list the people in the corporation he could sue, protected all those unlisted as protected beneficiaries).

4. Evidence which shows that a written agreement was made upon an oral condition precedent to its legal effectiveness is admissible unless it contradicts the express terms of such writing.

Hicks v. Bush, 10 N.Y.2d 488, 491, 180 N.E.2d 425, 427, 225 N.Y.S.2d 34, 36-37 (1962).

C. *When Parol Evidence Rule Does Not Apply*:

1. The Parol Evidence Rule does not apply to subsequent modifications that are supported by new consideration.

Backer v. Lewit, 180 A.D.2d 134, 138, 584 N.Y.S.2d 480, 482 (1st Dep't 1992).

2. Parol evidence rule does not apply in criminal proceedings.

People v. Dean, 56 A.D.2d 242, 251, 392 N.Y.S.2d 134, 142 (4th Dep't 1977), *aff'd*, 45 N.Y.2d 651, 384 N.E.2d 1277, 412 N.Y.S.2d 353 (1978).

3. The Parol Evidence Rule does not apply to a collateral parol contract which is "distinct from and independent of the written agreement" unless it contradicts the writing.

Mitchell v. Lath, 247 N.Y. 377, 380, 160 N.E. 646,

646 (1928).

D. *Complete Integration*: If a writing constitutes a complete integration, the entire agreement of the parties, and the parol evidence sought to be introduced would have naturally been included, this evidence is inadmissible.

Potsdam Cent. Sch. v. Honeywell, 120 A.D.2d 798, 800, 501 N.Y.S.2d 535, 537 (3d Dep't 1986).

E. *Oral Modifications*

1. Oral modifications are ineffective if a writing is required by the Statute of Frauds.

Intercontinental Planning, Ltd. v. Daystrom, Inc., 24 N.Y.2d 372, 379-80, 248 N.E.2d 576, 580, 300 N.Y.S.2d 817, 823 (1969).

2. "No oral modification" clauses are enforceable in contracts.

N.Y. GEN. OBLIG. § 15-301(1) (McKinney 1993); N.Y. U.C.C. § 2-209(2)(3) (McKinney 1993); *Cliffs Management Corp. v. Great Eastern Management Corp.*, 85 A.D.2d 584, 585, 445 N.Y.S.2d 460, 462 (1st Dep't 1981).

F. *Invalidation of Written Instruments*

1. If the issue is whether the parties in fact intended to form a legal relationship, the parol evidence rule does not apply.

Arner v. Arner, 89 A.D.2d 899, 899, 453 N.Y.S.2d 716, 716 (2d Dep't 1982).

2. Parol evidence is always admissible in order to show fraud, (*GTE Automatic Elec. Inc. v. Martin's Inc.*, 127 A.D.2d 545, 546, 512 N.Y.S.2d 107, 108 (1st Dep't 1987)) even if the instrument includes a disclaimer or merger clause (*Lee v. Goldstrom*, 135 A.D.2d 812, 813, 522 N.Y.S.2d 917, 918 (2d Dep't 1987)). *But see Mayer v. Rabinowitz*, 114 A.D.2d 357, 357, 493 N.Y.S.2d 877, 877 (2d Dep't 1985) (merger clause was specific to particular matter of alleged fraud).

G. *Interpretation of Writings*

1. Parol evidence is inadmissible unless needed to clarify

an ambiguity.

American Express Bank Ltd. v. Uniroyal, Inc., 164 A.D.2d 275, 277, 562 N.Y.S.2d 613, 615 (1st Dep't 1990); *Marrus v. AUI Indus., Inc.*, 171 A.D.2d 549, 549, 567 N.Y.S.2d 261, 262 (1st Dep't 1991).

2. The determination of an ambiguity is based on whether the words are susceptible to more than one meaning.

Campanile v. State Farm Gen. Ins. Co., 161 A.D.2d 1052, 1054, 558 N.Y.S.2d 203, 204 (3d Dep't 1990), *aff'd*, 78 N.Y.2d 912, 577 N.E.2d 1055, 573 N.Y.S.2d 463 (1991).

3. Trade or custom usage is admissible even if contrary to the ordinary meaning of the words.

New Hampshire Ins. Co. v. Cruise Shops, Inc., 67 Misc. 2d 60, 61, 323 N.Y.S.2d 352, 354 (Sup. Ct. N.Y. County 1971).

a. However, such extrinsic evidence may not be used to create an ambiguity when the intent of the parties is clear.

British American Dev. Corp. v. Fay's Drug Co., 178 A.D.2d 801, 577 N.Y.S.2d 528, 529 (3d Dep't 1991).

H. *Exceptions (When Parol Evidence is Admissible)*:

1. Parol evidence is admissible to show the illegality of the consideration, or of the subject matter.

Atkin v. Union Processing Corp., 90 A.D.2d 332, 334, 457 N.Y.S.2d 152, 154 (4th Dep't 1982), *aff'd*, 59 N.Y.2d 919, 453 N.E.2d 522, 466 N.Y.S.2d 293 (1983), *cert. denied*, *Union Processing Corp. v. Atkin*, 465 U.S. 1038 (1984).

2. In the case of a mistake, parol evidence is also admissible.

Marine Midland Bank-Southern v. Thurlow, 53 N.Y.2d 381, 387, 425 N.E.2d 805, 807, 442 N.Y.S.2d 417, 419 (1981); *Intershoe, Inc. v. Bankers' Trust Co.*, 160 A.D.2d 520, 521, 554 N.Y.S.2d 514, 515 (1st Dep't 1990), *rev'd on other grounds*, 77 N.Y.2d 517, 571 N.E.2d 641, 569 N.Y.S.2d 333 (1991).

3. Parol evidence is admissible to show the lack of, as well

as the failure of, consideration.

Hahn v. Mills, 72 A.D.2d 958, 959, 422 N.Y.S.2d 251, 252 (4th Dep't 1979).

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