CHAPTER ONE

EVIDENCE

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Table of Contents

I. Hearsay Exceptions And Related Issues 17

A. Right Of Confrontation 17

B. Admissions 18

1. Definition 18

2. Admissions vs. Confessions 19

3. Admission By Silence 20

4. Pre- Or Post-Arrest Silence 21

5. Admission By Conduct 22

6. Plea-Related Statements 23

7. Bruton Rule 24

8. Corroboration Of Confession 24

9. Statements Made By Counsel Or Other Agent 24

10. Interpreters 25

11. Non-Inculpatory Portion Of Statement 25

C. Business Records 26

1. Statutory Foundation 26

2. Authentication 27

3. "Reasonable Time" Requirement 28

4. Maker's Lack Of Personal Knowledge; Admissibility Of Statements

Made By Other Persons To Maker Of Record 28

5. Specific Types Of Records 29

a. Ballistics Reports 29
b. Criminal Enterprises 29
c. Court Transcript 29
d. Drug Testing/Lab Reports 29
e. Medical Records 30

i. Hospital Records 30
ii. Private Physicians' Records 30
iii. Statements Relevant To Treatment Or Diagnosis 30
iv. Opinions 35
v. X-Rays 35

f. Store Receipts And Price Tags …….. 36
g. Computer Printouts 37

6. Copies 37

7. Transcription Of Original Record Into Permanent Form 38

8. Right Of Confrontation 38

D. Public Records 44

1. Generally 44

2. Statutory Authentication Rule 44

3. Birth And Death Certificates 45

E. Best Evidence Rule 45

F. Declarations Against Penal Interest 46

1. Foundation 46

2. Offered By Prosecution 47

3. Unavailability; Declarant's Invocation Of Fifth Amendment 48

4. Motive To Falsify 48

5. Declarant's Awareness That Statement Is Against Interest 50

6. Basis Of Declarant's Knowledge 50

7. Non-Inculpatory Portion Of Statement 50

8. Right Of Confrontation 51

G. Dying Declarations 52

H. Excited Utterances 53

1. Foundation 53

2. Time Between Statement And Event 55

3. Statement Made In Response To Inquiry 57

4. Statements By Bystanders 57

5. Recantation 57

6. Right Of Confrontation 57

7. Infant Declarants 63

I. Former Testimony 63

1. Foundation 63

2. Proceedings In Which Testimony May be Admitted 64

3. Due Diligence In Locating And Producing Witness 64

4. Illness Or Incapacity Of Witness 65

5. Right Of Confrontation 65

J. Past Recollection Recorded 67

K. Present Sense Impression 67

L. Prompt Outcry Of Victim 70

M. Pedigree 73

N. Inferential Hearsay 73

O. State Of Mind 75

1. Intention to Perform Future Act 75

2. Declaration Of Reason, Motive Or Feeling 77

3. Evidence Not Offered For Truth 77

4. Right Of Confrontation 78

P. Trustworthiness Exception 79

1. Statements Offered By Respondent 79

2. Statements Offered By Prosecution 81

Q. Co-Conspirator Statements 81

R. Statements By Witness Who Is Unavailable Due To Respondent's Misconduct 82

S. Phone Conversations 86

T. Impeachment Of Hearsay Declarant 87

U. Opening The Door 87

V. Interpreters 88

W. Internet And Text Messages 89

II. Presumptions And Inferences 91

A. Constitutional Considerations 91

B. Penal Law 92

1. Possession Of Drugs In Car 92
a. PL §220.25(1) 92
b. Drugs Not Located In Passenger Compartment 92
c. Drugs Concealed Upon Occupant 92

2. Possession Of Drugs In Open View In a Room 92

a. PL §220.25(2) 93
b. Close Proximity 93
c. Circumstances Evincing Intent To Sell 93
d. Open View 93

3. Possession Of Weapon In Car 93

a. PL §265.15(3) 94
b. Weapon Concealed Upon Occupant 94
c. Location Of Weapon In Car 94
d. "Occupant" Of Car 95

4. Unauthorized Use Of A Motor Vehicle 95

5. Criminal Possession Of Stolen Property 95

6. Intent To Use Weapon Unlawfully 95

7. Presumption Of Sanity 95

C. Case Law-Created Rules 96

1. Person Intends The Ordinary Natural Consequences Of His Or Her Acts 96

2. Recent And Exclusive Possession Of Fruits Of Crime 96

a. Generally 96
b. "Recent And Exclusive" 97

3. Missing Witness Inference 97

a. Defense Witness 97
b. Prosecution Witness 98
c. Within "Control" Of Party 98
d. Cumulative Testimony 101
e. Knowledge Of Witness 102
f. Unavailability Of Witness Due To Invocation Of Fifth Amendment 102
g. Infant Witness 103
h. Respondent's Failure To Testify 103
i. Comments During Summation 103

4. Mailing And Delivery 103

III. Expert Testimony 104

A. Bite Marks 109

B. Blood Stains.....109

C. Credibility Of Witnesses 109

D. Credibility Of Confession 111

E. Capacity To Waive Miranda Rights.....112

F. Respondent's State Of Mind During Crime 113

G. DNA Tests 114

H. Drug Analysis 115

1. Use Of Known Standards 115

2. Factual Basis For Opinion 115

3. Conditions At Laboratory 116

4. Scientific Acceptance 116

I. Fingerprints 117

J. Identification 117

K. Arson 123

L. Polygraph And Other Credibility Tests 124

M. Syndrome Evidence 125

1. Rape Trauma Syndrome 125

2. Child Sexual Abuse Syndrome 126

3. Battered Person Syndrome/Domestic Violence 128

4. Shaken Baby Syndrome 128

5. Neonaticide Syndrome 128

6. Munchausen Syndrome By Proxy 129

7. Parental Alienation Syndrome 129

N. Forcible Sexual Assault And Other Injuries 129

O. Criminal Modus Operandi 131

P. "Profile" Evidence 136

Q. Accident Reconstruction 137

R. Firearm Identification 138

S. Handwriting Comparison 138

IV. Examination Of Witnesses 139

A. Order Of Proof 139

B. Direct Examination 141

C. Cross-Examination 142

1. Scope 142

2. Right Of Confrontation 142

a. Inability To Cross-Examine 142
b. Memory Lapse Of Witness 144
c. Hypnotically Refreshed Testimony 144
d. Right To Face Witness 145

i. In-Court Testimony 145
ii. Closed-Circuit Television 145

e. Identity Of Witness 147
f. Waiver Of Right 148
g. Location Of Police Observation Post 148
h. Adequacy Of Police Investigation 149

D. Examination Of Witnesses By Judge 150

E. Impeachment 152

1. Ability Of Witness To Perceive And Recall 152

2. Failure Of Alibi Witness To Promptly Come Forward 154

3. Bad Acts 155

a. Nature Of Acts 155
b. Use Of Extrinsic Evidence 157
c. Acts Committed By Juveniles Or Youthful Offenders 158
d. Good Faith Basis Of Examiner 159
e. Witness' Invocation Of Fifth Amendment 159
f. Dismissal Of Charges 160

4. Convictions 160

a. Nature Of Conviction 160
b. Use Of Extrinsic Evidence 161
c. Underlying Facts 161
d. Delinquency and Youthful Offender Adjudications 161
e. Proof Of Conviction 162

i. Certificate Of Conviction 162
ii. Adjudicative Facts 162
iii. Testimony Of Witness To Conviction 162

f. Right Of Confrontation 163
g. Finality Of Conviction 163

5. Sandoval 163

a. Pretrial Ruling 163
b. Bad Acts And Convictions 164

i. Nature And Time Of Acts 164
ii. Prosecutorial Misconduct 167
iii. Dismissal Of Charges 167
iv. Pending Cases; Invocation Of Fifth Amendment 168

c. Use Of Aliases 169
d. Advance Notice Of Prosecutor's Intent To Impeach 169
e. Failure Of Respondent To Seek Pretrial Ruling 169
f. Finality Of Pretrial Ruling 169

g. Cross-Examination Of Respondent By Attorney For Co-Respondent 170
h. Preemptive Presentation Of Evidence By Accused 170
i. Prosecution Witnesses 171

6. Motive To Falsify 171

a. Use Of Extrinsic Evidence 171
b. Bias And Hostility 171
c. Financial Or Property Interest 173
d. Witness' Fear Of Harm 174
e. Right Of Confrontation 175
f. Witness Cooperation Agreement 175

7. Prior Inconsistent Statements 176

a. Foundation 176

i. Oral Statements 176
ii. Written Statements 179
iii. Prior Testimony 180

b. Introduction Of Police Reports And Other Records 180
c. Pretrial Silence Of Accused 181
d. Admission Of "Consistent" Facts 182
e. Statements Made To Defense Counsel 182

8. Prior Sexual Conduct Or Allegations Of Victim In Sex Offense Case 182

9. Reputation For Truthfulness And Veracity 188

10. Opportunity To Tailor Testimony 189

11. Collateral Issues 190

12. Impeachment Of Own Witness 190

13. Prosecutorial Misconduct On Cross-Examination 192

F. Bolstering 193

1. Pretrial Identification Of Respondent 193

a. Proved By Testimony Of Identifying Witness 193

b. Proved By Testimony Of Police Officer Or Other Third Party ……..193
c. Photo Identifications 195
d. "Negative" Identification Evidence 196
e. Description Testimony.....196
f. Witness' Sketch Of Respondent 197
g. Identification Of Accomplice 197

2. Prior Consistent Statements 197

3. Good Character Of Witness ……..198

G. Competency To Testify And Be Sworn 199

1. Generally 199

2. Oaths 199

a. Generally 199
b. Infants 200
c. Voir Dire 203

3. Corroboration 203

H. Interpreters 203

I. Refreshing Recollection Of Witness 205

J. Exclusion Of Witness From Courtroom 206

V. Privileged Communications 208

A. Attorney-Client 208

1. Generally 208

2. Existence Of Relationship 210

3. Employees Of Attorney 211

4. Communications Within Privilege 212

a. Crime-Fraud Exception 212
b. Documents 214
c. Address Of Client ……214

d. Stolen Property ……214

5. Waiver 215

a. Presence Of Third Parties 215
b. In-Court Disclosure 216
c. Extrajudicial Disclosure 216

6. Sanction For Violation Of Privilege ……..217

B. Clergyman-Penitent 217

C. Spousal 218

D. Parent-Child 219

E. Physician (and other health care professional)-Patient 219

1. Generally 219

2. Exceptions 221

a. Public Health Law §3373 221
b. PL §265.25 221
c. Social Services Law §§413, 415 221
d. "Tarasoff" Warnings 222

3. Waiver 222

4. Sanctions For Disclosure 223

F. Psychologist-Client 224

G. Social Worker-Client 224

1. Generally 224

2. Exceptions 224

a. CPLR §4508 224
b. Reporting Cases Of Suspected Child Abuse Or Maltreatment ……225

VI. Circumstantial Evidence 225

A. Uncharged Crimes Evidence 225

1. Generally 225

2. Exceptions To Molineux Rule 227

a. Amorous Design 227
b. Common Plan Or Scheme 227
c. Defense Of Accident 228
d. Defense Of Consent 229
e. Identity 229

i. Unique Modus Operandi 229
ii. Prior Crime Committed In Presence Of Witness ...233
iii. Other Crime Directly Related to Crime Charged 234

f. "Inextricably Interwoven" With Crime Charged 235
g. Respondent's Mens Rea 238
h. Acting In Concert Charge 240
i. Motive Of Respondent 241
j. Motive Of Witness To Testify 242
k. Possession Of Weapon 243
l. Drug Sales 243

3. Burden Of Proof Concerning Other Crimes 243

4. "Inferential" Uncharged Crimes Evidence 244

a. Membership In Gang 245
b. Nickname 245
c. Police Fingerprint Card 245
d. Possession Of Large Amount Of Money Or Drug-Related Items By Respondent Charged With Possessing Or Selling Drugs 245
e. HIV Status 246
f. General Suggestion Of Criminality 247

5. Advance Ruling On Admissibility 247

6. Concession Of Element By Defense 248

7. Redaction Of Evidence To Avoid Prejudice 249

8. Preemptive Presentation Of Evidence By Accused 250

B. Character Evidence 250

1. Good Character Of Respondent 250

a. Generally 250
b. Nature Of Good Character Evidence 250
c. Cross-Examination Of Character Witness 251
d. Prosecution Rebuttal Evidence 252

2. Character Of Victim Where Justification Defense Is Raised 252

C. Consciousness Of Guilt 253

1. Flight Or Evasive Conduct 253

2. False Alibi Or Explanation 254

3. Bribes And Other Attempts To Influence Witness 254

4. Threats Against Witness 255

5. Behavior Of Respondent When Arrested 255

6. Refusal To Appear In Lineup 255

7. Apology For Offense 255

8. Consultation With Attorney 256

9. Conduct Of Others 256

10. Consciousness Of Innocence 256

VII. Demonstrative Evidence 256

A. Relevance 256

B. Chain Of Custody 258

1. Generally 258

2. Drugs And Other Lab-Tested Evidence 258

3. Other Physical Evidence 260

C. Photographs And Diagrams 261

D. Audio And Video Recordings …….....262

E. Courtroom Demonstrations And Experiments 267

1. Display Of Injuries 267

2. Display Of Respondent's Physical Characteristics 267

3. Voice Exemplar 268

4. Re-enactment Of Crime 268

F. Private Writings 270

G. Computer-Generated Exhibits 270

VIII. Collateral Estoppel 270

A. Generally 270

B. Double Jeopardy 272

C. Evidence Excludable Under Doctrine 272

D. Identity Of Parties 273

E. Finality Of Prior Determination 274

F. Full And Fair Opportunity To Litigate Issues 275

IX. Preservation Of Issues For Appellate Review 275

A. Generally 275

B. Preservation Of Specific Issues 278

1. Bolstering Of identification 278

2. Change In Theory Of Prosecution At Trial 278

3. Judicial Interference In Trial 278

4. Improper Ruling On Lesser Included Offense 278

5. Improper Restriction Of Cross-Examination 279

6. Repugnant Verdict 279

7. Right To Counsel 279

a. State Constitutional Right To Counsel During Interrogation 279
b. Right To Consult With Counsel During Trial 279

8. Failure To Serve Timely Notice Of Intent To Offer Evidence Under FCA §330.2 280

9. Miranda Violation 280

10. Illegality Of Arrest 280

11. Sandoval Ruling 280

12. Discovery Violation 281

13. Missing Witness Inference 281

14. Double Jeopardy 281

15. Hearsay/Right Of Confrontation 282

16. Least Restrictive Alternative 282

C. Legal Sufficiency Of Evidence 283

D. Offers Of Proof 284

E. Preservation By Co-Respondent 286

F. Motions In Limine 286

I. Hearsay Exceptions And Related Issues

Although some states permit the admission of hearsay when the declarant is available and subject to cross-examination, the Court of Appeals has rejected that approach and requires a showing of sufficient indicia of reliability before evidence may be admitted under a hearsay exception. Nucci v. Proper, 95 N.Y.2d 597, 721 N.Y.S.2d 593 (2001).

The proponent has the burden of establishing the applicability of a hearsay exception. Tyrrell v. Wal-Mart Stores, Inc., 97 N.Y.2d 650, 737 N.Y.S.2d 43 (2001); People v. Nieves, 67 N.Y.2d 125, 131, 501 N.Y.S.2d 1 (1986).

A prosecutor should not attempt to camouflage hearsay by phrasing questions to a witness in a particular manner. United States v. Johnson, 529 F.3d 493 (2d Cir. 2008) ("it is unacceptable for representatives of the government to present their case with abusive disregard for the rules of law," and that "there was no warning from the form of the AUSA's questions that [the witness's] answers would include inadmissible prejudicial matter").

A. Right Of Confrontation - The constitutional right of confrontation must be taken into account whenever the prosecution offers hearsay evidence containing the statements of a witness who is not available for cross-examination. This is particularly true after the United States ground-breaking decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), written by Justice Scalia.

After a lengthy discussion of the history and evolution of the right of confrontation, the Supreme Court noted that the principal evil at which the Confrontation Clause was directed was the use of ex parte witness examinations as evidence against the accused. The Court once again rejected the view that the Confrontation Clause applies only to in-court testimony, but noted that the Confrontation Clause focuses on "testimonial" evidence, which is, generally speaking, a statement that the declarant would reasonably expect to be used prosecutorially. This includes prior testimony at a court hearing, formalized materials such as affidavits and depositions, and statements taken by police officers.

With respect to testimonial evidence, the Court asserted that the Framers would

not have allowed admission of the statements of a witness who did not appear at trial unless he was unavailable, and the defendant had a prior opportunity for cross-examination. While the Court held in Ohio v. Roberts that the admissibility of hearsay evidence is conditioned on whether it bears adequate "indicia of reliability" -- to meet that test, evidence must either fall under a "firmly rooted hearsay exception" or bear "particularized guarantees of trustworthiness" -- the Sixth Amendment does not suggest any open-ended exceptions from the confrontation requirement.

Thus, where testimonial evidence is at issue, the Sixth Amendment requires unavailability and a prior opportunity for cross-examination.

In Crawford, the Supreme Court held that the Confrontation Clause was violated because the trial court admitted, as a declaration against interest, a statement that was made by the defendant's wife despite the fact that the defendant had no opportunity to cross-examine her. See also Davis v. Washington and Hammon v. Indiana, 547 U.S. 813, 126 S.Ct. 2266 (2006) (Confrontation Clause provides protection against only testimonial hearsay).

B. Admissions

1. Definition - In the context of a criminal or juvenile delinquency proceeding, an admission is a statement or act of the accused, or his or her representative, which is inconsistent with or otherwise undermines the accused's position. Richardson On Evidence, §8-201. See People v. Ramlall, 99 A.D.3d 815 (2d Dept. 2012) (defendant's statement to officer that he had "dispute" with complainant too ambiguous to be against penal interest or be judged trustworthy or reliable); People v. Pierre, 41 A.D.3d 289, 838 N.Y.S.2d 546 (1st Dept. 2007), lv denied 9 N.Y.3d 880 (trial court properly received, as admission, testimony regarding Internet instant message in which defendant told victim's cousin that he did not want victim's baby); People v. Leslie, 41 A.D.3d 510, 837 N.Y.S.2d 304 (2d Dept. 2007), lv denied 9 N.Y.3d 923 (defendant's statement -- "this is a bad situation that got out of hand. I'm sorry" -- constituted admission); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been

complainant), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless); People v. Ballinger, 176 Misc.2d 803, 675 N.Y.S.2d 494 (Sup. Ct., Kings Co., 1998) (defendant's statements that "he could not do the time" were too ambiguous to permit jury to infer guilt). The respondent is entitled to have the exculpatory portion of an admission admitted along with the inculpatory portion. People v. Dlugash, 41 N.Y.2d 725, 395 N.Y.S.2d 419 (1977); People v. Pitt, 84 A.D.3d 1275 (2d Dept. 2011) (defendant was entitled to have complete statements, rather than only inculpatory portions, introduced into evidence); People v. Rodriguez, 188 A.D.2d 566, 591 N.Y.S.2d 463 (2d Dept. 1992) (exculpatory statement made 10 minutes after admission was part of continuous interrogation); People v. Saintilima, 173 A.D.2d 496, 570 N.Y.S.2d 113 (2d Dept. 1991); People v. Freeman, 145 Misc.2d 590, 547 N.Y.S.2d 534 (Sup. Ct. Monroe Co., 1989) (rule applies only when defendant offers statement).

An admission may take the form of a judicial admission, such as adverse testimony, a stipulation (see CPLR §2104), a statement in pleadings, or a plea of guilty, or an extrajudicial admission. Richardson, §§ 8-214-219; see People v. Byfield, 15 A.D.3d 262, 790 N.Y.S.2d 434 (1st Dept. 2005), lv denied 4 N.Y.3d 884 (alibi notice properly admitted as admission that was contrary to defendant's position at trial); but see People v. Hills, 140 A.D.2d 71, 532 N.Y.S.2d 269 (2d Dept. 1988) (respondent may not compel presentment agency to stipulate to element of crime, since prosecutor is entitled to prove case in any legally proper manner).

2. Admissions vs. Confessions - A confession is an acknowledgment of guilt, and, therefore, constitutes direct evidence. An admission, which includes facts which tend to prove guilt, is circumstantial evidence. Richardson, §8-251. This distinction is important when the defense argues that the prosecution's evidence is wholly circumstantial, and, as a result, must meet the "moral certainty" standard. See, e.g., People v. Burke, 62 N.Y.2d 860, 477 N.Y.S.2d 618 (1984) (defendant made "admission" when, in response to question concerning whether he had covered his tracks, he stated "yes, there was nothing to worry about, [defendant] had left nothing behind, no one would find anything"); People v. Sanchez, 61 N.Y.2d 1022, 475

N.Y.S.2d 376 (1984) (defendant made "admission" when he conceded being with strangulation victim on night of murder, and hitting her twice); People v. Rumble, 45 N.Y.2d 879, 410 N.Y.S.2d 806 (1978) ("I'm not responsible for what I did" was confession); People v. Pagan, 159 A.D.2d 6, 559 N.Y.S.2d 286 (1st Dept. 1990), lv denied 76 N.Y.2d 895, 561 N.Y.S.2d 558 ("I didn't mean it" was "confession").

3. Admission By Silence - Testimony concerning an accusation made in a party's presence, combined with evidence that the party did not respond or made an evasive or equivocal reply, is admissible as a tacit admission of the truth of the accusation if the person fully heard and comprehended and was at liberty to answer, and the circumstances were such that the party would naturally be expected to deny the accusation if it were not true. Richardson, §8-223. Since the evidence is not admissible if the party addressed may have been incapable of hearing the accusation or was unable to understand the language used, Richardson, §8-223, the proponent should establish the listener's physical proximity to the speaker, that the speaker spoke English or another language understood by the listener, and the speaker's tone of voice. See, e.g., People v. Rogers, 94 A.D.3d 1246 (3d Dept. 2012) (no error in admission of testimony regarding defendant's failure to respond when victim's sister, seeing victim with icepack on her head, accused defendant of injuring victim, and failure to respond when victim stated to defendant that, when she had two black eyes, she had to lie about being in car accident to prevent others from knowing she was in abusive relationship); People v. Frias, 250 A.D.2d 495, 673 N.Y.S.2d 416 (1st Dept. 1998), lv denied 92 N.Y.2d 982, 683 N.Y.S.2d 763 (defendant's fear of accuser only affects weight of evidence); People v. Benanti, 158 A.D.2d 698, 551 N.Y.S.2d 963 (2d Dept. 1990), lv denied 76 N.Y.2d 731, 558 N.Y.S.2d 892 (defendant failed to respond to co-defendant's statement, "come on, let's go. We have three other people we have to kill"); People v. Adams, 154 A.D.2d 606, 546 N.Y.S.2d 433 (2d Dept. 1989) (defendant failed to deny having sex with complainant); People v. Husband, 135 A.D.2d 406, 522 N.Y.S.2d 132 (1st Dept. 1987); People v. Harold, 125 A.D.2d 491, 509 N.Y.S.2d 409 (2d Dept. 1986).

An individual can also adopt a statement through affirmative behavior. See

People v. Campney, 94 N.Y.2d 307, 704 N.Y.S.2d 916 (1999) (defendant met privately with brother for 10-15 minutes after brother confessed, was then seen holding the confession, and told brother that he "might as well sign" the confession because he had already told the police what happened).

A right of confrontation problem may arise when the prosecution introduces statements made to the accused by a cooperating accomplice as the accused's admissions by adoption. See State v. Hernandez, 875 So.2d 1271 (Florida Dist. Ct. App., 3rd Dist. 2004), appeal dism'd 911 So.2d 95 (statements made by co-defendant's during taped phone conversation he had with defendant at request of police were properly excluded); but see People v. Zavala, 168 Cal.App.4th 772 (Cal. Ct. App., 5th Dist., 2008) (since adoptive admissions are in effect defendant's own admissions, no Confrontation Clause issue raised by their introduction into evidence); People v. Combs, 101 P.3d 1007 (CA 2004) (no right of confrontation violation where statements incriminating defendant were admitted not for purposes of establishing truth of matter asserted, but as defendant's adoptive admissions).

4. Pre- Or Post-Arrest Silence - Evidence of the respondent's failure to deny an accusation while under arrest, or the respondent's invocation of the right to counsel, is not admissible on the prosecution's direct case. The respondent's right to remain silent outweighs the limited probative value of the evidence. See People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981); People v. Theodore, 113 A.D.3d 703 (2d Dept. 2014) (court improperly permitted prosecutor to question defendant about post-arrest silence where defendant initially responded to certain questions, but then invoked right to remain silent); People v. McArthur, 101 A.D.3d 752 (2d Dept. 2012), lv denied 20 N.Y.3d 1101 (reversible error where prosecutor stated in summation that at time of arrest, defendant looked "[d]isappointed," which is "not how an innocent person is going to react being told he's being charged with murder," commented on defendant's failure to question charges, stated that defendant looked "distracted" during a car ride to the police station, which is "the reaction of a guilty man who knows he's been caught," and stated that when questioned in police station, defendant "smile[d]"; defendant's denial of involvement in shooting did not open door to comments by the prosecutor);

People v. Slishevsky, _A.D.3d_, 2012 WL 2626932 (4th Dept. 2012) (court erred in admitting testimony of detective to effect that defendant never asked for details of allegations); People v. Whitley, 78 A.D.3d 1084, 912 N.Y.S.2d 257 (2d Dept. 2010) (silence or invocation of right against self-incrimination inadmissible even where defendant initially responds to questioning but then declines to answer additional questions); People v. Goldston, 6 A.D.3d 736, 776 N.Y.S.2d 102 (3rd Dept. 2004) (rule applies where defendant responds to questioning but declines to answer certain questions); People v. Carter, 149 A.D.2d 83, 545 N.Y.S.2d 125 (1st Dept. 1989), appeal withdrawn 75 N.Y.2d 916, 555 N.Y.S.2d 34 (1990); but see People v. Ronette Ricketts,

(County Ct., Dutchess Co., 2012) (defendant's refusal to make statement admissible to rebut psychiatric defense by showing defendant's presence of mind and command of faculties at time she was allegedly exhibiting paranoia, hearing voices, and talking to blackboard; however, subsequent invocation of right to counsel not admissible since it occurred at different time and location, followed Miranda warnings and was neither unprompted nor made in response to a general inquiry, and defendant's supplemental CPL §250.10 notice did not assert that she was continuing to exhibit paranoia, hear voices, or talk to inanimate objects when she arrived at police station).

However, in Salinas v. Texas, 133 S.Ct. 2174 (2013), the Supreme Court found no Fifth Amendment violation where the prosecutor argued that defendant's pre-custodial refusal to answer the officer's question suggested that he was guilty. The court observed that defendant was not subjected to the inherently compelling pressures of a pre-Miranda custodial interrogation, or subjected to threats to withdraw a governmental benefit, and thus was not deprived of a free choice to admit, deny, or refuse to answer. But see United States v. Okatan, 728 F.3d 111 (2d Cir. 2013) (noting that the Salinas decision did not decide the issue, court holds that a suspect's pre-arrest invocation of privilege and subsequent silence cannot be used by government in case in chief as substantive evidence of guilt).

5. Admission By Conduct - A nonverbal reaction to a statement, or conduct inconsistent with the defense at trial, may also be admissible. This includes

conduct that evidences a consciousness of guilt. Richardson, §§ 8-220-222. See, e.g., People v. Lourido, 70 N.Y.2d 428, 522 N.Y.S.2d 98 (1987) (testimony that defendant shrugged shoulders in response to accusation not admissible in absence of evidence that he understood English); People v. Morgan, 66 N.Y.2d 255, 496 N.Y.S.2d 401 (1985) (prosecutor improperly commented on defendant's calm denial of guilt to police, and suggested that a person who was innocent would have been more upset); People v. Pabon, 14 Misc.3d 140(A), 836 N.Y.S.2d 502 (App. Term, 1st Dept., 2007) (trial court improperly admitted testimonial evidence that non-testifying accomplice handed over contraband when after being asked by police to produce what defendant had given him); People v. Graziosa, 10 Misc.3d 128(A), 809 N.Y.S.2d 483 (App. Term, 1st Dept. 2005) (evidence that defendant was smiling and appeared "happy" at time of and after arrest contradicted justification defense); People v. Robinson, 140 A.D.2d 644, 528 N.Y.S.2d 676 (2d Dept. 1988) (no proof defendant's nod in response to accomplice's statement reflected agreement); People v. Borcsok, 107 A.D.2d 42, 485 N.Y.S.2d 766 (2d Dept. 1985); People v. Pena, 23 Misc.3d 1105(A), 881 N.Y.S.2d 366 (Crim. Ct., N.Y. Co., 2009) ("nod" when complainant asked about theft was incriminating).

6. Plea-Related Statements - A guilty plea, once withdrawn, is out of the case forever and for all purposes. People v. Droz, 39 N.Y.2d 457 (1976); People v. Spitaleri, 9 N.Y.2d 168 (1961).

Statements made during plea negotiations can be used against the accused at trial only if the prosecution specifically bargained for use of the statements. People v. Curdgel, 83 N.Y.2d 862, 611 N.Y.S.2d 827 (1994); People v. Evans, 58 N.Y.2d 14, 457 N.Y.S.2d 757 (1982); People v. Thompson, 108 A.D.3d 732 (2d Dept. 2013). See also United States v. Mezzanatto, 513 U.S. 196, 115 S.Ct. 797 (1995) (voluntary and knowing agreement to waive Federal Rules' exclusionary provisions is enforceable); United States v. Velez, 354 F.3d 190 (2d Cir. 2004) (proffer agreement in which defendant agreed to Government's use of statements in rebuttal was not unconstitutional); People v. Forbes-Haas, 32 Misc.3d 685 (County Ct., Onondaga Co., 2011) (CPLR §4547, which bars use of statements made during settlement

negotiations, does not apply in criminal prosecution since public interest in prosecuting crime outweighs interest in settlement of civil claims).

7. Bruton Rule - At a joint trial, a non-testifying defendant's statement incriminating himself and the co-defendant is inadmissible unless redacted; otherwise, separate trials are required because the jury may not follow an instruction not to consider one defendant's statement as evidence against another defendant. See Bruton v. United States, 391 U.S. 123, 88 S.Ct. 1620 (1968). See also Cruz v. New York, 481 U.S. 186, 107 S.Ct. 1714 (1987); State v. Gurule, 303 P.3d 838 (N.M. 2013) (Crawford line of cases has modified Bruton rule, so that rule applies only to testimonial statements by co-conspirator). Arguably, this rule does not apply in a bench trial. See People v. Jenkins, 115 A.D.2d 562, 496 N.Y.S.2d 83 (2d Dept. 1985).

8. Corroboration Of Confession - To support a finding, a confession or admission must be corroborated by evidence that the crime charged has been committed. FCA §344.2(3).

9. Statements Made By Counsel Or Other Agent - Admissions and other statements made by an agent who is acting within the scope of authority are admissible. Richardson, §8-208. Compare People v. Brown, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (statements made by counsel at Sandoval hearing regarding defendant's proposed trial testimony could be used to impeach defendant at trial); People v. Ortiz, _A.D.3d_, 2014 WL 385523 (1st Dept. 2014) (no error where defendant's trial testimony was impeached with statement made by defense counsel at arraignment where counsel stated that defendant was source of information and counsel was acting as defendant's authorized agent, even though counsel asserted that she had inaccurately conveyed defendant's version of incident); People v. Davis, 103 A.D.3d 810 (2d Dept. 2013), lv denied 21 N.Y.3d 1003 (defense witness impeached with statement made by witness's former counsel at witness's plea proceeding); People v. Quan Hong Ye, 67 A.D.3d 473, 889 N.Y.S.2d 556 (1st Dept. 2009), lv denied 14 N.Y.3d 807 (defendant's admissions, which were translated to officer by another officer who was acting as interpreter, were properly admitted; although defendant did not choose interpreter, he accepted him as agent); People v. Moye, 11 A.D.3d 212, 782

N.Y.S.2d 257 (1st Dept. 2004), lv denied 4 N.Y.3d 765 (trial court properly permitted use on cross examination of defendant of statements counsel made at arraignment); People v. Harvey, 309 A.D.2d 713, 766 N.Y.S.2d 194 (1st Dept. 2003) (false alibi notice admissible as judicial admission where defendant did not attempt to disavow notice until late in the trial) and People v. Russo, 210 A.D.2d 128, 621 N.Y.S.2d 844 (1st Dept. 1994) (counsel's statements at arraignment admissible despite use of phrase "on information and belief") with People v. Burgos-Santos, 98 N.Y.2d 226, 746 N.Y.S.2d 422 (2002) (statements in notice of alibi could not be used to impeach defendant who presented non-alibi defense at trial); People v. Cassas, 84 N.Y.2d 718, 622 N.Y.S.2d 228 (1995) (defense attorney's statement -- "I brought my client in to surrender. I believe he shot his wife. You'll find the gun in the room. It will have my client's prints on it" -- was not admissible in absence of evidence that counsel had authority to speak for defendant or that defendant waived attorney-client privilege); United States v. Jung, 473 F.3d 837 (7th Cir. 2007), cert denied 128 S.Ct. 326 (statements not admissible where counsel was speaking to victims as part of strategy to be cooperative, not attempting to develop criminal defense strategy); United States v. Valencia, 826 F.2d 169 (2d Cir. 1987) (admission of statements made at informal meeting with prosecutors would interfere with plea bargaining and pretrial dialogue) and United States v. Camacho, 2004 WL 1367457 (S.D.N.Y. 2004) (privilege not waived where counsel spoke hypothetically and at no time quoted or paraphrased defendant's statements, and, in any event, defendant did not authorize counsel to make statements).

In Bellamy v. State, 941 A.3d 1107 (Md. 2008), the court held that the statement of a non-testifying witness, made in connection with a plea bargain, that he saw a person other than the defendant shoot the victim, was found admissible as a party admission by the prosecutors since they unequivocally manifested a belief in the witness's statement and were acting as agents of the State.

10. Interpreters - An interpreter may become an agent when translating the respondent's statements. But see People v. Romero, 78 N.Y.2d 355, 575 N.Y.S.2d 802 (1991) (paid police informant was not defendant's agent).

11. Non-Inculpatory Portion Or Explanation Of Statement - See People

v. Robinson, 17 N.Y.3d 868 (2011) (reversible error found where testifying defendant not permitted to offer explanation for statements to police); People v. Dlugash, 41 N.Y.2d 725, 395 N.Y.S.2d 419 (1977) (defendant entitled to have entirety of admissions -- inculpatory and exculpatory facts -- considered by fact-finder); People v. Hubrecht, 2 A.D.2d 289, 769 N.Y.S.2d 36 (1st Dept. 2003), lv denied 2 N.Y.3d 741 (statements not admissible as continuous narrative).

C. Business Records

1. Statutory Foundation - "Any writing or record, whether in the form of an entry in a book or otherwise made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter." The circumstances of the making of the record, including the maker's lack of personal knowledge, may be proved to affect the weight, but shall not affect the admissibility, of the record. CPLR §4518(a). See People v. Fisher, 201 A.D.2d 193, 615 N.Y.S.2d 374 (1st Dept. 1994), appeal dism'd 84 N.Y.2d 935, 621 N.Y.S.2d 532 (police report not prepared by officer who signed it was admissible). Copies of certain writings are admissible without foundation testimony if certified as correct in "a certification or authentication by the head of the hospital, laboratory, department or bureau of a municipal corporation or of the state, or by an employee delegated for that purpose or by a qualified physician." See CPLR §§4518(c) (also provides for admission of hospital records in custody of warehouse), 2306(a), 2307. See also People v. Husted, 179 Misc.2d 606, 686 N.Y.S.2d 544 (App. Term, 9th & 10th Jud. Dist., 1998) (certification was adequate despite mistake as to date breathalyzer test was performed). Although CPLR §§2306(a) and 2307 refer to subpoenaed records, voluntarily produced records are also admissible if they have been properly certified. See Joyce v. Kowalcewski, 80 A.D.2d 27, 437 N.Y.S.2d 809 (4th Dept. 1981). But see People v. D'Agostino, 120 Misc.2d 437, 465 N.Y.S.2d 834 (County Ct. Monroe Co., 1983). The certification must set forth the business record foundation. See People v. Mertz, 68 N.Y.2d 136, 506

N.Y.S.2d 290 (1986); Matter of Gregory M., 184 A.D.2d 252, 585 N.Y.S.2d 193 (1st Dept. 1992), aff'd 82 N.Y.2d 588, 606 N.Y.S.2d 579 (1993) (certification undated).

The mere filing of papers received from other entities, even if retained in the regular course of business, is insufficient to qualify the papers as business records. People v. Cratsley, 86 N.Y.2d 81, 629 N.Y.S.2d 992 (1995). See also People v. Burdick, 72 A.D.3d 1399, 900 N.Y.S.2d 195 (3rd Dept. 2010) (mere filing of documents received from other entities, even if retained in regular course of business, does not qualify documents as business records, and witness did not have knowledge of business practices and record-keeping procedures of entity that produced records); People v. Rogers, 8 A.D.2d 888, 780 N.Y.S.2d 393 (3rd Dept. 2004) (report of drug tests performed by private lab used by State Police did not qualify as business record); People v. Surdis, 275 A.D.2d 553, 711 N.Y.S.2d 875 (3rd Dept. 2000), lv denied 95 N.Y.2d 908, 716 N.Y.S.2d 649; Standard Textile Company, Inc. v. National Equipment Rental, Ltd., 80 A.D.2d 911, 437 N.Y.S.2d 398 (2d Dept. 1981). However, the necessary foundation may be established in the absence of testimony from an actual employee of the business which sent the documents. People v. Cratsley, supra; People v. DiSalvo, 284 A.D.2d 547, 727 N.Y.S.2d 146 (2d Dept. 2001) (County routinely relied on records of private business entity, and County employee gave foundation testimony); Elkaim v. Elkaim, 176 A.D.2d 116, 574 N.Y.S.2d 2 (1st Dept. 1991) (judicial notice can provide foundation for admitting records when the records are so trustworthy as to be self-authenticating); People v. Markowitz, 187 Misc.2d 266, 721 N.Y.S.2d 758 (Sup. Ct., Richmond Co., 2001) (employee of business whose records were admitted was familiar with procedures of bank whose records were included).

2. Authentication - Records not self-authenticated under CPLR §4518 must be authenticated via the testimony of someone with personal knowledge of the business's practices and procedures. Richardson, §8-306. See also CPLR §2105 (attorney may certify that copy is true and complete); People v. Ramos, 13 N.Y.3d 914, 895 N.Y.S.2d 294 (2010) (where Appellate Division had held that judicial notice may provide basis for admitting business records when records are so patently trustworthy as to be self-authenticating, Court of Appeals holds that trial court erred when it

admitted record without proper foundation; even assuming some documents may be admitted as business records without foundation testimony, this record was not such a document since nothing on face indicated that it was made in regular course of business and that it was regular course of business to make it); People v. Brown, 13 N.Y.3d 332, 890 N.Y.S.2d 415 (2009) (Office of Chief Medical Examiner witness's testimony provided sufficient foundation for introduction of subcontractor laboratory's report where witness testified that she relied on documents as matter of practice and reviewed them and used them in conducting her own DNA analysis; testified that she was familiar with procedures and protocols used by laboratory and that such procedures were up to standard; testified as to reliability of testing procedures laboratory used to generate report and as to laboratory's duty to create such records; and testified that report was made contemporaneously and in regular course of business).

3. "Reasonable Time" Requirement - This aspect of the foundation has been liberally interpreted. See, e.g., People ex rel. McGee v. Walters, 62 N.Y.2d 317, 476 N.Y.S.2d 803 (1984) (report prepared after defendant failed to report to parole officer during previous 5 months was admissible); Toll v. State of New York, 32 A.D.2d 47, 299 N.Y.S.2d 589 (3rd Dept. 1969) (report made 15 days after events was admissible). But see Standard Textile Company, Inc. v. National Equipment Rental, Ltd., supra, 80 A.D.2d 911 (document made 8 months after event not admissible).

4. Maker's Lack Of Personal Knowledge; Admissibility Of Statements Made By Other Persons To Maker Of Record - Although CPLR §4518(a) provides that the maker's lack of personal knowledge affects the weight of the evidence, not its admissibility, entries based upon statements made by others to the maker of the record are inadmissible unless the proponent establishes that the statements were made pursuant to a business duty, see Johnson v. Lutz, 253 N.Y. 124 (1930); United States v. Bortnovsky, 879 F.2d 30 (2d Cir. 1989); People v. Canty, 153 A.D.2d 640, 544 N.Y.S.2d 857 (2d Dept. 1989) (no evidence of duty to report stolen car); People v. Dyer, 128 A.D.2d 719, 513 N.Y.S.2d 211 (2d Dept. 1987); People v. Wilson, 123 A.D.2d 457, 506 N.Y.S.2d 760 (2d Dept. 1986) (defendant's 911 call inadmissible), or that the

statements are admissible under a recognized exception to the hearsay rule. See Matter of Leon RR., 48 N.Y.2d 117, 421 N.Y.S.2d 863 (1979); Kelly v. Wasserman, 5 N.Y.2d 425, 185 N.Y.S.2d 538 (1959); Ferrara v. Pranski, 88 A.D.2d 904, 450 N.Y.S.2d 596 (2d Dept. 1982) (defendant's admission recorded in police report); People v. Swinger, 180 Misc.2d 344, 689 N.Y.S.2d 336 (Crim. Ct., N.Y. Co., 1998) (excited utterances in hospital record). But see Toll v. State of New York, supra, 32 A.D.2d 47. Inconsistent statements contained in a record, which are not being offered for the truth, also may be admitted. People v. Mullings, 83 A.D.3d 871, 921 N.Y.S.2d 152 (2d Dept. 2011) (police report should be admitted where it indicates that source of information was complaining witness, and information is inconsistent with testimony of the complaining witness).

5. Specific Types Of Records

a. Ballistics Reports - A report confirming the operability of a weapon is admissible, since it "further[s] the business of the police department" and is not prepared solely for litigation; expert testimony concerning the scientific principles underlying the test is not required. See Matter of Ronald B., 61 A.D.2d 204, 401 N.Y.S.2d 544, 547 (2d Dept. 1978).

b. Criminal Enterprises - The records of a criminal enterprise are admissible if the usual business record foundation is laid. See People v. Kennedy, 68 N.Y.2d 569, 510 N.Y.S.2d 853 (1987) (loan shark's diaries).

c. Court Transcript - See People v. Henry, 167 Misc.2d 1027, 641 N.Y.S.2d 1003 (Dist. Ct., Nassau Co., 1996) (transcript was admissible under business record and public record rules, and, therefore, could be used to support accusatory instrument); Kearney v. City Of New York, 144 Misc.2d 201, 543 N.Y.S.2d 879 (Sup. Ct. Kings Co., 1989) (court stenographer was under duty to take notes, and ADA was under duty to reveal exculpatory material).

d. Drug Testing/Lab Reports - A chemist's report identifying drugs is inadmissible in the absence of a foundation showing the nature of the tests and procedures employed. See Matter of Lopez v. Kramer, 118 A.D.2d 572, 499 N.Y.S.2d 183 (2d Dept. 1986); Matter of Selena B., 102 A.D.2d 724, 477 N.Y.S.2d 5 (1st Dept.

1984). But see People v. Atkins, 273 A.D.2d 11, 709 N.Y.S.2d 39 (1st Dept. 2000) (report properly admitted through testimony of chemist who did not personally test drugs recovered from defendant); People v. Torres, 213 A.D.2d 797, 623 N.Y.S.2d 645 (3rd Dept. 1995), lv denied 86 N.Y.2d 784, 631 N.Y.S.2d 630 (laboratory notes were properly admitted as business records, and supervisor of chemist who performed tests testified concerning lab procedures). In any event, the report should contain the date of the analyses, the name of the chemist, the materials that were analyzed, and the results of the tests. Cf. People v. Farrell, 58 N.Y.2d 637, 458 N.Y.S.2d 514 (1982).

e. Medical Records

i. Hospital Records - Entries in a hospital record regarding the treatment or diagnosis of a patient are admissible, since it is the business of the hospital to treat patients. Richardson, §301. Certain hospital records may be introduced if written certification or authentication is presented. See CPLR §4518(c). See also People v. Kinne, 71 N.Y.2d 879, 527 N.Y.S.2d 754 (1988) (certificate of authentication itself need not be made at or near time of act, transaction, occurrence or event recorded). But see People v. Gaess, N.Y.L.J., 5/4/88, p. 13, col. 2 (App. Term, 9th and 10th Jud. Dist.) (facility not shown to be a "hospital" within purview of CPLR §4518[c], as opposed to a mere doctor's office).

ii. Private Physicians' Records - A private physician's office records are admissible if the usual foundation is presented. See Wilson v. Bodian, 130 A.D.2d 221, 519 N.Y.S.2d 126 (2d Dept. 1987) (physicians' "reports" not admissible, since they are prepared for litigation).

iii. Statements Relevant To Treatment Or Diagnosis – Entries in a record -- or testimony -- containing statements relevant to diagnosis and treatment are admissible.

Historical information that has no bearing on diagnosis or treatment is not admissible. For instance, although a patient's general explanation identifying the source of an injury might be admissible, factual details and the name of the person who caused the injury may not. See Richardson, §8-610; People v. Spicola, 16 N.Y.3d 441 (2011) (boy's responses to nurse practitioner about why he was at Child Advocacy Center

were germane to diagnosis and treatment; without boy's allegations regarding what happened and when, nurse would not have known where to begin examination, and, when testifying, she did not identify who the boy said touched him and acknowledged she did not know whether boy was being truthful); People v. Duhs, 16 N.Y.3d 405 (2011) (in case in which defendant allegedly placed child's feet and lower legs into tub filled with scalding hot water, pediatrician was properly permitted to testify that child, when asked why he did not get out of tub, responded, "he wouldn't let me out"; pediatrician wanted to determine time and mechanism of injury so she could properly administer treatment, and to ascertain whether child had predisposing condition, such as a neurological disorder, that may have prevented him from getting out of bathtub); People v. Cantave, 93 A.D.3d 677 (2d Dept. 2012) (court properly redacted defendant's medical records to omit statement that he had been hit in nose with gun, which was not relevant to defendant's diagnosis or treatment for thumb injury and hand laceration); People v. Parada, 67 A.D.3d 581, 889 N.Y.S.2d 159 (1st Dept. 2009) (dissenting judge rejects majority's conclusion that prior consistent statements to pediatric nurse in course of forensic examination conducted at Children's Advocacy Center were sufficiently related to diagnosis and treatment to be admissible, since nurse's examination was arranged by law enforcement and was conducted over a year after alleged abuse had ended, it was for purpose of criminal investigation); People v. Ballerstein, 52 A.D.3d 1192, 860 N.Y.S.2d 718 (4th Dept. 2008) (victim's statements at Child Advocacy Center not admissible because they were made during forensic examination and were not relevant to diagnosis and treatment); Matter of Kimaya Mc., 51 A.D.3d 671, 858 N.Y.S.2d 237 (2d Dept. 2008) (complainant's statements that she was hit with brick properly admitted); People v. Dagoberto, 16 A.D.3d 595, 792 N.Y.S.2d 143 (2d Dept. 2005), lv denied 5 N.Y.3d 761 (statement that complainant "turned while man tried to stab him in the back" was relevant to treatment and diagnosis); People v. Thomas, 282 A.D.2d 827, 725 N.Y.S.2d 102 (3rd Dept. 2001), lv denied 96 N.Y.2d 925, 732 N.Y.S.2d 642 (victim's statement that she had been punched and choked was admissible, but not identification of defendant); People v. Pitti, 262 A.D.2d 503, 692 N.Y.S.2d 166 (2d Dept. 1999), lv denied 94 N.Y.2d 865, 704

N.Y.S.2d 541 (statement made by victim about smoking marijuana before his lung collapsed was not admissible, since expert testified that cause of collapsed lung was not relevant to treatment); People v. Bailey, 252 A.D.2d 815, 675 N.Y.S.2d 706 (3rd Dept. 1998), lv denied 92 N.Y.2d 922, 680 N.Y.S.2d 463 (patient's statement that a person "kissed and sucked on her neck and placed his penis between her legs" was admissible since it prompted doctor to conduct further examination); People v. Goode, 179 A.D.2d 676, 578 N.Y.S.2d 611 (2d Dept. 1992) (complainant's claim that he was hit with fist containing a metal object was properly admitted); People v. Riggsbee, 159 A.D.2d 1018, 552 N.Y.S.2d 466 (4th Dept. 1990) (statement that officer's injuries occurred at work was inadmissible); People v. Matthews, 148 A.D.2d 272, 544 N.Y.S.2d 398 (4th Dept. 1989) (statements by defendant's mother inadmissible, because they were not relied upon by doctor in making diagnosis); People v. Harris, 132 A.D.2d 940, 518 N.Y.S.2d 269 (4th Dept. 1987) (physician improperly permitted to testify to victim's statements concerning location of attack and name of perpetrator); People v. Conde, 16 A.D.2d 327, 288 N.Y.S.2d 69 (3rd Dept. 1962), aff'd 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963) (decedent's statement that she fell from a ladder admitted). See also People v. Ortega, 15 N.Y.3d 610, 917 N.Y.S.2d 1 (2010) (in Benston, references to "old boyfriend" as perpetrator, description of case as involving "domestic violence," and references to "safety plan" for complainant were admissible since domestic violence differs materially from other types of assault in effect on victim and resulting treatment; in Ortega, statement that complainant was "forced to" smoke white, powdery substance was admissible since treatment of victim of coercion may differ from treatment of patient who has intentionally taken drugs); People v. Wright, 81 A.D.3d 1161, 918 N.Y.S.2d 598 (3d Dept. 2011) (child complainant's statements admissible where hospital needed to create discharge plan to provide for her safety rather than send her home with defendant, and to refer her to counseling services; although police personnel were present and may have asked question that elicited statements, the information was included in medical records by hospital personnel who were also present); People v. Greenlee, 70 A.D.3d 966, 897 N.Y.S.2d 132 (2d Dept. 2010), lv denied 14 N.Y.3d 888 (portion of complainant's medical records stating that her attackers were friends of

former boyfriend who were attempting to prevent her from testifying against boyfriend in domestic violence proceeding was likely relied on by hospital personnel in developing discharge plan to ensure complainant's safety); People v. Baltimore, 301 A.D.2d 610, 754 N.Y.S.2d 650 (2d Dept. 2003), lv denied 100 N.Y.2d 592, 766 N.Y.S.2d 167 (2003) (complainant's statements that she was "kicked, slapped, pulled by her hair and had a knife to her neck" were admissible); State v. Payne, 694 S.E.2d 935 (W. Va. 2010) (hearsay testimony by forensic nurse trained in sexual assault examination properly admitted under diagnosis or treatment exception; such evidence admissible when gathered for dual medical and forensic purpose, but inadmissible when gathered strictly for investigative or forensic purposes); Taylor v. State, 268 S.W.3d 571 (Tex. Ct. of Crim. App., 2008) (statement made to non-medical professional in expectation or hope it will be relayed to medical professional is admissible, and rule extends to statements made for purpose of facilitating mental health treatment by psychiatrist or other trained mental health professional; courts also notes that it must be shown that declarant was aware that statements were made for purposes of diagnosis or treatment and that proper diagnosis or treatment depends upon veracity of statements, that motive for self-preservation does not necessarily disappear once course of treatment has been determined and has commenced, that presumption that person understands that veracity will serve his/her interest does not arise when person is being treated for mental illness, and that in order to bring identity of perpetrator within rule, proponent must show that it was important to efficacy of treatment that professional know identity of perpetrator); People v. Anonymous, 192 Misc.2d 570, 746 N.Y.S.2d 894 (Sup. Ct., Bronx Co., 2002) (diagrams on which child's respective injuries were delineated next to note as to how injury was sustained, and who inflicted it, were admissible since identity of abuser affects nature of psychological problems in child abuse cases); People v. Swinger, supra, 180 Misc.2d 344 (statements regarding domestic violence were admissible, since identifying patient as domestic violence victim is relevant to diagnosis and treatment).

In In re Dolan, 35 Misc.3d 781 (Sup. Ct., Nassau Co., 2012), the court held that it could apply the exception to statements made by persons other than the patient, such

as relatives or law enforcement personnel.

Of course, even when not admissible as a statement made for purposes of treatment or diagnosis, a patient's statements might be admissible as an admission or a prior inconsistent statement.

The illegibility of part of a record does not require the exclusion of relevant and legible portions. See Joyce v. Kowalcewski, supra, 80 A.D.2d 27.

Whether contained in a record or the subject of testimony, this type of hearsay evidence usually will not be testimonial under right of confrontation rules. See People v. Duhs, 16 N.Y.3d 405 (child's statement to emergency room pediatrician not testimonial since primary purpose was to determine mechanism of injury so she could render diagnosis and administer treatment; it did not matter that pediatrician may also have been motivated to fulfill ethical and legal duty as mandatory reporter of child abuse); People v. Shaw, 80 A.D.3d 465, 914 N.Y.S.2d 155 (1st Dept. 2011) (declaration made to gynecologist at hospital was not testimonial where doctor acted primarily as treating physician and role in gathering evidence for police by way of rape kit was secondary); see also State v. Bennington, 264 P.3d 440 (Kan. 2011) (victim's statements to sexual assault nurse examiner, which were made in presence of law enforcement officer who asked questions, and which reported past events rather than information regarding ongoing public safety or medical emergency, were testimonial; statements made during questioning by SANE also were testimonial since source of questions was officer and SANE followed statutory procedures for gathering evidence for prosecution, and thus acted as agent of law enforcement); State v. Miller, 264 P.3d 461 (Kan. 2011) (statements made to sexual assault nurse examiner not testimonial where there was no law enforcement officer present, victim complained she was "hurting," her mother decided to seek medical treatment without request to do so by law enforcement officers, SANE asked questions common to all medical examinations, and SANE did provide medical treatment); State v. Mendez, 242 P.3d 328 (N.M. 2010) (statements made to nurse of sexual assault nurse examiner program during examination of victim of alleged sexual abuse may be admissible under hearsay exception even though there is a criminal investigation; however, goals of SANE

nurses, when compared with goals of other medical providers, can be more closely aligned with law enforcement, and thus courts must be aware of potential that SANE nurses will be used in end run around hearsay rule).

iv. Opinions - Even in the absence of any indication of the procedures employed or the qualifications of the doctors or other individuals involved, test results and medical opinions expressed in a record may be admissible. See, e.g., People v. Kohlmeyer, 284 N.Y. 366 (1961); Rodriguez v. Triborough Bridge and Tunnel Authority, 276 A.D.2d 769, 716 N.Y.S.2d 24 (2d Dept. 2000), appeal dism'd 96 N.Y.2d 814, 727 N.Y.S.2d 694 (2001) (entry regarding result of blood alcohol test result was admissible where doctor testified regarding hospital procedures for trauma patients); Miller v. Alagna, 203 A.D.2d 264, 609 N.Y.S.2d 650 (2d Dept. 1994) (police report containing conclusion that defendants' vehicle did not strike plaintiff was properly admitted since detective was qualified to render expert opinion); Wilson v. Bodian, supra, 130 A.D.2d 221; People v. Davis, 95 A.D.2d 837, 463 N.Y.S.2d 876 (2d Dept. 1983) (entry reading "gunshot wound of chest [and left] upper arm" properly admitted); Lichtenstein v. Montefiore Hospital and Medical Center, 56 A.D.2d 281, 392 N.Y.S.2d 18 (1st Dept. 1977) (suicide diagnosis admissible); People v. Richardson, 38 A.D.2d 990, 329 N.Y.S.2d 425 (3rd Dept. 1972) (report containing diagnosis of gunshot wound used to prove serious physical injury); Tyson v. Bittner, 3 A.D.2d 861, 161 N.Y.S.2d 710 (2d Dept. 1957) (entry stating that patient was intoxicated was admissible). But see Matter of E.T. and B.T., 808 N.E.2d 639 (Indiana, 2004) (opinions in medical or hospital records are admissible only if the expertise of the opinion giver is established); Boucheron v. Tilley, 87 A.D.2d 983, 450 N.Y.S.2d 110 (4th Dept. 1982) ("gratuitous opinions" of doctors as to whether plaintiff's condition was causally related to ingestion of butazolidin were not part of diagnosis).

v. X-Rays - An x-ray is admissible as proof of a person's condition if it is authenticated by proof that it is a photograph of the person whose injury is at issue, and expert testimony is offered to interpret it. See CPLR §4532-a (admissibility of x-rays in personal injury actions); Galuska v. Arbaiza, 106 A.D.2d 543, 482 N.Y.S.2d 846 (2d Dept. 1984) (x-ray improperly admitted where requirements of

§4532-a were not satisfied). When a medical record is admitted pursuant to CPLR §4518, an x-ray properly included in the record is also admissible. Compare Freeman v. Kirkland, 184 A.D.2d 331, 584 N.Y.S.2d 828 (1st Dept. 1992) (records, reports and correspondence generated by other medical specialists and laboratories properly admitted as part of plaintiff's medical file); Stein v. Lebowitz-Pine View Hotel, Inc., 111 A.D.2d 572, 489 N.Y.S.2d 635 (3rd Dept. 1985), lv denied 65 N.Y.2d 611, 494 N.Y.S.2d 1026 with Serra v. City of New York, 215 A.D.2d 643, 627 N.Y.S.2d 699 (2d Dept. 1995) (MRI report not admissible without foundation for hearsay exception). The best evidence rule applies, and permits the introduction of secondary evidence, such as an x-ray report, where the proponent explains the absence of the primary evidence. See Schozer v. Penn Life Insurance Company, 84 N.Y.2d 639, 620 N.Y.S.2d 797 (1994).

f. Store Receipts And Price Tags - A store receipt is not admissible to prove the value of the property purchased in the absence of the usual business record foundation. See People v. Teague, 145 A.D.2d 911, 536 N.Y.S.2d 293 (4th Dept. 1988); see also People v. King, 102 A.D.3d 434 (1st Dept. 2013), lv denied 20 N.Y.3d 1100 ("training receipt" created within minutes after employee apprehended shoplifter, which memorialized property that was stolen, was not created solely for purposes of litigation and was admissible as business record).

In United States v. Tin Yat Chin, 371 F.3d 31 (2d Cir. 2004), the court held that copies of credit card receipts purportedly signed by defendant were admissible as non-hearsay where they tended to show that someone referring to himself by defendant's name signed receipts on the dates and times in question and laid a foundation for other alibi testimony.

In People v. Giordano, 50 A.D.3d 467, 856 N.Y.S.2d 568 (1st Dept. 2008), the court held that the stolen jackets' price tags, and testimony by security guards as to the selling price of the jackets on the price tags, did not constitute inadmissible hearsay, since the tags were not offered as an assertion of value as distinct from the selling price, and constituted circumstantial evidence of the price a shopper would have been expected to pay, and thus were essentially verbal acts by the store stating an offer to sell at a particular price.

g. Computer Printouts - "An electronic record, as defined in [State Technology Law §102], used or stored as [a business] memorandum or record, shall be admissible in a tangible exhibit that is a true and accurate representation of such electronic record. The Court may consider the method or manner by which the electronic record was stored, maintained or retrieved in determining whether the exhibit is a true and accurate representation of such electronic record." CPLR §4518(a). An "'[e]lectronic record' shall mean information, evidencing any act, transaction, occurrence, event, or other activity, produced or stored by electronic means and capable of being accurately reproduced in forms perceptible by human sensory capabilities." State Technology Law §102(2). "In anticipation of the court's potential demand for extrinsic evidence on this point, the proponent should be prepared to offer foundation testimony concerning the particular business's data entry and storage system as well as the method by which the derivative forms of the data are produced." Vincent C. Alexander, 2002 Supplementary Practice Commentary, CPLR 4518. See Ed Guth Realty, Inc. v. Gingold, 34 N.Y.2d 440, 358 N.Y.S.2d 367 (1978); Federal Express Corporation v. Federal Jeans, Inc., 14 A.D.3d 424, 788 N.Y.S.2d 113 (1st Dept. 2005); People v. McFarlan, 191 Misc.2d 531, 744 N.Y.S.2d 287 (Sup. Ct., N.Y. Co., 2002) (given growth in electronic storage of information, new rules must be articulated with respect to what is a writing and what is an original document); People v. Wray, 183 Misc.2d 444, 704 N.Y.S.2d 787 (Sup. Ct., Kings Co., 2000) (printouts of DMV driving records admissible); see also State v. Kandutsch, 799 N.W.2d 865 (Wis. 2011) (while computer-stored records are hearsay, computer-generated record is not hearsay when it is result of automated process free from human input or intervention); People v. Zavala, 216 Cal.App.4th 242 (Cal. Ct. App., 4th Dist., 2013) (printed compilation of cell phone data retrieved from computer via human query for purposes of trial is admissible where underlying data was automatically recorded and stored by reliable computer program in regular course of business).

6. Copies - Aside from those copies which are admissible under CPLR §§2306(a) and 2307, documents "recorded, copied, or reproduced ... by any process, including reproduction" in the regular course of business are admissible if they

are “satisfactorily identified.” See, e.g., People v. Rosa, 156 A.D.2d 733, 549 N.Y.S.2d 487 (2d Dept. 1990). An enlargement or facsimile of the reproduction is admissible if the original is in existence and available for inspection. CPLR §4539(a). Reproductions created by image-storing processes are admissible in lieu of an original if the process does not permit additions, deletions or changes without leaving a record, and are authenticated through testimony establishing the manner in which tampering or degradation of the reproduction is prevented. CPLR §4539(b).

7. Transcription Of Original Record Into Permanent Form - When information in a writing is transferred in the ordinary course of business into a permanent record, and the original is destroyed, the permanent record is admissible even though it was not made at the time of the events recorded. See People v. Klein, 105 A.D.2d 805, 481 N.Y.S.2d 743 (2d Dept. 1984), aff'd 65 N.Y.2d 613, 491 N.Y.S.2d 155 (1985).

8. Right Of Confrontation – In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 129 S.Ct. 2527 (2009), a five-Justice Supreme Court majority held that sworn “certificates of analysis” showing the results of forensic analysis, and stating that the seized substance was found to contain cocaine, were testimonial. The majority noted that it has previously included affidavits within the “core class of testimonial statements”; that an objective witness reasonably would have believed that the statement would be available for use at trial; that although the certificates are inculpatory only when taken together with other evidence linking petitioner to the contraband, it is often true that a witness’s testimony, taken alone, will not suffice to convict, but no case has been cited in which such testimony was admitted absent an opportunity to cross-examine; that while the dissent contends that a “conventional witness recalls events observed in the past, while an analyst’s report contains near-contemporaneous observations of the test," these affidavits were completed almost a week after the tests were performed, and, in Davis v. Washington, the victim’s statements to police officers were sufficiently close in time to the alleged assault that the trial court admitted her affidavit as a “present sense impression”; that a person who volunteers testimony is no less a witness than one who responds to interrogation, and,

in any event, the affidavits were presented in response to a police request; that although respondent claims that there is a difference between testimony recounting historical events, which is prone to distortion or manipulation, and testimony which is the result of neutral, scientific testing, dispensing with confrontation because testimony is obviously reliable is akin to dispensing with a jury trial because the defendant is obviously guilty, and, in any event, forensic evidence is not immune from the risk of manipulation; that business and public records are generally admissible absent confrontation because they are created for the administration of an entity's affairs and not for the purpose of establishing or proving a fact at trial, while the analysts' statements were prepared specifically for use at trial; that the power to subpoena is no substitute for the right of confrontation, since the witness could be unavailable or refuse to appear, and, in any event, the Confrontation Clause imposes a burden on the prosecution to present witnesses, not on the defendant to bring an adverse witnesses into court; and that the Confrontation Clause may make prosecution more burdensome, but "the sky will not fall after today's decision" since many states have adopted confrontation requirements and there is no evidence that the criminal justice system has ground to halt.

In Bullcoming v. New Mexico, 131 S.Ct. 2705, a five-Justice majority found a Confrontation Clause violation where the prosecution introduced a forensic laboratory report, which contained a testimonial certification that defendant's blood-alcohol concentration was above the threshold for aggravated DWI, through the testimony of a scientist who did not sign the certification or perform or observe the test reported in the certification. The majority noted, inter alia, that surrogate testimony of the kind the witness was equipped to give could not convey what the analyst knew or observed about the events his certification concerned or expose any lapses or lies on the certifying analyst's part; that the Confrontation Clause does not tolerate dispensing with confrontation simply because the court believes that questioning one witness about another's testimonial statements provides a fair enough opportunity for cross-examination; that despite the absence of notarization, the formalities attending the report are more than adequate to qualify the analyst's assertions as testimonial; and

that application of the Confrontation Clause in these circumstances would not impose an undue burden on the prosecution.

In Williams v. Illinois, 132 S.Ct. 2221 (2012), an expert, who had not participated in the analyses, testified at defendant's nonjury rape trial that a DNA profile produced by an outside laboratory (Cellmark) matched a profile produced by the state police lab using a sample of defendant's blood. The expert explained the notations on documents admitted as business records, stating that, according to the records, vaginal swabs taken from the victim were sent to and received back from Cellmark. Defendant argued that the expert went astray when she testified that the DNA profile provided by Cellmark was produced from semen found on the victim's vaginal swabs, but the Illinois courts found that this statement was not admitted for the truth of the matter asserted. Five Justices found no Confrontation Clause violation. In one opinion, four Justices noted that the Confrontation Clause has no application to out-of-court statements that are not offered to prove the truth of the matter asserted; that out-of-court statements related by an expert solely for the purpose of explaining the assumptions on which the opinion rests are not offered for their truth; that if this had been a jury trial, the out-of-court statements could not have gone to the jury without careful jury instructions and an evaluation of the risk of juror confusion; that the Cellmark report was not testimonial since it was very different from statements, such as affidavits, depositions, prior testimony, and confessions, that the Confrontation Clause was originally understood to reach, and was produced before any suspect was identified for the purpose of finding a rapist who was on the loose and was not inherently inculpatory; that the ruling will not prejudice a defendant who really wishes to probe the reliability of DNA testing, because those who participated in the testing may be subpoenaed by the defense and questioned at trial; and that if DNA profiles could not be introduced without calling the technicians who participated in the preparation of the profile, economic pressures would encourage prosecutors to forgo DNA testing and rely instead on older forms of evidence, such as eyewitness identification, that are less reliable. Justice Thomas concurred in the result, concluding that the Cellmark report lacked the solemnity of an affidavit or deposition and was not testimonial. However, Justice

Thomas in other respects sided with the dissent, rejecting the plurality's conclusion that the out-of-court statements were not offered for their truth and were not testimonial in nature. See People v. Pealer, 20 N.Y.3d 447 (2013) (introduction of records pertaining to routine inspection, maintenance and calibration of breathalyzer machines, without producing persons who created records, does not violate Confrontation Clause; testing performed by employees of Division of Criminal Justice Services, an executive agency, whose primary motivation was to advise police that machine was adequately calibrated and operating properly and not to secure evidence for use in particular criminal proceeding, and testing certificates did not directly inculpate defendant or prove essential element of charges); People v. Duhs, 16 N.Y.3d 405 (2011) (child's statement, made to pediatrician for purposes of diagnosis and treatment, not testimonial); People v. Brown, 13 N.Y.3d 332, 890 N.Y.S.2d 415 (2009) (DNA report, prepared by Office of the Chief Medical Examiner's subcontractor laboratory, not "testimonial" where OCME witness had conducted analysis linking defendant's DNA to profile found in victim's rape kit, had personally examined laboratory's file, interpreted profile of data represented in machine-generated graphs, made critical determination linking defendant to crime, and stated that she was familiar with procedures and protocols used by laboratory, and report consisted of machine-generated graphs, charts and numerical data and no conclusions, interpretations or comparisons); People v. Pacer, 6 N.Y.3d 504, 814 N.Y.S.2d 575 (2006) (DMV affidavit admitted to show that defendant's driving privileges had properly been revoked was testimonial; court rejects People's argument that affidavit was more like non-accusatory business or public record); See also State v. Lui, 315 P.3d 493 (Wash. 2014) (no Confrontation Clause violation where court admitted results of DNA testing performed by non-testifying analysts and testifying expert rendered opinion that samples matched, since witness drew her own interpretations from data and reached her own conclusion, and admitted evidence of temperature readings from murder victim's body and ambient environment taken by non-testifying doctor and relied upon by witness who estimated time of death); Commonwealth v. Yohe, 79 A.3d 520 (Pa. 2013) (no Confrontation Clause violation where non-testifying lab technicians provided raw data to supervisor,

who examined data, formed independent expert opinion, and expressed opinion in toxicology report that was admitted at trial and in live testimony); State v. Navarette, 294 P.3d 435 (N.M. 2013) (Confrontation Clause precludes pathologist from relating observations recorded by non-testifying pathologist in autopsy report as basis for opinion of testifying pathologist who neither participated in nor observed autopsy; autopsy findings depended on subjective interpretation and were not based on scientific technique that produces raw data that any third party can examine in order to express opinion); People v. Acevedo, 112 A.D.3d 454 (1st Dept. 2013) (no right of confrontation violation where autopsy report prepared by non-testifying medical examiner was introduced through testimony of another medical examiner since report was not testimonial); Jenkins v. United States, 75 A.3d 174 (D.C. Ct. App., 2013) (Confrontation Clause violated where court permitted government to present entirety of DNA evidence through testimony of single expert without making available for cross-examination laboratory analysts who performed underlying serological and DNA laboratory work; Supreme Court's "splintered" decision in Williams v. Illinois creates no rule of law the court can apply and thus court applies pre-Williams case law); People v. Pitre, 108 A.D.3d 643 (2d Dept. 2013) (no violation of right of confrontation where expert testified that DNA profile produced from sample of decedent's blood matched profile produced from stain on jeans worn by defendant when arrested); People v. Washington, 108 A.D.3d 576 (2d Dept. 2013) (no Confrontation Clause violation where court admitted Medical Examiner's Office files containing DNA profiles derived from testing of evidence recovered from crime scenes and documents were prepared prior to defendant's arrest and did not, standing alone, link him to crime, and expert conducted critical analysis by comparing crime scene profiles to profile generated from swab of defendant's cheek); People v. Raucci, 109 A.D.3d 109 (3d Dept. 2013) (Confrontation Clause not violated where analyst based opinion upon raw data generated, in part, by another chemist in same lab, but testifying analyst drew scientific conclusions); United States v. James, 712 F.3d 79 (2d Cir. 2013) (no Confrontation Clause violation where experts who did not participate in autopsies testified based on records that were not prepared primarily to create record for use at criminal trial); People v. Rios, 102 A.D.3d 473 (1st Dept.

2013), lv denied 20 N.Y.3d 1103 (no Confrontation Clause violation where testifying analyst made independent comparison between defendant's DNA profile and DNA recovered from semen stains on victim's underwear, and testified about other analysts' tests only to explain basis for opinion); People v. Castor, 99 A.D.3d 1177 (4th Dept. 2012), lv denied 20 N.Y.3d 1010 (no violation of right of confrontation where People failed to call technicians at independent laboratories who performed toxicology tests; reports were contemporaneous record of objective facts and results did not directly link defendant to crime and concerned only substances ingested by victim, and thus it was not likely that content of reports was influenced by pro-law enforcement bias); People v. Vargas, 99 A.D.3d 481 (1st Dept. 2012), lv denied 21 N.Y.3d 1011 (right of confrontation not violated by testimony by DNA analyst that made reference to data gathered by non-testifying technicians); People v. Morrison, 90 A.D.3d 1554 (4th Dept. 2011) (court erred in admitting DNA report prepared by supervisor who did not perform independent review and analysis of DNA data and whose only involvement was reading report to ensure that analyst followed proper procedure); People v. Encarnacion, 87 A.D.3d 81 (1st Dept. 2011), lv denied 17 N.Y.3d 952 (no right of confrontation violation where witness testified regarding DNA testing linking defendant to crime scene even though witness had not personally tested all items about which she testified); People v. Hall, 84 A.D.3d 79 (1st Dept. 2011), lv denied 18 N.Y.3d 924 (concluding that autopsy report was not testimonial, court notes that Melendez-Diaz did not explicitly hold that autopsy reports are testimonial and that Justice Thomas continued to adhere to position that Confrontation Clause is implicated by extrajudicial statements only insofar as they are contained in formalized testimonial materials such as affidavits, depositions, prior testimony, or confessions; that mandate of OCME is to provide impartial determination of cause of death and it is not law enforcement agency and is independent of prosecutor; and that there was testimony by medical examiner from same office as medical examiner who performed autopsy); People v. Dail, 69 A.D.3d 873, 894 N.Y.S.2d 78 (2d Dept. 2010), lv denied 14 N.Y.3d 839 (no violation of right of confrontation where court admitted lab reports containing results of DNA tests performed on defendant's saliva and items recovered from burglarized residences, but

determination linking defendant to crimes was made by forensic geneticist who testified, based on her analysis of data in lab reports, that defendant's DNA was present on items recovered from burglarized residences); People v. Hamilton, 66 A.D.3d 921, 887 N.Y.S.2d 261 (2d Dept. 2009), lv denied 13 N.Y.3d 907 (no right of confrontation violation where defendant's fingerprint and palm print cards were admitted into evidence without testimony by detective who took the prints; print cards themselves were not directly accusatory and were properly admitted through testimony of print examiner, who compared latent palm print found at scene with defendant's palm print and concluded that they matched); People v. Umpierre, 37 Misc.3d 775 (Sup. Ct., Bronx Co., 2012) (blood alcohol test results were testimonial evidence and could not be introduced via testimony of officer who recorded administration of tests since officer who recorded tests did not hear part of other officer's interaction with defendant and could not convey what other officer knew or observed or expose any lapses or inaccuracies on that officer's part).

D. Public Records

1. Generally - Under CPLR §4520, "[w]here a public officer is required or authorized, by special provision of law, to make a certificate or an affidavit to a fact ascertained, or an act performed, by him in the course of his official duty, and to file or deposit it in a public office of the state, the certificate or affidavit so filed or deposited is prima facie evidence of the facts stated." The official need not be called as a witness. Richardson, §8-1101.

Where the law does not require that the official duty be performed by the officer personally, the record is admissible if a subordinate had personal knowledge. Richardson, §8-1101.

2. Statutory Authentication Rule - A copy of an official record is prima facie evidence of the original if the copy is attested as correct by an officer, or a deputy of an officer, who has legal custody of the record. CPLR §4540(a). See People v. Michaels, 174 Misc.2d 982, 667 N.Y.S.2d 646 (Crim. Ct., Richmond Co., 1997). A copy of court records must be accompanied by a certificate signed by or containing a facsimile of the signature of the clerk of the court having legal custody of the record,

and, unless the copy is used in the same court, containing the court seal. CPLR §4540(b). See People v. Smith, 258 A.D.2d 245, 697 N.Y.S.2d 783 (4th Dept. 1999), lv denied 94 N.Y.2d 829, 702 N.Y.S.2d 600 (DMV driving record abstract inadmissible where attestation of correctness and State seal were preprinted on blank forms before data was placed on document); People v. Azpuru, 2002 WL 31015575 (Crim. Ct., N.Y. Co., 2002) (Smith not applicable since, under new policy, seal and certification are electronically placed on each page contemporaneously with driver's identification and record). Other records are admissible if the certificate contains the signature or a facsimile of the signature of the officer having custody of the original or his or her deputy or clerk, and his or her official seal. The county seal must be affixed to a county clerk's certificate. CPLR §4540(b). The proponent should ask the court to take judicial notice of the authority of the officer and his or her official signature and seal. Richardson, §§ 2-204(m), 9-201.

Authentication of records from other jurisdictions is governed by CPLR §4540(c). See, e.g., People v. Ricks, 90 A.D.3d 1562 (4th Dept. 2011) (record was properly authenticated by agent in charge of identification unit for Colorado government agency, but document certifying that agent had legal custody of record was signed by that agent rather than by separate authority; strict compliance with §4540(c) is necessary).

Certain public records also qualify as business records, and thus may be authenticated pursuant to CPLR §4518(c). Richardson, §8-1101.

3. Birth And Death Certificates - The admission of certified copies of death and birth records to prove the facts stated therein is permitted by Public Health Law §4103(3). See also PHL §4100-a(1) ("certified copy" means photocopy or microfilm print certified by commissioner or another individual specified in §4100-a[1]).

E. Best Evidence Rule - Under the best evidence rule, a party seeking to prove the contents of a writing must produce the original or satisfactorily account for its absence. But see United States v. Diaz-Lopez, 625 F.3d 1198 (9th Cir. 2010), cert denied 131 S.Ct. 2918 (best evidence rule not violated where evidence was offered to prove there was no record, not contents of database). The impact of this rule has been reduced by CPLR provisions making photocopies admissible (see, e.g., CPLR §§4539,

4540[a]). When a fact, such as a person's date of birth, exists independently, the rule does not apply. Richardson, §§ 10-101-105. See People v. Torres, 118 A.D.2d 821, 500 N.Y.S.2d 178 (2d Dept. 1986) (rule not violated where officer testified to conversations which had already been admitted as part of tape recording).

Secondary evidence of a writing's contents, such as a photocopy or testimony by a witness who is familiar with the writing, is admissible if it is shown that the writing had been in existence and was genuine (if authenticity is at issue), and that there is an adequate excuse for its absence, such as diligent efforts to locate it, an adversary's destruction of, or refusal to produce upon formal demand, a document in his or her possession or control, or a party's admission to the contents of the writing or the accuracy of a copy. Richardson, §§ 10-201-219. See, e.g., People v. McCargo, 144 A.D.2d 496, 534 N.Y.S.2d 195 (2d Dept. 1988) (photocopy of confession admitted where original was mislaid at pretrial hearing and defendant acknowledged that copy was fair representation of original). There is also a "voluminous writings" exception to the rule, see, e.g., People v. Case, _A.D.3d_, 2014 WL 563589 (4th Dept. 2014) (summaries improperly admitted where defendant not provided with underlying data before trial and exhibits were not based solely upon information in evidence); People v. Weinberg, 183 A.D.2d 932, 586 N.Y.S.2d 132 (2d Dept. 1992) (summary of computer entries), and a "collateral writings" exception. Richardson, §10-106.

F. Declarations Against Penal Interest

1. Foundation - Before a statement may be admitted as a declaration against penal interest, the following foundation must be laid: 1) the declarant must be unavailable to testify; 2) the declarant must have been aware when making the statement that it was contrary to his or her penal interest; 3) the declarant must have had competent knowledge of the underlying facts; 4) there must be sufficient competent evidence independent of the declaration to assure its trustworthiness and reliability. See People v. Brensic, 70 N.Y.2d 9, 517 N.Y.S.2d 120 (1987); Richardson, §8-403; but see Letendre v. Hartford Accident and Indemnity Company, 21 N.Y.2d 518, 289 N.Y.S.2d 183 (1968) (while upholding admission of testifying declarant's reliable hearsay statements even though they did not qualify under traditional hearsay exception, court

notes that had declarant died or disappeared, his statements would have been admissible as declaration against interest).

2. Offers By Prosecution vs. Offers By Defense - When the prosecution offers the statement, a separate hearing should be held to determine its admissibility. In view of due process protections afforded the respondent, the court must also find that the interest compromised by the declaration is of sufficient magnitude to all but rule out any motive to falsify. If the declaration is the product of custodial questioning, there is a rebuttable presumption of unreliability. See People v. Brensic, supra, 70 N.Y.2d 9. An accomplice's declaration against penal interest must be corroborated in order to support a finding of guilt. People v. Picard, 32 A.D.3d 317, 819 N.Y.S.2d 760 (1st Dept. 2006).

Declarations that exculpate the accused are subject to a more lenient standard, and will be admitted if there is a reasonable possibility that the statement might be true; depriving the accused of an opportunity to offer another person's hearsay admission may constitute a denial of the fundamental right to present a defense. People v. McFarland, 108 A.D.3d 1121 (4th Dept. 2013); see People v. Shabazz, 22 N.Y.3d 896 (2013) (female co-defendant's statement to other defendant's attorney, which conflicted with her denial of guilt at her own trial, improperly excluded; courts below erred by focusing on inconsistency between co-defendant's trial testimony and pretrial statement, since knowledge that declaration is against penal interests must be assessed at time it was made and subsequent recantations generally affect weight and credibility); People v. McArthur, _A.D.3d_, 977 N.Y.S.2d 545 (4th Dept. 2014) (accomplice's plea colloquy properly excluded where he made contradictory statements and sought to alter account out of desire to avoid entering prison as a "snitch"); People v. Soto, _A.D.3d_, 976 N.Y.S.2d 87 (1st Dept. 2013) (in DWI prosecution in which defendant claimed he was passenger and woman made statement admitting that she was driving, independent evidence of trustworthiness adequate where defense witness testified that he saw defendant with young lady on night of accident who had agreed to drive because defendant was intoxicated, and saw her drive off with defendant as passenger).

3. Unavailability; Declarant's Invocation Of Fifth Amendment - Unavailability has been defined generally as including death, an inability to secure the presence of a person who is outside the jurisdiction, and the witness' invocation of a privilege. See People v. Brown, 26 N.Y.2d 88, 308 N.Y.S.2d 825 (1970); see also People v. Shabazz, 22 N.Y.3d 896 (2013) (female co-defendant's statement to other defendant's attorney, which conflicted with her denial of guilt at her own trial, improperly excluded); but see People v. Coleman, 69 A.D.3d 430, 893 N.Y.S.2d 23 (1st Dept. 2010), lv denied 15 N.Y.3d 748 (witness not shown by defendant to be unavailable where prosecutor conceded that if witness appeared in court and Fifth Amendment problem could not be avoided, he would dismiss case against her). When ruling as to the "unavailability" of the declarant, the court may not assume that a declarant who has an open case will become unavailable by invoking the Fifth Amendment; the declarant must appear in court and take the stand in order to invoke the privilege. See People v. Anderson, 153 A.D.2d 893, 545 N.Y.S.2d 604 (2d Dept. 1989).

The prosecutor's refusal to offer immunity (see CPL article 50) to a proposed defense witness may, in some circumstances, violate the defendant's right to a fair trial. See, e.g., People v. Shapiro, 50 N.Y.2d 747, 431 N.Y.S.2d 422 (1981). However, FCA article 3 contains no provision allowing a family court judge to grant immunity to a witness in a delinquency proceeding. Although it was held in Matter of Barry M., 93 Misc.2d 882, 403 N.Y.S.2d 979 (Fam. Ct. Queens Co., 1978) that a family court judge may grant immunity pursuant to CPL §50.30, that decision pre-dates article 3, which, in §303.1(1), precludes application of CPL provisions which article 3 does not specifically incorporate.

The admission of declarations against penal interest offered by the prosecution may constitute a denial of due process where the prosecutor has selectively granted immunity only to witnesses who help the prosecution. United States v. Dolah, 245 F.3d 98 (2d Cir. 2001).

4. Motive To Falsify - When the declarant is an alleged accomplice, or has some other incentive to falsify, the statement must be scrutinized carefully. Richardson, §§ 8-403, 410. Compare People v. Burns, 6 N.Y.3d 793, 811 N.Y.S.2d 297

(2006) (trial court properly refused to admit signed statement by declarant who alleged that group of men, and not defendant, were involved in shooting; only portion of statement that was against penal interest was admission to possession of heroin, which was not relevant to issues at trial); People v. Blades, 93 N.Y.2d 166, 689 N.Y.S.2d 1 (1999) (co-defendant's statement during plea allocution that a second person was armed was not relevant to charge that defendant committed burglary individually; in addition, sufficient indicia of reliability were not present since co-defendant was required to implicate defendant as part of plea bargain and his penal interest was not impaired by identifying defendant); People v. Morgan, 76 N.Y.2d 493, 561 N.Y.S.2d 408 (1990) (accomplice had motive to minimize role), People v. Brensic, supra, 70 N.Y.2d 9 (accomplice had hope of leniency); People v. Shortridge, 65 N.Y.2d 309, 491 N.Y.S.2d 298 (1985) (defendant's father had incentive to exculpate son); People v. Coleman, 69 A.D.3d 430 (hearsay statement offered by defendant as declaration against penal interest made by girlfriend properly excluded where girlfriend contradicted herself and statement was contradicted by other evidence, she appeared to be under influence of drugs, and she admitted that critical portions of statement were not based on personal knowledge) and United States v. Jackson, 335 F.3d 170 (2d Cir. 2003) (co-conspirator had motive to avoid testifying against defendant and statements were inconsistent) with People v. Clinkscaleas, 78 A.D.3d 1069, 912 N.Y.S.2d 260 (2d Dept. 2010) (defendant deprived of fair trial when court refused to admit evidence where declarant was unavailable because of refusal to testify on constitutional grounds, statement was clearly and unambiguously against penal interest, and there was reasonable possibility that statement might be true); People v. Darrisaw, 206 A.D.2d 661, 614 N.Y.S.2d 622 (3rd Dept. 1994) (statement offered by defendant was sufficiently reliable despite declarant's retraction); People v. Fonfrias, 204 A.D.2d 736, 612 N.Y.S.2d 421 (2d Dept. 1994) (declaration offered by defendant improperly excluded) and People v. Smith, 195 A.D.2d 112, 606 N.Y.S.2d 656 (1st Dept. 1994), lv denied 83 N.Y.2d 876, 613 N.Y.S.2d 137 (when defendant makes offer, evidence need only establish reasonable possibility statement might be true). See also Lunbery v. Hornbeak, 605 F.3d 754 (9th Cir. 2010), cert denied 131 S.Ct. 798 (although trial court dismissed corroborative evidence as

providing only motive and opportunity because there was no evidence that third party had committed murder, hearsay statement would have provided missing element).

Arguably, statements made during a plea allocution are more reliable. See People v. Thomas, 68 N.Y.2d 194, 507 N.Y.S.2d 973 (1986).

5. Declarant's Awareness That Statement Is Against Interest - Compare People v. Soto, _A.D.3d_, 976 N.Y.S.2d 87 (1st Dept. 2013) (in DWI prosecution in which defendant claimed he was passenger, court erred in excluding statement made to defense investigator by woman who admitted that she, not defendant, was driving car but refused to testify on Fifth Amendment grounds; although exposure to criminal liability was relatively minor and she may or may not have known that her conduct in causing property damage and leaving scene violated Vehicle and Traffic Law, she expressed apprehension that she could get in trouble and made repeated inquiries about consulting with lawyer, and it can be inferred that she had apprehensions when she arrived for interview with investigator); People v. Fields, 66 N.Y.2d 876, 498 N.Y.S.2d 759 (1985) (declarant reluctant to sign statement and indicated he wanted to keep out of trouble) with People v. Ennis, 11 N.Y.3d 403, 872 N.Y.S.2d 364 (2008) (questionable whether declarant viewed statements as against penal interest since they were made during session with prosecution regarding possible cooperation agreement); People v. Simmons, 84 A.D.3d 1120 (2d Dept. 2011), lv denied 18 N.Y.3d 928 (statement that declarant "did what he had to do" too ambiguous to be against penal interest or be deemed trustworthy or reliable).

6. Basis Of Declarant's Knowledge - The declarant must have had the same knowledge of the facts contained in the declaration as a witness who would be permitted to testify to those facts. Richardson, §8-409. See, e.g., People v. Campney, 252 A.D.2d 734, 677 N.Y.S.2d 393 (3rd Dept. 1998) (statements by defendant's brother improperly admitted where there was evidence that he was not present during events; "exacting standard" of reliability applies when prosecution offers statement); People v. Cassella, 143 A.D.2d 192, 531 N.Y.S.2d 639 (2d Dept. 1988).

7. Non-Inculpatory Portion Of Statement - In criminal proceedings, the non-inculpatory portion of the statement is generally not admissible. See People v.

Brensic, supra, 70 N.Y.2d 9; People v. Maerling, 46 N.Y.2d 289, 413 N.Y.S.2d 316 (1978); People v. Nicholson, 108 A.D.2d 929, 485 N.Y.S.2d 821 (2d Dept. 1985). See also Williamson v. United States, 512 U.S. 594, 114 S.Ct. 2431 (1994). But see Richardson, §8-413 (collateral facts are admissible). Thus, it will often be the case that the portion of the declarant's statement which exculpates the person offering it will not be admissible. But see Matter of Marvin D., 262 A.D.2d 481, 692 N.Y.S.2d 124 (2d Dept. 1999) (court erred in refusing to admit statement by driver that the rifle in the car belonged to her friend).

8. Right Of Confrontation - Although admissibility used to be governed by Ohio v. Roberts, 448 U.S. 56, 100 S.Ct. 2531 (1980) (prosecution must establish that declarant is unavailable and that there are adequate indicia of reliability), the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) now bars admission of an unavailable declarant's "testimonial" statements to the police; incriminating statements made by an accomplice during police questioning clearly come within the definition of "testimonial" evidence. See also Matter of Ashanti A., 71 A.D.3d 1139, 898 N.Y.S.2d 198 (2d Dept. 2010) (court is presumed in nonjury trial to have considered only competent evidence, and thus no reversible error where non-testifying accomplice's plea allocution was admitted but later withdrawn by presentment agency); United States v. Harper, 514 F.3d 456 (5th Cir. 2008) (court rejects Government's argument that Crawford did not apply because testimony was not offered against defendant); People v. Woods, 9 A.D.3d 293, 779 N.Y.S.2d 494 (1st Dept. 2004) (co-defendant's plea allocution improperly admitted); United States v. Summers, 414 F.3d 1287 (10th Cir. 2005) (key to determining whether out-of-court statement is testimonial is whether "a reasonable person in the position of the declarant would objectively foresee that his statement might be used in the investigation or prosecution of a crime;" evidence that co-defendant asked officer who was arresting him, "How did you guys find us so fast?," should not have been admitted, and was hearsay since it was an assertion by the declarant of his wonderment at the ability of the police to apprehend him and the other perpetrators so quickly); United States v. Saner, 313 F.Supp.2d 896 (S.D. Indiana, 2004) (non-custodial statement made by

accomplice was inadmissible); but see People v. Reynoso, 2 N.Y.3d 820, 781 N.Y.S.2d 284 (2004) (statement of non-testifying co-defendant offered not for truth, but to show detective's state of mind); United States v. Saget, 377 F.3d 223 (2d Cir. 2004) (statements made by co-conspirator to government informant were not testimonial where true status of informant was not known to declarant); People v. Torres, 2004 WL 575205 (Calif. Ct. App., 5th Dist., 2004) (statements made by defendant and co-defendant while they were alone in back of police car were not testimonial); People v. Soto, 8 Misc.3d 350, 795 N.Y.S.2d 429 (Sup. Ct., Bronx Co., 2005) (pedigree statement not testimonial).

G. Dying Declarations - Before a statement may be admitted as a dying declaration, it must be established that the declarant was in extremis, spoke under a sense of impending death with no hope of recovery, and would, if alive, be competent to testify. Richardson, §8-702. The declarant's belief that death was possible or probable is not enough; there must have been a hopeless expectation of death. The required state of mind could be inferred from the nature of the wounds, or the deceased's own statements or preparations for death. Richardson, §8-704; People v. Clay, 88 A.D.3d 14 (2d Dept. 2011), lv denied 17 N.Y.3d 952 (statement properly admitted as dying declaration where victim was shot six times; three bullets entered abdomen, and right and left side of back, condition appeared to be declining at time of declarations and he was struggling to breathe and at some point was unable to speak in response to officer's inquiries, and officer informed him that he did not think he would live); People v. Williams, 16 Misc.3d 1104(A), 841 N.Y.S.2d 828 (Sup. Ct., Kings Co., 2007) (victim was under sense of impending death where he was gasping for breath, stated, "Ma, Ma, oh shit, oh shit, oh shit," questioned detective regarding seriousness of injury, and stated to EMS worker, "Am I going to die? I don't want to die. Please don't let me die"). Arguably, a child's statement may qualify under this exception. People v. Stamper, 742 N.W.2d 607 (Mich. 2007) (child may be sufficiently aware of impending death for purposes of dying declaration exception, and, in this case, four-year-old child had such capacity).

The Court of Appeals has refused to loosen these traditional requirements even

when there are other indicia of trustworthiness. See People v. Nieves, 67 N.Y.2d 125, 501 N.Y.S.2d 1 (1986). And, this hearsay exception is applicable only in homicide prosecutions involving the death of the declarant, and the statement must relate to the circumstances of the death. Richardson, §8-706. A conclusion regarding the cause of death and/or the identity of the killer that appears to be based on suspicion or surmise is not admissible, but such an opinion is admissible if it is a summary statement of observed facts. Richardson, §8-707.

It has been held that the dying declarations made in response to police questioning are not testimonial under the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). People v. Clay, supra, 88 A.D.3d 14 (dying declaration admissible as exception to Confrontation Clause); see also State v. Jones, 197 P.3d 815 (Kan. 2008) (dying declaration admissible even when testimonial and un-confronted); Harkins v. State, 143 P.3d 706 (Nev. 2006); People v. Monterroso, 101 P.3d 956 (CA 2004); People v. Durio, 7 Misc.3d 729, 794 N.Y.S.2d 863 (Sup. Ct., Kings Co., 2005); People v. Paul, 25 A.D.3d 165, 803 N.Y.S.2d 66 (1st Dept. 2005), lv denied 6 N.Y.3d 757 (while not deciding whether dying declarations are subject to absolute exception to application of Confrontation Clause, court holds that victim's dying declarations to civilian witnesses were not testimonial under the circumstances); but see United States v. Jordan, 2005 WL 513501 (D. Colorado, 2005) (dying declarations should be treated like other testimonial hearsay).

H. Excited Utterances

1. Foundation - A statement is admissible as an excited utterance (or "spontaneous declaration") when the "declarant was under the stress of excitement caused by an external event sufficient to still his reflective faculties, thereby preventing opportunity for deliberation which might lead the declarant to be untruthful. The court must assess not only the nature of the startling event and the amount of time which has elapsed between the occurrence and the statement, but also the activities of the declarant in the interim to ascertain if there was significant opportunity to deviate from the truth. Above all, the decisive factor is whether the surrounding circumstances reasonably justify the conclusion that the remarks were not made under the impetus of

studied reflection." People v. Edwards, 47 N.Y.2d 493, 419 N.Y.S.2d 45, 47 (1979). See People v. Cantave, 21 N.Y.3d 374 (2013) (no error in exclusion of defendant's 911 call where defendant's voice was somewhat agitated but did not evidence inability to reflect upon events; it was suspect that defendant failed to report names of alleged assailants and seemed to refer to them as being unknown even though he knew them well; and defendant did not complain of injury or request ambulance until questioned specifically about injury, pain and need for emergency services by 911 operator and omitted entirely that he had bit off part of victim's ear and injured his finger); People v. Johnson, 1 N.Y.3d 302, 772 N.Y.S.2d 238 (2003) (statement inadmissible where victim had become more relaxed, and, according to officer, had time for reflection); People v. Caviness, 38 N.Y.2d 227, 379 N.Y.S.2d 695 (1975); In re Odalis F., 85 A.D.3d 441 (1st Dept. 2011) (911 call made by complainant improperly admitted where, in period between alleged threats with knife and call, complainant called mother on phone and waited for her to get home, and, when mother arrived, asked her whether he should call the police; also, other than recording of 911 call, there was no evidence of existence of startling event); People v. Gantt, 48 A.D.3d 59, 848 N.Y.S.2d 156 (1st Dept. 2007), lv denied, 10 N.Y.3d 765 (victim's request that marijuana be removed from sock before police arrived did not show he had opportunity to deliberate and thus deviate from truth since seriously wounded person might reflexively recognize adverse consequences of having police find drugs on him but still be incapable of studied reflection); People v. Windsor, 2 Misc.3d 130(A), 784 N.Y.S.2d 923 (App. Term, 2d & 11th Jud. Dist., 2004), lv denied 2 N.Y.3d 748 (statements improperly admitted where declarant made no statements that demonstrated that she was personally witnessing occurrence); People v. Pette, 251 A.D.2d 600, 674 N.Y.S.2d 768 (2d Dept. 1998), appeal withdrawn 92 N.Y.2d 951, 681 N.Y.S.2d 481 (decedent who made inconsistent statements before alleged excited utterances possessed reflective capacity); People v. Simpson, 238 A.D.2d 611, 656 N.Y.S.2d 765 (2d Dept. 1997) (dissenting judges note that 911 caller lied to operator about existence of gun in order to secure an immediate response, and, therefore, did not lack reflective capacity); People v. Vasquez, N.Y.L.J., 2/16/96, p. 30, col. 4 (App. Term, 2d and 11th Jud. Dist.) (where patient had had a lobotomy and was

schizophrenic, it was not established that incident was sufficiently startling to still the patient's reflective faculties); Richardson, §8-605; see also McCarty v. State, 257 S.W.3d 238 (Tex. Ct. Crim. App., 2008) (under state evidence rule, event about which excited utterance was made does not have to be same event that caused declarant's excitement); People v. Barrett, 747 N.W.2d 797 (Mich. 2008) (excited utterance exception does not require proponent to establish exciting event without consideration of hearsay statement itself).

It must also appear that the declarant had an opportunity to observe the events described. People v. Fratello, 92 N.Y.2d 565, 684 N.Y.S.2d 149 (1998), cert denied 526 U.S. 1068.

2. Time Between Statement And Event - The passage of time between the event and the statement does not preclude admission, since the psychological and emotional effect may persist for a period of time. The court must consider the nature of the initial trauma and shock, and the activities of the declarant after the event. See, e.g., People v. Cotto, 92 N.Y.2d 68, 677 N.Y.S.2d 35 (1998) (although victim remained lucid for much of trip to hospital, he was in great pain and shock and trauma never subsided); People v. Brown, 70 N.Y.2d 513, 522 N.Y.S.2d 837 (1987) (statement in emergency room 30 minutes after shooting; admissible); People v. Auleta, 82 A.D.3d 1417, 919 N.Y.S.2d 222 (3d Dept. 2011) (statements properly admitted where victim testified that she was able to form and execute escape plan and then drive 10-15 minutes in traffic to friends' home and report rape to them, friends testified that victim was hysterical, crying and shaking, could not walk up stairs without stumbling, and collapsed in fetal position on bed before responding to questions by stating that she had been raped); People v. Hayes, 21 Misc.3d 131(A), 873 N.Y.S.2d 514 (App. Term, 1st Dept., 2008) (statements properly admitted where declarant cab driver had witnessed hit-and-run accident involving pedestrian and was pursuing fleeing Jeep driven by defendant, and accident had occurred within previous 15 minutes at location approximately 20 blocks away); People v. McMillan, 10 Misc.3d 97, 810 N.Y.S.2d 786 (App. Term, 2d & 11th Jud. Dist., 2005) (trial court erred in admitting statement made by complainant where she appeared upset and shaken, but there was

no evidence as to when statement was made in relation to incident, and complainant knew defendant had been arrested); United States v. Tocco, 135 F.3d 116 (2d Cir. 1998) (statement made about 3 hours after fire was set was admissible; declarant was still "all hyped" and "nervous"); People v. Melendez, 296 A.D.2d 424, 744 N.Y.S.2d 485 (2d Dept. 2002), lv denied 98 N.Y.2d 770, 752 N.Y.S.2d 10 (2002) (defendant made 911 call immediately or soon after stabbing); People v. Fenner, 283 A.D.2d 516, 727 N.Y.S.2d 117 (2d Dept. 2001), lv denied 96 N.Y.2d 939, 733 N.Y.S.2d 379 (statements inadmissible where declarant was able to urge his brother to remain calm); People v. Seymour, 183 A.D.2d 35, 588 N.Y.S.2d 551 (1st Dept. 1992), lv denied 81 N.Y.2d 766, 594 N.Y.S.2d 729 (statement admissible even though victim was tied up for 24-48 hours before being found, since he had been unconscious or semi-conscious; however, statement made 20 minutes after first one was not admissible, since victim had received treatment and was reasonably comfortable); People v. Lee, 177 A.D.2d 288, 576 N.Y.S.2d 97 (1st Dept. 1991) (statement made one hour after shooting was improperly admitted, since victim was not in shock, consented to surgery and never lost consciousness); People v. Treat, 167 A.D.2d 110, 561 N.Y.S.2d 198 (1st Dept. 1990), lv denied 77 N.Y.2d 844, 567 N.Y.S.2d 212 (1991) (burn victim showered to ease pain, and then went to hospital; admissible, since victim was still under influence of intense, "unrelenting trauma"); People v. Rowley, 160 A.D.2d 963, 554 N.Y.S.2d 933 (2d Dept. 1990), appeal dism'd 76 N.Y.2d 896, 561 N.Y.S.2d 558 (statement by excited and almost incoherent complainant who identified defendant to police while chasing him; admissible); People v. Wright, 157 A.D.2d 534, 549 N.Y.S.2d 724 (1st Dept. 1990), lv denied 75 N.Y.2d 971, 556 N.Y.S.2d 256 (statement made 3-5 minutes after robbery; admissible); People v. Brooks, 133 A.D.2d 411, 519 N.Y.S.2d 404 (2d Dept. 1987), aff'd 71 N.Y.2d 877, 527 N.Y.S.2d 753 (1988) (statement made 90 minutes after decedent brought to hospital; admissible); People v. Vigilante, 122 A.D.2d 900, 505 N.Y.S.2d 942 (2d Dept. 1986) (statement made 15-20 minutes after crime, and decedent was unconscious for 13 minutes; admissible); People v. Connors, 121 A.D.2d 556, 503 N.Y.S.2d 850 (2d Dept. 1986) (statement made 10 minutes after crime while declarant was still hysterical; admissible). See also Richardson, §8-606.

3. Statement Made In Response To Inquiry - A statement may be admitted even though it was made in response to a question, and, therefore, was not genuinely "spontaneous." Compare People v. Fenner, 283 A.D.2d 516 (statements made in response to suggestive comments and questioning by eyewitness not admissible); People v. Connors, 149 A.D.2d 606, 540 N.Y.S.2d 281 (2d Dept. 1989) (detailed account after repeated questioning not admissible) with People v. Vigilante, supra, 122 A.D.2d 900 (statement made in response to nonsuggestive questions; admissible) and People v. Taylor, 117 A.D.2d 829, 499 N.Y.S.2d 151 (2d Dept. 1986) (decedent wrote defendant's nickname in blood in response to question, "who did this to you?"; admissible). See also Richardson, §8-607.

4. Statements By Bystanders - New York law permits the introduction of statements made by bystanders who were not involved in the startling event. Richardson, §8-608). See, e.g., People v. Wright, supra, 157 A.D.2d 534 (witness to robbery; admissible); People v. Matos, 107 A.D.2d 823, 484 N.Y.S.2d 844 (2d Dept. 1985) (numerous bystanders shouted that defendant was one of the assailants; not admissible, since there was no proof of the declarants' identities or of their opportunity to observe).

5. Recantation - See People v. Gantt, 48 A.D.3d 59 (reliability of victim’s statements not fatally undermined by victim’s statement to police nine days after shooting that he had been unable to see assailant's face and identified defendant merely because he had heard somebody on street around time of shooting say defendant's name, where victim undoubtedly was convinced that it now was in his interest to deny earlier statements implicating a fellow drug dealer).

6. Right Of Confrontation - If an unavailable declarant’s statement can be characterized as “testimonial” evidence under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), it will not be admissible in the absence of a prior opportunity to cross examine the declarant. In Davis, the trial court admitted a recording of an emergency 911 call. In the companion case of Hammon v. Indiana, the trial court admitted, as a present sense impression, an affidavit signed by the complainant, and, as excited utterances,

statements made by the complainant to an officer who arrived at the scene after the incident. The Supreme Court concluded that hearsay statements are nontestimonial when they were "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." Statements are testimonial "when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." The Court "refer[red] to interrogations because ... the statements in the[se] cases ... are the products of interrogations - which in some circumstances tend to generate testimonial responses. This is not to imply, however, that statements made in the absence of any interrogation are necessarily nontestimonial. The Framers were no more willing to exempt from cross-examination volunteered testimony or answers to open-ended questions than they were to exempt answers to detailed interrogation."

Relying on this formulation, the Court concluded in Davis that the statements were nontestimonial, and that, in Hammon, they were testimonial.

Subsequently, in Michigan v. Bryant, 131 S.Ct. 1143 (2011), a majority found no Confrontation Clause violation where police officers, who were dispatched to a gas station parking lot where they found a man who was mortally wounded and who told them that he had been shot by defendant outside defendant's house and had then driven himself to the lot, were allowed to testify at trial about what the murder victim said. The majority noted that the identification and description of the shooter and the location of the shooting were not testimonial statements because they had a primary purpose to enable police assistance to meet an ongoing emergency; that to make the "primary purpose" determination, a court must objectively evaluate the circumstances in which the encounter between the individual and the police occurs and the parties' statements and actions"; that "[t]he existence of an ongoing emergency at the time of the encounter is not determinative, but it is among the most important circumstances informing the interrogation's primary purpose," and that "[a]n emergency focuses the participants not on proving past events potentially relevant to later criminal prosecution,

but on ending a threatening situation"; that "[a]n assessment of whether an emergency threatening the police and public is ongoing cannot narrowly focus on whether the threat to the first victim has been neutralized because the threat to the first responders and public may continue"; that "[d]omestic violence cases like Davis v. Washington and Hammon v. Indiana often have a narrower zone of potential victims than cases involving threats to public safety," and "Davis and Hammon involved the use of fists, while this case involved a gun"; that "[a] victim's medical condition is important to the primary purpose inquiry to the extent that it sheds light on the victim's ability to have any purpose at all in responding to police questions and on the likelihood that any such purpose would be a testimonial one"; that "[f]ormality suggests the absence of an emergency, but informality does not necessarily indicate the presence of an emergency or the lack of testimonial intent"; that "the statements and actions of both the declarant and interrogators also provide objective evidence of the interrogation's primary purpose," that "[p]olice officers' dual responsibilities as both first responders and criminal investigators may lead them to act with different motives simultaneously or in quick succession," and that "during an ongoing emergency, victims may want the threat to end, but may not envision prosecution." See also People v. Nieves-Andino, 9 N.Y.3d 12, 840 N.Y.S.2d 882 (2007) (4-judge majority holds that statements made by shooting victim to officers who arrived at scene within minutes were not testimonial, noting that even when assailant has fled, circumstances may objectively indicate that there is ongoing emergency); People v. Bradley, 8 N.Y.3d 124, 830 N.Y.S.2d 1 (2006) (statement at scene by visibly shaken and bleeding complainant not testimonial; although she was describing past events, police were investigating ongoing emergency); United States v. Polidore, 690 F.3d 705 (5th Cir. 2012), cert denied 133 S.Ct. 1583 (911 caller's statements not testimonial where caller was reporting ongoing street-level drug trafficking but not an emergency, and, although caller appeared to have understood that statements would start investigation that could lead to criminal prosecution, reasonable caller in his position would not have thought statements were creating substitute for trial testimony); People v. Clay, 88 A.D.3d 14 (2d Dept. 2011), lv denied 17 N.Y.3d 952 (statement made by shooting victim shortly

before death, in response to officer's inquiry regarding identity of shooter, was testimonial where there were other officers already present who would have already tried to determine nature of any emergency, officer's question was pointed and designed to learn identity of perpetrator, and victim, having been attended to by another officer and advised that he probably was not going to "make it," could only have reasonably expected that his response would be used in prosecution); People v. Legere, 81 A.D.3d 746, 916 N.Y.S.2d 187 (2d Dept. 2011) (no error in admission of tape of 911 call and statements made by detective to another officer at scene where detective's primary purpose was to obtain emergency aid for himself and another detective, and to prevent further harm by perpetrator, who was still at large and armed); People v. Johnson, 189 Cal.App.4th 1216 (Cal. Ct. App., 1st Dist., 2010) (victim's statements to 911 operator while driving away from scene of shooting not testimonial since victim's flight does not establish danger has passed; defendant may still have been angry and able to pursue); People v. Porco, 71 A.D.3d 791, 896 N.Y.S.2d 161 (2d Dept. 2010), aff'd 17 N.Y.3d 877 (harmless error where court admitted detective's testimony that complainant, while being treated by paramedics at her home after attack, nodded affirmatively in response to detective's question as to whether defendant attacked her); People v. Gantt, 48 A.D.3d 59 (statement to officer in response to single inquiry not testimonial where officer, who was responding to scene of shooting that had just occurred, could not have been certain that assailant posed no further threat to victim or onlookers); People v. Rodriguez, 47 A.D.3d 406, 850 N.Y.S.2d 26 (1st Dept. 2007), lv denied, 10 N.Y.3d 770 (evidence not testimonial where police were involved in ongoing emergency involving presence of loaded firearms at playground, and, even after locating two weapons, officer needed to confirm that no other weapons were present); People v. Mackey, 16 Misc.3d 136(A), 847 N.Y.S.2d 904 (App. Term, 1st Dept., 2007) (statements made by victim immediately after she flagged down police, in response to inquiries as to "what was wrong," were not testimonial); People v. Morton, 15 Misc.3d 141(A), 841 N.Y.S.2d 822 (App. Term, 2d & 11th Jud. Dist., 2007) (statements made by complainant moments after police separated defendant from her were not testimonial); People v. Watson, 14 Misc.3d 942, 827 N.Y.S.2d 822 (Sup. Ct.,

N.Y. Co., 2007) (first statement - made shortly after robbery when witness, bleeding profusely from head, emerged from restaurant and told officer that defendant "just robbed me. He just robbed us at Burger King" - was not testimonial; second statement - elicited moments afterwards when officer asked witness whether any other perpetrators had been involved, and witness responded that defendant had acted alone - was not testimonial; third statement - made approximately two minutes later, when officer asked witness to tell him what had happened, and witness responded with narrative of events - was testimonial); Matter of German F., 13 Misc.3d 642, 821 N.Y.S.2d 410 (Fam. Ct., Queens Co.) (hearsay not testimonial where victim was lying prone on sidewalk moments after officer had seen victim surrounded by crowd and observed blood on victim's pants and socks and a large cut on the victim's lower leg); People v. Jackson, 12 Misc.3d 1178(A), 824 N.Y.S.2d 765 (Sup. Ct., Queens Co., 2006) (statements not testimonial where primary purpose of 911 interrogation was to enable police to assist in ongoing emergency and not prove past fact).

The Court in Davis did not decide whether and when statements made to persons other than law enforcement personnel may be testimonial. A number of courts have found statements to child welfare interviewers to be testimonial, but only when the interviewer is effectively acting as an agent of the police. See Commonwealth v. Allshouse, 36 A.3d 163 (Pa. 2012) (4-year-old child's statement to child protective caseworker non-testimonial where primary purpose of interview was not to gather information for criminal prosecution); In re Rolandis G., 902 N.E.2d 600 (Ill., 2008) (statements to child advocate during videotaped interview at child advocacy center were testimonial since advocate was acting as police representative and nothing indicated that interview was, to a substantial degree, for purposes of treatment rather than investigation); State v. Snowden, 867 A.2d 314 (Md., 2005) (child sex abuse victims' statements to social worker working with police were testimonial); State v. Mack, 101 P.3d 349 (Oregon, 2004) (statements to child welfare caseworker were testimonial where police solicited statements and videotaped the interviews); State v. Contreras, 979 So.2d 896 (Fla., 2008) (videotaped statement to coordinator of Child Protective Team were testimonial where law enforcement officer was not in room but was

connected electronically in order to suggest questions); People v. Shaw, 80 A.D.3d 465, 914 N.Y.S.2d 155 (1st Dept. 2009) (no right of confrontation violation in admission of victim's declaration to gynecologist at hospital since doctor acted primarily as treating physician and role in gathering evidence for police by way of rape kit was secondary); Bobadilla v. Carlson, 575 F.3d 785 (8th Cir. 2009), cert denied 130 S.Ct. 1081 (rejecting state court's decision in State v. Bobadilla, 709 N.W.2d 243, Eighth Circuit upholds award of habeas relief where trial court admitted statement made by child complainant to social worker in presence of police officer; social worker was acting as "surrogate interviewer" for police after she was asked to assist with criminal investigation, and state statute required that social workers and police officers coordinate planning and execution of investigation to eliminate need for multiple interviews); State v. Bella, 220 P.3d 128 (Or. Ct. App., 2009) (statements made by victim to hospital physicians not testimonial where physicians had statutory obligation to report non-accidental injuries to medical examiner; statute does not alter purpose of encounter between physician and patient); see also State v. Clark, 999 N.E.2d 592 (Ohio 2013) (court violated defendant's Confrontation Clause rights by admitting hearsay statement made by three-and-a-half-year-old child to preschool teacher where teachers had statutory duty to report abuse and statute expressly contemplated prosecution for criminal acts of child abuse, and teacher questioning child acts in dual capacity as instructor and as agent for law enforcement); Miller v. Stovall, 608 F.3d 913 (6th Cir. 2010) (suicide note written by defendant's lover, who allegedly shot defendant's husband and then committed suicide and left behind evidence implicating defendant, was testimonial; question is whether reasonable person in declarant's position would anticipate statement being used against accused in investigating and prosecuting crime).

If the accused had an opportunity at a pretrial hearing to cross-examine the now unavailable declarant regarding the hearsay statements, the statements may be admissible. See People v. Ochoa, 18 Cal.Rptr.3d 365 (Cal. Ct. App., 2004), appeal dism'd 169 P.3d 884 (complainant's hearsay statements, admitted at preliminary hearing, were also admissible at trial when complainant asserted Fifth Amendment privilege; although certain statements were not elicited at hearing, defendant was aware

of them and could have cross-examined complainant about them at hearing).

As to nontestimonial statements, the State Constitution arguably requires the prosecution to establish the declarant's unavailability and sufficient indicia of reliability. See People v. Rodriguez, 306 A.D.2d 686, 761 N.Y.S.2d 368 (3rd Dept. 2003); People v. Torres, 196 A.D.2d 758, 601 N.Y.S.2d 919 (1st Dept. 1993), lv denied 82 N.Y.2d 854, 606 N.Y.S.2d 606; People v. Grant, 113 A.D.2d 311, 497 N.Y.S.2d 23 (2d Dept. 1985). But see People v. Cook, 159 Misc.2d 430, 603 N.Y.S.2d 979 (Sup. Ct. Kings Co., 1993) (no showing of unavailability required by Constitution or state evidence law).

7. Infant Declarants - A statement made by an infant may be inadmissible absent an inquiry into the child's competency. See People v. Wright, 81 A.D.3d 1161, 918 N.Y.S.2d 598 (3d Dept. 2011) (statements admissible where trial court determined after in camera examination that child would be competent to testify as unsworn witness); People v. Sullivan, 117 A.D.2d 476, 504 N.Y.S.2d 788 (3rd Dept. 1986) (statement of 4-year-old improperly admitted); People v. Hamilton, 14 Misc.3d 1203(A), 831 N.Y.S.2d 361 (County Ct., Suffolk Co., 2006); but see State v. Silverman, 906 N.E.2d 427 (Ohio 2009) (4-year-old's statements admissible without determination of competency).

I. Former Testimony

1. Foundation - Under CPL article 670, which, along with CPL article 660, has been incorporated by reference in FCA §370.1(2), testimony given at a trial, a felony hearing, or a conditional examination of a witness (see CPL article 660) may be received into evidence at a subsequent proceeding when the witness is unable to attend by reason of death, illness or incapacity, or cannot with due diligence be found, or is outside the state or in federal custody and cannot with due diligence be brought before the court. CPL §670.10(1). See also People v. Robinson, 89 N.Y.2d 648, 657 N.Y.S.2d 575 (1997) (if evidence is material and bears sufficient indicia or reliability, and witness is unavailable, defendant has due process right to introduce Grand Jury testimony). Prior testimony is proved by the introduction of an authenticated transcript. CPL §670.20(1). See also CPLR 4517 (if stenographer dies or becomes incompetent before preparing transcript, competent person may read original notes into evidence);

Richardson, §§ 8-507, 516 (in civil actions, testimony may be proved by person who heard it).

2. Proceedings In Which Testimony May Be Admitted - See CPL §670.10(2) (testimony admissible at "[a]ny proceeding constituting a part of a criminal action based upon the charges which were pending against the defendant at the time of the witness's testimony and to which such testimony related," and at a post-judgment challenge to a conviction upon the charges to which the testimony related); People v. Ayala, 75 N.Y.2d 422, 554 N.Y.S.2d 412 (1990) (suppression hearing testimony not included in statute); In re Jaquan A., 45 A.D.3d 305, 846 N.Y.S.2d 88 (1st Dept. 2007), lv denied, 10 N.Y.3d 707 (suppression hearing testimony not admissible at fact-finding hearing).

3. Due Diligence In Locating And Producing Witness - See, e.g., Hardy v. Cross, 132 S.Ct. 490 (2011) (Seventh Circuit erred in holding that State courts unreasonably found that efforts to find witness were inadequate because State failed to contact witness' current boyfriend, whom she was with moments before the assault, or any of her other friends in the area, did not make inquiries at cosmetology school where witness had once been enrolled, and neglected to serve witness with subpoena after she expressed fear about testifying; "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence ... but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising"); People v. Diaz, 97 N.Y.2d 109, 735 N.Y.S.2d 885 (2001) (no due diligence where People failed to establish that witness who had problems with English understood the "subtleties" of a conversation designed to induce him to come from Mexico; People should have addressed witness in his native tongue); People v. Whitley, 78 A.D.3d 1084, 912 N.Y.S.2d 257 (2d Dept. 2010) (due diligence standard requires People to explain to witness, fully and plainly, what they would do to accommodate concerns over issues such as length of travel time, travel arrangements, expenses and potential personal disruption that might accompany trip); People v. Nettles, 118 A.D.2d 875, 500 N.Y.S.2d 361 (2d Dept. 1986); Richardson, §8-514.

4. Illness Or Incapacity Of Witness - See, e.g., People v. Muccia, 139 A.D.2d 838, 527 N.Y.S.2d 620 (3rd Dept. 1988) (witness who refused to testify was unable to attend due to "incapacity"); People v. Williams, 115 A.D.2d 676, 496 N.Y.S.2d 510 (2d Dept. 1985) (adequate medical testimony presented); see also Turner v. Commonwealth, 726 S.E.2d 325 (Va. 2012) (in determining whether preliminary hearing testimony is admissible because witness is unavailable due to lack of memory, court has obligation to conduct inquiry and observe witness's demeanor to ensure witness has not feigned loss of memory in attempt to avoid testifying).

5. Right Of Confrontation - The admission of former testimony violates the respondent's right of confrontation unless he or she had an adequate opportunity to cross-examine the witness at the prior proceeding. Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004); People v. Hilts, 12 N.Y.3d 747, 876 N.Y.S.2d 698 (2009) (no error in admission of informant's testimony at first trial where People failed to inform defendant about informant's request for help from prosecutor regarding informant's unrelated case; request and prosecutor's noncommittal response were immaterial where defendant had large quantity of evidence impeaching informant's credibility); People v. Torres, 962 N.E.2d 919 (Ill. 2012) (defense counsel had no fair opportunity at preliminary hearing to effectively inquire into witness's opportunity to observe, interest, bias, prejudice, and motive; although cross-examination at hearing had same "motive" and "focus" as would similar cross-examination at trial, counsel would have done more with witness had court not sustained objections and made it clear that it was not enthusiastic about proceeding with hearing); Commonwealth v. Wholaver, 989 A.2d 883 (Pa. 2010), cert denied 131 S.Ct. 332 (right of confrontation not violated by admission of preliminary hearing testimony since defendant was able to meaningfully cross-examine witnesses at hearing); Chavez v. State, 213 P.3d 476 (Nev., 2009) (defendant had adequate opportunity to confront witness at preliminary hearing where Nevada law did not preclude defendant from questioning witness's credibility or motive and judge allowed unrestricted opportunity to confront complainant on all pertinent issues, nearly all discovery was complete, and most of defendant's extensive cross-examination was based upon statements witness had made to authorities about sexual

abuse); State v. Arroyo, 935 A.2d 975 (Conn. 2007) (child victim's videotaped testimony in witness room with one-way mirror not testimonial where defendant had opportunity to cross examine); People v. Fry, 92 P.3d 970 (Colo 2004) (testimony from preliminary hearing inadmissible since there is limited opportunity for cross-examination under Colorado law); People v. Oxley, 64 A.D.3d 1078, 883 N.Y.S.2d 385 (3rd Dept. 2009), lv denied 13 N.Y.3d 941 (preliminary hearing testimony of deceased witness properly admitted where adequate opportunity for cross-examination was provided at hearing and any limitations were due to defendant's failure to fully avail himself of opportunity); People v. Linton, 21 A.D.3d 909, 800 N.Y.S.2d 627 (2d Dept. 2005) (complainant's Grand Jury testimony properly admitted as past recollection recorded, since complainant testified at trial and was subject to cross-examination); Owens v. Frank, 394 F.3d 490 (7th Cir. 2005), cert denied 125 S.Ct. 2910 (cross examination at preliminary hearing was not so limited as to deny trier of fact a satisfactory basis for evaluating testimony); State v. Noah, 162 P.3d 799 (Kan., 2007) (defendant did not have sufficient opportunity to cross-examine at preliminary hearing after complainant began crying and was unable to continue cross-examination); People v. Wilson, 114 P.3d 758 (CA, 2005) (testimony admissible although, at time of testimony, witness had not yet been granted generous sentence reduction and defendant had not received information about meeting between witness and officers); see also In re Tayquan T., 91 A.D.3d 518 (1st Dept. 2012) (fact that witness was only subject to type of cross-examination appropriate for probable cause hearing was relevant to weight to be accorded probable cause hearing testimony); People v. Green, 159 A.D.2d 432, 553 N.Y.S.2d 117 (1st Dept. 1990), rev'd on other grounds 78 N.Y.2d 1029, 576 N.Y.S.2d 75 (1991) (after 9-year-old's prior testimony was admitted because child suffered loss of memory, defendant could have cross-examined child but chose not to); United States v. Ciak, 102 F.3d 38 (2d Cir. 1996) (existence of conflict of interest did not establish that defense counsel's examination of witness at prior trial was inadequate per se); United States v. Carneglia, 256 F.R.P. 366 (EDNY, 2009) (neither lower burden of proof, nor less serious nature of charges, affected defense counsel's motive or opportunity to cross-examine at preliminary hearing, and, since witness may be unavailable to testify

at trial, preliminary hearing testimony is highly consequential); Richardson, §8-515.

J. Past Recollection Recorded - When a witness has no memory and his/her recollection is not refreshed by a writing containing the facts, the writing is admissible to prove the witness' prior knowledge if the witness once had personal knowledge of the contents of the writing, the writing was prepared by the witness or at his/her direction, the writing was prepared at or about the time of the events when they were fresh in the witness' mind, and the witness swears that he/she believed the writing was correct when it was made. If the writing was prepared by a third party, the witness must state that he/she examined the writing and verified its accuracy when the events were fresh in the witness' mind. Richardson, §§ 6-216-220. See, e.g., Matter of Saperston v. Holdaway, 93 A.D.3d 1271 (4th Dept. 2012), appeal dism'd 20 N.Y.3d 1052 (journal entries not admissible where, although father testified that he made entries contemporaneously with events, he later added commentary and/or observations regarding events); People v. Fields, 151 A.D.2d 598, 542 N.Y.S.2d 356 (2d Dept. 1989); People v. Ramirez, 112 A.D.2d 326, 491 N.Y.S.2d 776 (2d Dept. 1985). Sometimes it is sufficient if the witness testifies that he/she gave an accurate oral account, and the recorder testifies that he/she accurately transcribed the account. But see People v. Taylor, 80 N.Y.2d 1, 586 N.Y.S.2d 545 (1991) (insufficient showing of accuracy where witness testified that she reported accurately, but officer did not recall taking message).

K. Present Sense Impression - A statement made while the declarant was perceiving the event or condition described or immediately thereafter may be admissible. See People v. Buie, 86 N.Y.2d 501, 634 N.Y.S.2d 415 (1995) (showing of declarant's unavailability not required; and, there was no improper bolstering where declarant also testified); People v. Brown, 80 N.Y.2d 729, 594 N.Y.S.2d 696 (1993) (911 tapes properly admitted; declarant may be unidentified and non-participating bystander, but statement must be corroborated by "indicia of reliability"); Fischer v. State, 252 S.W.3d 375 (Tex. Ct. Crim. App., 2008) (officer's contemporaneously recorded statements regarding observations of DWI suspect not within present sense impression exception; most of the statements constituted a calculated narrative in an

adversarial, investigative setting); Brown v. Keane, 355 F.3d 82 (2d Cir. 2004) (statement made by non-observer did not qualify as present sense impression); People v. Smith, 267 A.D.2d 407, 700 N.Y.S.2d 227 (2d Dept. 1999) (tape of 911 call admitted even though call was made after robber left gas station); People v. Mieles, 226 A.D.2d 397, 640 N.Y.S.2d 264 (2d Dept. 1996) (tape recording made by undercover as he observed drug transaction was admissible); People v. Brown, 224 A.D.2d 184, 637 N.Y.S.2d 127 (1st Dept. 1996), lv denied 89 N.Y.2d 920, 654 N.Y.S.2d 722 (statement admissible even though declarant did not state that he saw the events, since it was clear that he did); People v. Vasquez, 214 A.D.2d 93, 631 N.Y.S.2d 322 (1st Dept. 1995), lv denied 88 N.Y.2d 943, 647 N.Y.S.2d 177 (1996) (statement need not expressly reflect contemporaneity; here, woman's reference to "the" gun, rather than "a" gun, suggested that she had just seen it). See also Federal Rules of Evidence, Rule 803(1).

In People v. Vasquez, 88 N.Y.2d 561, 647 N.Y.S.2d 697 (1996), the Court of Appeals upheld the exclusion of “911" tape recordings offered by defendants, finding insufficient corroboration in Vasquez because the testimony of a defense witness was inconsistent with the caller’s statements, and concluding in Dalton and Adkinson that the statements were not made contemporaneously with the events. See also People v. Cantave, 21 N.Y.3d 374 (2013) (defendant failed to establish that his 911 call was communicated spontaneously and contemporaneously with events described or that description of events was corroborated by other evidence); People v. Semple, 174 Misc.2d 879, 666 N.Y.S.2d 900 (Sup. Ct., Kings Co., 1997) (court grants defendant's motion to introduce audiotape of radio communications between pursuing police vehicles and precinct).

A statement made within a "marginal time lag" after the event may still be admissible. Compare People v. Kello, 96 N.Y.2d 740, 723 N.Y.S.2d 111 (2001) (statements made more than 2½ hours after incident not admissible); People v. Parchment, 92 A.D.3d 699 (2d Dept. 2012) (element of contemporaneity not satisfied where 911 caller described events using past tense, and People failed to demonstrate that delay between conclusion of events and call was not sufficient to destroy indicia of

reliability); United States v. Green, 541 F.3d 176 (3rd Cir. 2008) (error to admit statement made 50 minutes after events, and after declarant had been searched and driven to government offices and been debriefed by agents with respect to events); People v. Ortiz, 33 A.D.3d 1044, 822 N.Y.S.2d 327 (3rd Dept. 2006) (court erred in admitting statement made at least 7 minutes after event) and People v. Robinson, 282 A.D.2d 75, 728 N.Y.S.2d 421 (1st Dept. 2001) (calls made 2 seconds and 15-45 seconds after robbery admissible, but call made 2-4½ minutes later not admissible) with People v. George, 79 A.D.3d 1148, 913 N.Y.S.2d 569 (2d Dept. 2010) (no error in admission of audiotape of 911 call where call was made after perpetrators left complainant's store, but time delay was not sufficient to destroy indicia of reliability); People v. Osbourne, 69 A.D.3d 764, 894 N.Y.S.2d 61 (2d Dept. 2010), lv denied 14 N.Y.3d 843 (911 tape recording admissible where call was made "substantially contemporaneously" with caller's discovery of injured complainant); People v. Neloms, 8 A.D.3d 136, 779 N.Y.S.2d 26 (1st Dept. 2004), lv denied 3 N.Y.3d 710 (victim screamed that robbers were on their way out of the building); People v. Gutierrez, 248 A.D.2d 295, 670 N.Y.S.2d 85 (1st Dept. 1998), lv denied 92 N.Y.2d 925, 680 N.Y.S.2d 467 (statement made 3 minutes after shooting admissible) and People v. Gethers, 34 Misc.3d 1238(A) (Sup. Ct., Richmond Co., 2012) (911 call admissible where there was four-minute delay after end of incident).

If an unavailable declarant's statement can be characterized as "testimonial" evidence under Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006), it will not be admissible in the absence of a prior opportunity to cross examine the declarant. Arguably, with respect to nontestimonial statements, the New York Constitution requires that the prosecution demonstrate the declarant's unavailability by proving a good faith effort to secure the declarant's attendance, and show that the statement bears sufficient indicia of reliability. See People v. Rodriguez, 306 A.D.2d 686, 761 N.Y.S.2d 368 (3rd Dept. 2003); People v. Torres, 196 A.D.2d 758, 601 N.Y.S.2d 919 (1st Dept. 1993), lv denied 82 N.Y.2d 854, 606 N.Y.S.2d 606; People v. Grant, 113 A.D.2d 311, 497 N.Y.S.2d 23 (2d Dept. 1985). But see People v. Cook, 159 Misc.2d 430, 603 N.Y.S.2d 979 (Sup. Ct.

Kings Co., 1993) (no showing of unavailability required by Constitution or state evidence law). It is unclear whether the admission of nontestimonial present sense impressions may be challenged under the State Constitution's right of confrontation.

L. Prompt Outcry Of Victim - Evidence that a sexual assault victim made a prompt complaint may be admitted to negate any suggestion that the victim delayed in reporting and thus assist in the fact-finder's evaluation of the victim's credibility. The victim's identification of the accused may be admitted; the details of the crime must be limited, but courts have not always adhered closely to that rule. Richardson, §8-615. See, e.g., People v. Shelton, 1 N.Y.3d 614, 777 N.Y.S.2d 9 (2004) (81-year-old complainant's outcry morning after rape, after she had been warned not to tell anyone, was admissible); People v. McDaniel, 81 N.Y.2d 10, 595 N.Y.S.2d 364 (1993) (no error where mother testified that child reported being bothered, attacked and molested by defendant); People v. Rice, 75 N.Y.2d 929, 555 N.Y.S.2d 677 (1990) (description of suspect not admissible); People v. Garrison, 103 A.D.3d 751 (2d Dept. 2013), lv denied 21 N.Y.3d 943 (testimony that complainant reported she was dragged into alley and raped did not exceed allowable level of detail); People v. Rickman, 103 A.D.3d 757 (2d Dept. 2013), lv denied 21 N.Y.3d 946 (only fact of complaint, not accompanying details, may be elicited); People v. Verrilli, 69 A.D.3d 963, 895 N.Y.S.2d 439 (2d Dept. 2010), lv denied 14 N.Y.3d 894 (no error in admission of testimony that victim told sister that defendant had raped her); People v. Molina, 26 Misc.3d 51, 894 N.Y.S.2d 327 (App. Term, 9th & 10th Jud. Dist., 2009), lv denied 14 N.Y.3d 803 (no error in admission of testimony that complainant stated that defendant touched her private parts; only fact of complaint, not details, may be elicited, but witness can go beyond merely acknowledging that complaint was made and provide nature of complaint); People v. Farwell, 26 Misc.3d 26, 893 N.Y.S.2d 421 (App. Term, 9th & 10th Jud. Dist., 2009) (court rejects defendant's claim that testimony went beyond bounds of recent-outcry exception where prosecutor offered it to rebut defendant's theory that complaint was "made up" and corroborate complainant's allegation that offense occurred; also, prompt outcry witness can go beyond merely acknowledging that complaint was made and state nature of the complaint sufficiently to show it concerned offense charged and its

essential nature); People v. Bernardez, 63 A.D.3d 1174, 881 N.Y.S.2d 316 (2d Dept. 2009), lv denied 13 N.Y.3d 794 (no error where court allowed witness to disclose nature of complaint, which did not exceed allowable level of detail); People v. Phillips, 55 A.D.3d 1145, 865 N.Y.S.2d 787 (3rd Dept. 2008) (where court admitted, as prompt outcry, detailed statement by victim about alleged sexual acts committed by defendant, Third Department notes that, generally, testimony regarding outcry is limited to nature of complaint and the fact that complaint was made); People v. Fabre, 16 Misc.3d 134(A), 847 N.Y.S.2d 898 (App. Term, 9th & 10th Jud. Dist., 2007), lv denied 9 N.Y.3d 875 (majority holds that testimony of complainant's sister, who stated that she was told by complainant that defendant touched her inappropriately on calf and breast, did not exceed level of detail permissible under prompt outcry exception); People v. Allen, 13 A.D.3d 892, 787 N.Y.S.2d 417 (3rd Dept. 2004), lv denied 4 N.Y.3d 883 (evidence improperly admitted where victim disclosed incident to friends almost 2 months later, and testified that she had delayed reporting because she was afraid of how people would react, including her father who might "go after" defendant, that she feared losing friendship of girlfriend who was dating defendant, and that she did not go to hospital because she was afraid to tell what happened; victim, who was living with parents, had others in whom she could confide; defendant did not "open door" by exploiting delay); People v. Bott, 234 A.D.2d 625, 651 N.Y.S.2d 207 (3rd Dept. 1996), lv denied 89 N.Y.2d 1009, 658 N.Y.S.2d 247 (1997) (mother testified that child said it hurt to go to the bathroom and related statements as to how child got the "boo-boo," and that child said, "Kurtis won't hurt me anymore, right Mommy?"); People v. Terrence, 205 A.D.2d 301, 612 N.Y.S.2d 571 (1st Dept. 1994) (no error in admission of report of beating and verbal abuse).

Serial outcries may be admissible. See, e.g., People v. Santos, 243 A.D.2d 276, 662 N.Y.S.2d 318 (1st Dept. 1997), lv denied 91 N.Y.2d 880; People v. Fabian, 213 A.D.2d 298, 625 N.Y.S.2d 4 (1st Dept. 1995).

The prompt outcry exception only applies in sex crime cases. People v. Dukes, 30 A.D.3d 682, 817 N.Y.S.2d 683 (3rd Dept. 2006), lv granted 7 N.Y.3d 847; People v. Anthony C., 6 Misc.3d 616, 787 N.Y.S.2d 648 (Sup. Ct., Bronx Co.) (prompt outcry not

admissible in a robbery case).

A delayed outcry may be admissible if made at the first suitable opportunity. See People v. Parada, 17 N.Y.3d 501 (2011) (complainant's statements to cousin a few weeks after defendant anally sodomized her and before abuse ended admissible under prompt outcry rule; court rejects defendant's contention that disclosure made to child cannot come within prompt outcry rule); People v. Rosario, 17 N.Y.3d 501 (2011) (prior consistent statements alleging sexual abuse not admissible under prompt outcry rule where as much as five months elapsed between last instance of alleged abuse and note complainant wrote for boyfriend; concept of promptness necessarily suggests immediacy not ordinarily present when months go by, especially when complainant is a teenager, not a child); People v. McDaniel, supra, 81 N.Y.2d 10 (child could not be expected to awaken mother in middle of night); People v. Lapi, 105 A.D.3d 1084 (3d Dept. 2013), lv denied 21 N.Y.3d 1043 (where sexual contact occurred over weekend during which victim was in care of defendant's mother, and victim returned to his mother's care on Sunday and disclosed events to her on following Friday, and considering victim's young age and familial relationship between victim and defendant, statements fell within prompt outcry rule); People v. Llanos, 26 Misc.3d 131(A), 906 N.Y.S.2d 782 (App. Term, 1st Dept., 2010), lv denied 15 N.Y.3d 753 (infant complainant made statement later on day of incident when, for first time since incident, infant and foster mother were alone); People v. Parada, 67 A.D.3d 581, 889 N.Y.S.2d 159 (1st Dept. 2009) (prompt outcry exception applicable to outcry made at end of course of sexual conduct); People v. Stuckey, 50 A.D.3d 447, 855 N.Y.S.2d 141 (1st Dept. 2008), lv denied, 11 N.Y.3d 742 (given victim's age and expressed fear of retribution if she disclosed abuse, court properly admitted, as prompt outcry, then 9-year-old child's report to mother of defendant's conduct approximately three days following last incident after her teacher taught class on how to deal with inappropriate touching; prompt outcry exception is not inapplicable to outcry made at end of course of sexual conduct); Matter of Gregory AA., 20 A.D.3d 726, 799 N.Y.S.2d 830 (3rd Dept. 2005) (although 7-year-old did not make disclosure for at least two months, delay was adequately explained by child's testimony that he was afraid of getting in trouble and

being grounded); People v. Rapp, 2 Misc.3d 130(A), 784 N.Y.S.2d 923 (App. Term, 1st Dept. 2004) (statements made one week after incident admissible given complainant's age and defendant's threat of reprisals).

It has been held that evidence of prompt outcry is admissible even where the declarant may be incompetent to testify. People v. Potter, 1 Misc.3d 495, 765 N.Y.S.2d 236 (County Ct., Ulster Co., 2003) (3-year-old complainant).

Evidence of the complainant's failure to make a prompt outcry was admitted in People v. Zazversky, 193 Misc.2d 347, 750 N.Y.S.2d 493 (County Ct., Ulster Co., 2002) (court also admits testimony that after alleged sexual abuse, there was no change in complainant's demeanor or peer relationships, and her school performance improved).

After the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), a right of confrontation-based objection may be raised where the prompt outcry can be labeled as "testimonial" evidence. Cf. Moody v. State, 594 S.E.2d 350 (Georgia 2004) (statements made by witness to officer conducting "field investigation" were "testimonial"); but see People v. Holland, 11 Misc.3d 141(A), 816 N.Y.S.2d 699 (App. Term, 1st Dept., 2006), lv denied 7 N.Y.3d 757 (prompt outcry not testimonial); People v. Romero, 4 Misc.3d 1013(A), 791 N.Y.S.2d 872 (Crim. Ct., Bronx Co., 2004) (prompt outcry to complainant's mother not testimonial).

M. Pedigree - Hearsay evidence, or testimony which is based on hearsay, is admissible to prove pedigree facts which are directly in issue. See People v. Lewis, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987) (14-year-old incest victim properly permitted to testify that defendant was her father); People v. Keller, 258 A.D.2d 880, 685 N.Y.S.2d 498 (4th Dept. 1999), rev'g 168 Misc.2d 693, 641 N.Y.S.2d 980 (Sup. Ct., Monroe Co., 1996), lv denied 93 N.Y.2d 973, 695 N.Y.S.2d 59 (statement by owner of getaway vehicle that defendant was her grandson did not come within hearsay exception for pedigree and family history); People v. Lammes, 208 A.D. 533, 203 N.Y.S. 736 (4th Dept. 1924) (exception not applicable to statement regarding age). See also Federal Rules, 804(b)(4) (statement of personal or family history), 803(19) (reputation among family members concerning personal or family history).

N. Inferential Hearsay - When testimony concerning a witness' own conduct

implicitly suggests what another person said to the witness, the testimony is objectionable. Often, such testimony concerns an out-of-court identification. See, e.g., People v. DeJesus, 105 A.D.3d 476 (1st Dept. 2013) (no error in admission of detective's brief testimony that defendant was already a suspect at time People's main witness was interviewed, or admission of police testimony about obtaining information from other persons during investigation, where evidence was offered for non-hearsay purposes); United States v. Gomez, 617 F.3d 88 (2d Cir. 2010) (court erred in admitting testimony by detective regarding phone made to defendant after detective spoke to co-conspirator and instructed him to call supplier, since jury could infer that detective dialed defendant's number because co-conspirator identified him); People v. Fairweather, 69 A.D.3d 876, 894 N.Y.S.2d 81 (2d Dept. 2010) (right of confrontation violation where detective testified that he determined defendant was suspect after interviewing injured complainant); People v. Tucker, 54 A.D.3d 1065, 866 N.Y.S.2d 209 (2d Dept. 2008) (no error in admission of police testimony that defendant became suspect after detective spoke with non-testifying individuals who did not witness crime; there was no suggestion that individuals implicitly accused or even possessed sufficient information to implicate defendant, and thus no danger that jury would treat evidence as accusation by non-testifying witness); People v. Berry, 49 A.D.3d 888, 854 N.Y.S.2d 507 (2d Dept. 2008) (reversible error where prosecutor elicited testimony from investigating detective that personal telephone/address book was recovered from witness during interview at police station, and that detective photocopied a page from the book, sought subscriber information for a specific entry on that page, and put out "wanted card" for defendant); People v. Buenos Ruis, 11 A.D.3d 714, 784 N.Y.S.2d 558 (2d Dept. 2004) (no right of confrontation violation where officer testified that he obtained defendant's photo from eyewitness, and investigated further and apprehended defendant in Costa Rica; testimony was not admitted for truth, but to explain events leading to defendant's apprehension); People v. Johnson, 7 A.D.3d 732, 777 N.Y.S.2d 190 (2d Dept. 2004) (reversible error where court admitted testimony that defendant was arrested following detective's interview with co-defendant); People v. Bacenet, 297 A.D.2d 817, 748 N.Y.S.2d 28 (2d Dept. 2002) (reversible error where detective stated

that he completed processing defendant's arrest after asking complainant whether she recognized anyone in lineup); Ryan v. Miller, 303 F.3d 231 (2d Cir. 2002) (right of confrontation violated where court admitted testimony that officers arrested petitioner after speaking to accomplice); United States v. Reyes, 18 F.3d 65 (2d Cir. 1994) (error where, although agent did not reveal what was said, his testimony regarding discussions with co-conspirators suggested that they had admitted their role and implicated other defendants; such evidence can sometimes be admitted as "background" to explain investigation or agent's state of mind, but non-hearsay purpose must be relevant and probative value of evidence must outweigh danger of unfair prejudice); People v. Baldelli, 152 A.D.2d 741, 544 N.Y.S.2d 193 (2d Dept. 1989) (improper to admit testimony that defendant was arrested as a result of phone call by wife of complainant); People v. Eyre, 138 A.D.2d 397, 525 N.Y.S.2d 681 (2d Dept. 1988). See also People v. Rivera, 96 N.Y.2d 749, 725 N.Y.S.2d 264 (2001) (although introduction of such evidence may be improper in some circumstances - court cites United States v. Reyes, 18 F.3d 65 - defendant opened door in this case); People v. Vadell, 122 A.D.2d 710, 505 N.Y.S.2d 635 (1st Dept. 1986).

O. State Of Mind

1. Intention To Perform Future Act - The trier of fact may infer from a declarant's statement of an intention to perform a future act that the act was, in fact, performed. Richardson, §289. The statement must have been made under circumstances which made it probable that the expressed intent was a serious one, and that the meeting would, in fact, take place. See, e.g., People v. Wright, 17 N.Y.3d 643 (2011) (court erred in excluding evidence that witness told police she had overheard conversation in which attack on victim was being planned, and that co-defendant and other prosecution witness were present but defendant was not; statement by witness that he was going to kill victim may have come within "statement of present intention" exception to hearsay rule, but in any event statements were not offered for truth, only to prove defendant was not part of meeting and witness was); People v. James, 93 N.Y.2d 620, 695 N.Y.S.2d 715 (1999) (statement by person other than defendant could be sued to prove joint cooperative action by declarant and persons mentioned in

statement; it must be shown that declarant is unavailable; that the statement unambiguously contemplates future action by the declarant which requires the defendant's cooperation; that any understanding or arrangement referred to in the statement occurred in the recent past and that the declarant was a party to it or had competent knowledge of it; and that there is independent evidence of reliability, i.e., a showing of circumstances which all but rule out a motive to falsify, and evidence that the future acts were at least likely to have taken place); People v. Sorrentino, 93 A.D.3d 450 (1st Dept. 2012) (no error in admission of deceased's statements to friends about deteriorating relationship with defendant, including intention to terminate relationship and stay away from defendant); People v. Borukhova, 89 A.D.3d 194 (2d Dept. 2011), lv denied 18 N.Y.3d 955 (no error in admission of testimony by victim's father that son told him on morning of his death that he was bringing child to park for defendant to pick up because she had asked him to do so; state-of-mind exception permits testimony regarding victim's future intent and prior arrangement with defendant to meet); People v. Kimes, 37 A.D.3d 1, 831 N.Y.S.2d 1 (1st Dept. 2006), lv denied 9 N.Y.3d 846 (missing murder victim's statements showed that she had no plans to travel or sell her townhouse, and was unlikely to transfer ownership of townhouse to defendant and her son); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless; concurring judge and dissenting judge treat statement as admission); People v. Chambers, 125 A.D.2d 88, 512 N.Y.S.2d 89 (1st Dept. 1987), appeal dism'd 70 N.Y.2d 694, 518 N.Y.S.2d 1031 (deceased's double hearsay statement that defendant told her he intended to visit her at her apartment at a particular time on the day she was killed was not admissible); People v. Bongarzone, 116 A.D.2d 164, 500 N.Y.S.2d 532 (2d Dept. 1986), aff'd 69 N.Y.2d 892, 515 N.Y.S.2d 227 (1987) (defendant informed undercover detective that he would call his mother and instruct her to give detective information regarding intended murder victim; admissible); People v. Herrera, 11 Misc.3d 1070(A), 816 N.Y.S.2d 699 (Sup. Ct., Rockland Co.,

2006) (court admits victim's statement over phone that she had to go because the man doing the power washing (defendant) wanted to speak to her); People v. Rivers, 177 Misc.2d 738, 677 N.Y.S.2d 427 (Sup. Ct., Bronx Co., 1998) (court refuses to admit statement of murder victim "that he would break every last one of [the Tower Boys'] asses" to show that victim did some unspecified act of violence against one or more of the Tower Boys, of which defendant was a member).

2. Declaration Of Reason, Motive Or Feeling - Statements regarding, e.g., the declarant's knowledge, purpose, intent, feelings or emotions at the time of the statements may be admitted. People v. Reynoso, 73 N.Y.2d 816, 537 N.Y.S.2d 113 (1988). See also People v. Matthews, 16 A.D.3d 135, 791 N.Y.S.2d 24 (1st Dept. 2005), lv denied 4 N.Y.3d 888 (documents containing defendant's purported home address admissible to show her intent to make location her residence); Schering v. Pfizer Inc. and UCB Pharma Inc., 189 F.3d 218 (2d Cir. 1999) (survey in which physicians related memories and impressions of communications from sales representatives was admissible to prove what representatives said).

3. Evidence Not Offered For Truth - The mere utterance of a statement may circumstantially show the declarant's or the listener's state of mind - e.g., intent, sanity, knowledge or malice. Fisch, §763; Richardson, §8-106; see also People v. Kass, 59 A.D.3d 77, 874 N.Y.S.2d 475 (2d Dept. 2008) (defendant's testimony regarding a conversation during which informant described himself as "very big drug dealer in Washington Heights" was admissible since informant's statement may have contributed to defendant's fear of him); People v. Eric Rose, 41 A.D.3d 742, 840 N.Y.S.2d 363 (2d Dept. 2007), lv denied 9 N.Y.2d 926 (no error in admission of testimony to effect that victim told witness to look to defendant if anything happened to her); Matter of Kendall J., 24 A.D.3d 357, 807 N.Y.S.2d 330 (1st Dept. 2005) (defense entitled to question doctor about possible coaching by complainant's mother); People v. Cobenais, 301 A.D.2d 958, 755 N.Y.S.2d 736 (3rd Dept. 2003), lv denied 99 N.Y.2d 653, 760 N.Y.S.2d 117 (2003) (tape of 911 call with complainant sobbing in background was probative of forcible compulsion element of attempted rape); Schering v. Pfizer Inc. and UCB Pharma Inc., supra, 189 F.3d 218 (surveys, in which physicians related

memories and impressions of communications from sales representatives, admissible to prove physicians' state of mind, which was evidence of what representatives were implying); People v. Boyd, 256 A.D.2d 350, 683 N.Y.S.2d 271 (2d Dept. 1998) (defendant entitled to testify concerning conversation with person from whom he bought vehicle in attempt to show he believed he had right to possess it); People v. Thompson, 25 Misc.3d 1241(A), 906 N.Y.S.2d 782 (Sup. Ct., Ulster Co., 2009) (nothing in decedent's diary or oral statements was indicative of extreme fear or would logically lead to inference that decedent would have been unwilling to have defendant handle firearm in her presence, as defendant claimed); People v. Morales, 179 Misc.2d 324, 684 N.Y.S.2d 853 (Sup. Ct., Kings Co., 1999) (defendant's spontaneous statement to police -- "I should have killed him. This guy had no business talking to my wife like that. She's my damn woman" -- was not offered for truth; statement such as, "I didn't mean to kill him" would be inadmissible hearsay).

Under this rule, a respondent who is raising a justification defense may present evidence of his or her statements reflecting a belief of danger. Compare People v. Reynoso, 73 N.Y.2d 816, 537 N.Y.S.2d 113 (1988) with People v. Villaneuva, 35 A.D.3d 229, 829 N.Y.S.2d 1 (1st Dept. 2006), lv denied 8 N.Y.3d 885 (defendant's self-exculpatory comment to accomplice at end of incident was inadmissible hearsay) and People v. Starostin, 265 A.D.2d 267, 698 N.Y.S.2d 6 (1st Dept. 1999), lv denied 94 N.Y.2d 885, 705 N.Y.S.2d 17 (2000) (testimony by defendant that his mother told him about complainant's threats was improperly excluded, but testimony that defendant told officer about complainant's threats was inadmissible hearsay offered to prove defendant believed complainant posed danger).

Such a respondent also may present evidence of threats or other statements by the victim which either affected the respondent's state of mind, see Richardson, §205, or bear on whether the victim was the aggressor. See People v. Miller, 39 N.Y.2d 543, 384 N.Y.S.2d 741 (1976); People v. Owens, 158 A.D.2d 478, 550 N.Y.S.2d 934 (2d Dept. 1990).

4. Right Of Confrontation - See Horton v. Allen, 370 F.3d 75 (1st Cir., 2004) (state of mind exception is "firmly rooted" for Confrontation Clause purposes).

P. Trustworthiness Exception

1. Statements Offered By Respondent - Arguably, in view of the respondent's constitutional right to a fair trial, a statement which is not covered by a traditional hearsay exception may be admitted if there are substantial guarantees of trustworthiness and the statement is more probative than other evidence which could be secured through reasonable efforts. See People v. Robinson, supra, 89 N.Y.2d 648 (defendant had due process right to introduce Grand Jury testimony); People v. Burns, 6 N.Y.3d 793, 811 N.Y.S.2d 297 (2006) (trial court properly refused to admit signed statement by declarant who alleged that group of men, and not defendant, were involved in shooting); People v. Thompson, 111 A.D.3d 56 (2d Dept. 2013) (reversible error where court precluded defendant from offering evidence that elderly victim, who did not testify due to mental incapacity, repeatedly and consistently identified another individual as perpetrator; utilization of CPL §660.10, which provides that, under certain circumstances, "a criminal court may, upon application of either the people or a defendant, order that a witness or prospective witness in the action be examined conditionally under oath in order that such testimony may be received into evidence at subsequent proceedings in or related to the action," was not only means of presenting evidence); People v. Bradley, 99 A.D.3d 934 (2d Dept. 2012) (when truth of matter asserted in inconsistent statement is relevant to core factual issue, relevancy is not restricted to issue of credibility and right to present defense may encompass right to place before trier of fact secondary forms of evidence, such as hearsay); People v. Valette, 88 A.D.3d 461 (1st Dept. 2011), lv denied 18 N.Y.3d 887 (since evidence was neither reliable nor critical to establish defendant's defense, defendant not constitutionally entitled to introduce it); People v. Abdul, 76 A.D.3d 563, 906 N.Y.S.2d 594 (2d Dept. 2010), lv denied 15 N.Y.3d 892 (court should have permitted defendant to introduce co-defendant's declaration against interest admitting he killed victim even though defendant could only offer statement as hearsay within hearsay); People v. Gibian, 76 A.D.3d 583, 907 N.Y.S.2d 226 (2d Dept. 2010), lv denied 15 N.Y.3d 920 (court improperly precluded defendant from testifying about mother's statement to him concerning how she killed decedent to show defendant's state of mind where

defendant contended that it was only after mother made detailed statement that he confessed in effort to protect her and that testimony would establish motive to protect mother and explain ability to provide accurate details in his confession; moreover, depriving defendant of opportunity to present hearsay evidence of another person's admission may violate fundamental right to present defense, and where constitutional rights directly affecting issue of guilt are implicated, hearsay rule may not be applied mechanistically to defeat ends of justice); People v. Oxley, 64 A.D.3d 1078, 883 N.Y.S.2d 385 (3rd Dept. 2009), lv denied 13 N.Y.3d 941 (in case involved alleged declarations against penal interest, court notes that less exacting standard for admissibility applies where statements form critical part of defense, and due process concerns may tip scales in favor of admission); People v. Madrigal, 12 A.D.3d 199, 783 N.Y.S.2d 583 (1st Dept. 2004), lv denied 4 N.Y.3d 746 (deceased witness's grand jury testimony properly excluded where it was not critical to defense; witness's daughter gave similar testimony in grand jury and was available to testify); People v. Rosa, 302 A.D.2d 231, 754 N.Y.S.2d 279 (1st Dept. 2003), lv denied 99 N.Y.2d 658, 760 N.Y.S.2d 123 (2003) (suppression hearing testimony of deceased defense witness not admissible where People did not have full and fair opportunity to cross-examine witness regarding underlying charges); People v. Benjamin, 272 A.D.2d 276, 709 N.Y.S.2d 517 (1st Dept. 2000), lv denied 95 N.Y.2d 904, 716 N.Y.S.2d 644 (defendant failed to establish that negative identifications were reliable or that there was any reason to elicit them through hearsay rather than by calling declarants); People v. McKee, 269 A.D.2d 225, 703 N.Y.S.2d 447 (1st Dept. 2000), lv denied 94 N.Y.2d 950, 710 N.Y.S.2d 7 (statement of witness who allegedly made exculpatory statement to police, but who later denied witnessing crime, was not admissible in absence of showing of reliability); People v. Cordon, 261 A.D.2d 278, 691 N.Y.S.2d 390 (1st Dept. 1999), lv denied 93 N.Y.2d 1016, 697 N.Y.S.2d 575 (videotaped Grand Jury testimony not admissible where the witness' testimony from a previous trial was already in evidence, and defendant was merely trying to demonstrate the witness' demeanor); People v. Esteves, 152 A.D.2d 406, 549 N.Y.S.2d 30 (2d Dept. 1990), lv denied 75 N.Y.2d 918, 555 N.Y.S.2d 37; People v. Brunson, 151 A.D.2d 303, 542 N.Y.S.2d 571 (1st Dept.

1989). See also Federal Rules, 807; but see United States v. Jackson, 335 F.3d 170 (2d Cir. 2003) (co-conspirator had motive to avoid testifying against defendant and statements were inconsistent).

2. Statements Offered By Prosecution - When hearsay has been offered by the prosecution, the Court of Appeals has expressed a reluctance to abandon its reliance on specific categories of exceptions. See People v. Nieves, supra, 67 N.Y.2d 125; People v. Burwell, 159 A.D.2d 407, 553 N.Y.S.2d 105 (1st Dept. 1990); People v. Esteves, supra, 152 A.D.2d 406. After the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004), it is clear that "testimonial" statements made by an unavailable declarant are inadmissible in any event.

Q. Co-Conspirator Statements - Statements made by a co-conspirator in the course and furtherance of a conspiracy are admissible against other co-conspirators as evidence of both the conspiracy and a substantive crime. Richardson, §8-236. See, e.g., People v. Sanders, 56 N.Y.2d 51, 451 N.Y.S.2d 30 (1982); People v. Abreu, 89 A.D.3d 412 (1st Dept. 2011), lv denied 18 N.Y.3d 922 (conspiracy still in progress where stolen property had not yet been divided up, and declaration apprised other conspirators of progress or status of conspiracy and it was important for conspirators to know victim had been killed); People v. Canales, 32 Misc.3d 1211(A) (Sup. Ct., Kings Co., 2011) (statements made after all defendants had been arrested were not made within course of and in furtherance of conspiracy; if "cover-up" conspiracy comes into being, admissions made in course of and in furtherance of new conspiracy can be introduced, but there is no presumption that conspirators make agreements to cover up crimes if they should be unexpectedly arrested)

Such statements are admissible only after a prima facie case of conspiracy has been introduced. See People v. Caban, 5 N.Y.3d 143, 800 N.Y.S.2d 70 (2005) (no error where trial court admitted statements subject to later proof of prima facie case); People v. Salko, 47 N.Y.2d 230, 417 N.Y.S.2d 894 (1979); People v. Rossney, 178 A.D.2d 765, 577 N.Y.S.2d 683 (3rd Dept. 1991), lv denied 79 N.Y.2d 1007, 584 N.Y.S.2d 461 (1992) (prima facie case may be established in absence of proof of overt acts in

furtherance of conspiracy).

It is possible, albeit unlikely, that such statements will be deemed testimonial under the Supreme Court's decision in Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004) and Davis v. Washington, 547 U.S. 813, 126 S.Ct. 2266 (2006). See, e.g., People v. McBean, 32 A.D.3d 549 819 N.Y.S.2d 368 (3rd Dept. 2006) (statements not testimonial where declarant did not know she was speaking to government agent); see also United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121 (1986) (declarant need not be "unavailable" for purposes of Federal right of confrontation); People v. Persico, 157 A.D.2d 339, 556 N.Y.S.2d 262 (1st Dept. 1990), lv denied 76 N.Y.2d 895, 561 N.Y.S.2d 558 (declarant must be "unavailable" for purposes of State Constitutional right of confrontation).

R. Statements Of Witness Who Is Unavailable Due To Respondent's Misconduct - When there is clear and convincing proof that the respondent caused a witness' unavailability by means of threats, murder, etc., a court may admit the witness' Grand Jury testimony. United States v. Mastrangelo, 693 F.2d 269 (2d Cir. 1982), cert denied 467 U.S. 1204, 104 S.Ct. 2385. See also United States v. Stewart, 485 F.3d 666 (2d Cir. 2007) (forfeiture rule applies when defendant's efforts were focused on preventing witness from testifying at different trial); United States v. Dhinsa, 243 F.3d 635 (2d Cir. 2001) (federal rule places no limitation on subject matter of declarant's statements that can be offered to prove defendant murdered declarant; court also holds that government need not show that defendant's *sole* motivation was to procure declarant's absence, only that defendant was motivated in part by such a desire); People v. Geraci, 85 N.Y.2d 359, 625 N.Y.S.2d 469 (1995) (although Second Circuit uses preponderance standard, New York law requires clear and convincing evidence that defendant intimidated the witness); People v. Prochilo, 41 N.Y.2d 759, 395 N.Y.S.2d 635 (1977); People v. Encarnacion, 87 A.D.3d 81 (1st Dept. 2011), lv denied 17 N.Y.3d 952 (evidence sufficient where defendant called witness's home over 1,000 times, and, through friends, told her that if she came in, defendant would "get her"); People v. Steward, 54 A.D.3d 880, 864 N.Y.S.2d 488 (2d Dept. 2008), lv denied, 11 N.Y.3d 858 (People failed to meet burden to connect defendant to threats by young

male where there was no evidence of prior history of coercion, defendant was incarcerated during trial, limiting opportunities to orchestrate threats, and fact that defendant made telephone calls to one or possibly two "males" was insufficient); People v. Byrd, 51 A.D.3d 267, 855 N.Y.S.2d 505 (1st Dept. 2008) (complainant's grand jury testimony properly admitted after court determined that complainant was unavailable because of battered person syndrome; history of domestic abuse and testimony about battered person syndrome properly admitted at hearing to show defendant had such a degree of control over complainant that seemingly innocuous calls or hospital visits would have coercive effect on her); People v. Jernigan, 41 A.D.3d 331, 838 N.Y.S.2d 81 (1st Dept. 2007), lv denied 9 N.Y.3d 923 (People established by clear and convincing evidence that defendant caused victim's unavailability where defendant left phone messages on victim's answering machine imploring her not to testify and urging her not to send him to prison and committed several acts of violence against her going back to the 1980s, and, although victim visited defendant in jail while case was pending, that was consistent with defendant's ability to control her); People v. Johns, 297 A.D.2d 645, 746 N.Y.S.2d 907 (2d Dept. 2002), lv denied 99 N.Y.2d 559, 754 N.Y.S.2d 212 (2002) (prosecution failed to establish identity of people who made threats or date, time and place of threats, or that any of the persons who threatened witness ever spoke to defendant or that defendant was aware of threats); People v. Hamilton, 127 A.D.2d 691, 511 N.Y.S.2d 912 (2d Dept. 1987), aff'd 70 N.Y.2d 987, 526 N.Y.S.2d 421 (1988); People v. Copney, 41 Misc.3d 250 (Sup. Ct., Kings Co., 2013) (in domestic violence prosecution, complainant's grand jury testimony found admissible where defendant called complainant over one hundred times and used foul and upsetting language, and stated, inter alia: "If you don't go, they got nothing," and "If you don't come, they have no case. Everything is on you"); People v. Swinson, 38 Misc.3d 1220(A) (Sup. Ct., N.Y. Co., 2013) (People failed to meet burden where defendant, during calls from prison, discussed pending case and his incarceration but without threats or intimidation, and, in conversational tone, pleaded with complainant to drop charges, and complainant, rather than being cowed, challenged defendant, berated him for not taking responsibility for his actions and informed him that she was not afraid of him); People v. Smith, 29

Misc.3d 1056, 907 N.Y.S.2d 860 (Sup. Ct., Kings Co., 2010) (grand jury testimony of domestic violence complainant admissible where defendant placed over 300 telephone calls to her from jail; although defense argues that there were no threats of harm or efforts at intimidation, "[t]he power, control, domination and coercion exercised in abusive relationships can be expressed in terms of violence certainly, but just as real in repeated calls sounding expressions of love and concern," and defendant's "onslaught of attention cannot be viewed in vacuum, but understood in relation to the surrounding circumstances"); see also United States v. Carson, 455 F.3d 336 (D.C. Cir. 2006) (forfeiture can result when co-conspirator renders witness unavailable through misconduct that was within scope of conspiracy).

This rule may be applied to other types of hearsay. See, e.g., People v. Cotto, 92 N.Y.2d 68, 677 N.Y.S.2d 35 (1999) (statements made during preparation session which not covered by any traditional exception to hearsay rule); Perkins v. Herbert, 596 F.3d 161 (2d Cir. 2010), cert denied 131 S.Ct. 318 (prosecution failed to meet preponderance of the evidence standard where habeas petitioner was incarcerated continuously after date of robbery and prison record logs revealed no contact with witness or man who conveyed threats, and petitioner's motive to silence witness was shared by man who conveyed threats, who, even if aware that witness had failed to identify him, would still have motive to prevent witness from testifying and potentially revealing his involvement); In re Duane F., 309 A.D.2d 265, 764 N.Y.S.2d 434 (1st Dept. 2003) (presentment agency failed to establish that witness was unavailable where, given her past compliance, there was no reason to believe she would not have obeyed a subpoena or a material witness order; while there is no rule dictating that witness testify in person at Sirois hearing, fundamental fairness requires prosecutor to produce the witness or explain why the witness is unavailable, and at the very least, the family court should have interviewed the complainant in camera); In re Juan J., 283 A.D.2d 305, 724 N.Y.S.2d 848 (1st Dept. 2001) (complainant's deposition properly admitted); People v. Mahabub, 38 Misc.3d 554 (Crim. Ct., N.Y. Co., 2012) (statements not admitted where complainant's recantation and refusal to testify coincided with numerous phone calls made by defendant in violation of order of protection, but People

failed to show that defendant had coercive control over complainant; charge that defendant punched complainant did not compare to crimes that would cause a complainant to fear the defendant; contents of calls were unknown, nearly half were made while complainant was cooperating with prosecution, fewer were made in month before complainant recanted, and there was no evidence of calls after recantation and before complainant refused to testify; and complainant's expression of position through attorney bolstered conclusion that her actions were voluntary); People v. Kahn, 26 Misc.3d 1211(A), 906 N.Y.S.2d 782 (Sup. Ct., Queens Co., 2010) (victim unavailable since she avoided People's phone calls, disregarded subpoena, informed People that she would not testify and had no contact with District Attorney's Office, and there was sufficient evidence that defendant caused unavailability where he made at least 100 telephone calls to victim from jail, and, when victim visited him in jail on two occasions, he had opportunity to exert influence in person; defendant's mother made numerous visits to her son in jail; mother brought victim to defendant's attorney's office and asked attorney to counsel victim regarding what to say to make case go away and made phone calls to attorney and put victim on phone for same purpose, and continually made statements to attorney indicating that she would make sure victim did not testify); Matter of Jonathan D., 22 Misc.3d 1126(A), 881 N.Y.S.2d 364 (Fam. Ct., Bronx Co., 2009) (respondent's mother not "unavailable" where she was unable to recall certain details, but answered numerous questions and appeared to have advanced prosecution's theory of case: even assuming, arguendo, that she was unavailable, presentment agency failed to establish by clear and convincing evidence that unavailability was procured by respondent's misconduct and that desire to silence mother motivated him where mother's unavailability may have been result of propensity to enable respondent in his alleged misdeeds, protect herself from incrimination arising from inconsistent testimony, or avoid further ACS involvement and child endangerment charges, or her inability to recall events which occurred approximately twenty months earlier); People v. Santiago, 2003 WL 21507176 (Sup. Ct., N.Y. Co., 2003) (grand jury testimony and other statements admitted where pattern of domestic violence caused complainant's unavailability). But see People v. Joyner, 284 A.D.2d 344, 726 N.Y.S.2d

434 (2d Dept. 2001), lv denied 96 N.Y.2d 940, 733 N.Y.S.2d 380 (despite defendant's misconduct in causing unavailability of witness, lineup identification not admissible where it was the product of unduly suggestive procedure).

It must be established that the accused specifically intended to prevent the victim from testifying. Giles v. California, 554 U.S. 353, 128 S.Ct. 2678 (2008) (forfeiture rule applies only when defendant engaged in conduct designed to prevent witness from testifying; majority refuses to adopt different rule for domestic violence cases, but in such cases evidence may support finding that crime was intended to isolate victim and stop her from reporting abuse or cooperating with criminal prosecution); Michigan v. Burns, 832 N.W.2d 738 (Mich. 2013) (insufficient proof of specific intent to cause unavailability where defendant instructed complainant not to report abuse; wrongdoing after crime has been reported or discovered is inherently more suspect and can give rise to strong inference of intent to cause unavailability); People v. Maher, 89 N.Y.2d 456, 654 N.Y.S.2d 1004 (1997) (out-of-court statements excluded where there was no evidence that defendant's acts were motivated by desire to prevent the victim from testifying).

A witness is "unavailable" to the prosecution and his/her statements are admissible where, after the witness recants, he/she testifies on the accused's behalf. People v. White, 4 A.D.3d 225, 772 N.Y.S.2d 309 (1st Dept. 2004), lv denied 3 N.Y.3d 650; see also People v. Turnquest, 35 Misc.3d 329 (Sup. Ct., Queens Co., 2012) (ordinarily, forfeiture occurs where misconduct causes witness's physical absence, but forfeiture-by-misconduct rule also applies when defendant causes witness to recant).

In a habeas proceeding brought by a New York defendant, the Second Circuit held that, when the court admits hearsay evidence because a witness has refused while on the stand to testify, the court may not preclude cross examination of the witness. Cotto v. Herbert, 331 F.3d 217 (2d Cir. 2003).

S. Phone Conversations - Before evidence of a named person's statements over the phone may be admitted, a foundation must be laid establishing that the named person was, in fact, the person on the phone. When a witness testifies that he or she is familiar with the voice, authentication is complete whether familiarity was acquired

before or after the conversation. Although a mere statement of identity by the caller is not sufficient, a statement of identity by a person who has answered a call to a number listed under his or her name may be sufficient. References to facts that could only be known by the alleged speaker might also be sufficient. See People v. Lynes, 49 N.Y.2d 286, 425 N.Y.S.2d 295 (1980); United States v. Khan, 53 F.3d 507 (2d Cir. 1995) (evidence of identity was sufficient where defendant had provided a number at which she could be reached and the caller returned a message left at that number, and the caller provided defendant's father's address).

T. Impeachment Of Hearsay Declarant - A hearsay declarant is subject to impeachment by any of the means available when a witness gives live testimony. See People v. DelValle, 248 A.D.2d 126, 670 N.Y.S.2d 827 (1st Dept. 1998) People v. Canady, 186 A.D.2d 749, 589 N.Y.S.2d 184 (2d Dept. 1992), lv denied 81 N.Y.2d 786, 594 N.Y.S.2d 732 (1993); People v. Conde, 16 A.D.2d 327, 228 N.Y.S.2d 69 (3rd Dept. 1962), aff'd 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963); People v. Jackson, 2002 WL 1798837 (Sup. Ct., Kings Co.); Richardson, §8-111; Federal Rules, 806; but see People v. Bosier, 6 N.Y.3d 523, 814 N.Y.S.2d 584 (2006) (while noting that a defendant who has caused a witness to become unavailable is not in all circumstances barred from impeaching the witness with the witness's out-of-court statements, Court of Appeals upholds exclusion of witness's out-of-court statements where they did not go to heart of prosecution's case and witness might have credibly explained them); People v. Chandler, 30 A.D.3d 161, 815 N.Y.S.2d 567 (1st Dept. 2006), lv denied 7 N.Y.3d 786 (trial court properly precluded defendant from introducing collateral evidence regarding possible crimes committed by witness where defendant's threats caused unavailability of witness).

U. Opening The Door - The respondent can open the door to the admission of testimony that would otherwise be inadmissible under the Confrontation Clause. People v. Reid, 19 N.Y.3d 382 (2012) (defendant, by eliciting testimony that police had information that certain individual was involved in shooting, suggesting that more than one source indicated that this individual was at scene, and persistently arguing that police investigation was incompetent, opened door to admission of

testimonial evidence that non-testifying co-defendant told police that other individual was not at shooting). See also People v. Richardson, 95 A.D.3d 1039 (2d Dept. 2012) ("A trial court should decide issues involving 'opening the door' by considering whether, and to what extent, the evidence or argument said to open the door is incomplete and misleading, and what, if any, otherwise inadmissible evidence is reasonably necessary to correct the misleading impression"); People v. Ko, 15 A.D.3d 173, 789 N.Y.S.2d 43 (1st Dept. 2005), lv denied 5 N.Y.3d 807 (although evidence was testimonial under Crawford v. Washington, defendant opened door to admission of entire hearsay statement by using part of it); but see People v. Ryan, 17 A.D.3d 1, 790 N.Y.S.2d 723 (3rd Dept. 2005) (defendant did not open door to unfettered revelation of accomplices' statements where counsel's cross-examination focused on discrete statements by accomplices concerning use of gun during robbery); People v. Evans, 16 A.D.3d 517, 792 N.Y.S.2d 112 (2d Dept. 2005), lv denied 4 N.Y.3d 886 (defendant did not open door when he established that witness made inconsistent statement, but did not ask questions aimed at content of statements).

V. Interpreters - See, e.g., United States v. Curbelo, 726 F.3d 1260 (11th Cir. 2013), cert denied 2014 WL 102891 (defendant's inability to cross-examine person who translated recording does violate Confrontation Clause when defendant is able to cross-examine participant in recorded conversation who testifies that translation is accurate); People v. Morel, 8 Misc.3d 67, 798 N.Y.S.2d 315 (App. Term, 2d & 11th Jud. Dist., 2005), lv denied 5 N.Y.3d 808 (declarant's statements to unavailable translator who acted as party's agent are admissible if there is no motive to mislead and no reason to believe translation is inaccurate; Confrontation Clause did not guarantee right to scrutinize truth of the contents of statements the translator attributed to the officer in Spanish and to defendant in English where defendant had opportunity to cross-examine investigating officer as to questions he posed to translator and as to responses translator attributed to defendant, and defendant was a witness to translator's Spanish-language rendition of officer's questions and to his own Spanish-language responses); United States v. Hieng, 679 F.3d 1131 (9th Cir. 2012) (Crawford line of Supreme Court decisions did not invalidate Ninth Circuit holding that person may testify regarding

statements made by defendant through interpreter); People v. Arroyo, 2005 WL 1315726 (Cal. Ct. App., 5th Dist., 2005) (defendant's right of confrontation was violated when witness was permitted to testify to what translator, who was investigating detective with obvious prosecutorial bias, told witness defendant had said, and defendant had no opportunity to cross-examine translator; however, unbiased and adequately skilled translator simply serves as "language conduit," so that a translated statement will be considered to be the statement of the original declarant and not that of the translator); but see United States v. Charles, 722 F.3d 1319 (11th Cir. 2013) (right of confrontation violated where court admitted officer's testimony regarding interpreter's translation of defendant's statements to officer and defendant had no opportunity to cross-examine interpreter).

W. Internet, GPS, And Text Messages - People v. Hughes, _A.D.3d_, 2014 WL 642001 (3d Dept. 2014) (photographs of text messages properly authenticated where Verizon employee testified that messages had been sent between certain phone numbers, and victim identified phone numbers as belonging to her and defendant and identified photographs as depicting text messages she received from him); People v. Green, 107 A.D.3d 915 (2d Dept. 2013) (photographs of text messages properly authenticated where content made no sense unless defendant sent messages, and photographs were authenticated by complainant's testimony that they were "actual photographs of the screen of [her] telephone" and that she saw detective taking photographs); United States v. Cameron, 699 F.3d 621 (1st Cir. 2012), cert denied 133 S.Ct. 1845 (Yahoo! and Google records not testimonial under Confrontation Clause where they were unrelated to trial or law enforcement purpose, but records containing information on screen names Yahoo! had associated with potential child pornography, and National Center for Missing and Exploited Children CyberTipline records, were testimonial since primary utility of records was in reporting crimes to law enforcement); United States v. Espinal-Almeida, 699 F.3d 588 (1st Cir. 2012), cert denied 133 S.Ct. 1837 (expert testimony not required to authenticate GPS data and evidence generated by Garmin and Google Earth software); People v. Agudelo, 96 A.D.3d 611 (1st Dept. 2012) (cell phone instant messages admitted where detective testified that he viewed

messages on victim's phone and read printout of messages, which victim had cut and pasted into a document, and victim testified that document was accurate and that she knew messages were from defendant because his name appeared on her phone when they were received; authentication from Internet service provider about source of messages not required); People v. Clevenstine, 68 A.D.3d 1448, 891 N.Y.S.2d 51 (3rd Dept. 2009), lv denied 14 N.Y.3d 799 (computer disk containing instant messages properly authenticated where victims testified that they engaged in instant messaging about sexual activities with defendant through MySpace, police investigator testified that he retrieved conversations from hard drive of computer used by victims, legal compliance officer for MySpace explained that messages in question were from users of accounts created by defendant and victims, and defendant's wife recalled sexually explicit conversations she viewed in defendant's MySpace account; although it was possible that someone accessed defendant's account and sent messages under his user name, likelihood of that scenario was factual issue for jury); People v. Pierre, 41 A.D.3d 289, 838 N.Y.S.2d 546 (1st Dept. 2007), lv denied 9 N.Y.3d 880 (although witness did not save or print instant message and there was no Internet service provider or other technical evidence, message was authenticated where close friend testified to defendant's screen name, cousin testified that she sent instant message to that screen name and received reply which made no sense unless it was sent by defendant, and there was no evidence that anyone had motive or opportunity to impersonate defendant); see also Rodriguez v. State, 273 P.3d 845 (Nev. 2012) (court erred in admitting text messages where State failed to authenticate messages by presenting evidence, such as context and content of messages, sufficient to establish that defendant sent or participated in sending them); Griffin v. State, 19 A.3d 415 (Md. 2011) (material printed from MySpace profile of defendant's girlfriend was not adequately authenticated where document contained girlfriend's picture, birth date and location and identified her boyfriend, but she did not give testimony establishing that profile was created by her and that contents were authored by her; authentication of social networking site materials can be accomplished by asking purported author of posting in question whether he or she created profile and authored posting, by

searching computer belonging to person who allegedly created profile to determine whether computer was used to originate profile and posting, or by obtaining information from social networking site that links creation of profile and posting to purported creator); Commonwealth v. Purdy, 945 N.E.2d 372 (Mass. 2011) (e-mails purportedly sent by defendant were properly authenticated where they originated from account bearing defendant's name and used by defendant; they were found on hard drive of defendant's computer; and at least one e-mail contained attached photograph of defendant and, in another, author described business that was owned by defendant); United States v. Fluker, 698 F.3d 988 (7th Cir. 2012) (email messages properly authenticated where contents and context established that identified sender was the actual sender).

The New York County Lawyers' Association has provided guidance to lawyers regarding clients' social media postings. New York County Lawyers' Association Ethics Opinion 745 (NYCLA Prof. Ethics Comm., 7/2/13, http://www.nycla.org/siteFiles/Publications/Publications1630_0.pdf) (in civil matters, attorneys may advise clients as to significance and implications of posts, including what client should/should not post and what client may or may not remove; advise client how posts may be received and/or presented by client's legal adversaries and advise client to consider posts in that light; discuss possibility that legal adversary may obtain access to "private" social media pages through court orders or compulsory process; review how factual context of posts may affect their perception; review posts that may be or already have been published; and discuss possible lines of cross-examination).

II. Presumptions And Inferences

A. Constitutional Considerations - Since the prosecution must prove each element beyond a reasonable doubt, the fact-finder may, but cannot be required to, employ an inference or presumption concerning a material element. See Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450 (1979).

In a bench trial, the accused is not entitled to notice of the court's intention to rely upon a presumption. See People v. Snow, 225 A.D.2d 1031, 639 N.Y.S.2d 233 (4th Dept. 1996).

B. Penal Law

1. Possession Of Drugs In Car

a. PL §220.25(1) - "The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found," except a licensed and hired driver or a person authorized to possess the substance, or when the substance "is concealed upon the person of one of the occupants."

b. Drugs Not Located In Passenger Compartment - See People v. Warrington, 192 A.D.2d 735, 597 N.Y.S.2d 119 (2d Dept. 1993), lv denied 82 N.Y.2d 760, 603 N.Y.S.2d 1003 (presumption applied to contraband found in speaker in trunk); People v. Glenn, 185 A.D.2d 84, 592 N.Y.S.2d 175 (4th Dept. 1992) (presumption applied to drugs in locked suitcase in trunk).

c. Drugs Concealed Upon Occupant - For this exception to apply, there must be clear-cut evidence of exclusive possession by one individual at or just before the time of arrest. See People v. Verez, 83 N.Y.2d 921, 615 N.Y.S.2d 306 (1994) (use of presumption not precluded where co-defendant possessed and fired gun on street but it was recovered from between bucket seats in vehicle and there was no evidence that co-defendant possessed it just prior to arrest); People v. Lemmons, 40 N.Y.2d 505, 387 N.Y.S.2d 97 (1976) (presumption applied to gun found in handbag that was on floor of vehicle; exception would apply when, for example, gun is secreted on someone's person); In re Mark S., 274 A.D.2d 334, 711 N.Y.S.2d 398 (1st Dept. 2000) (co-respondent's admission that he possessed gun found under his foot did not establish exclusive possession as a matter of law). People v. Williams, 146 A.D.2d 659, 537 N.Y.S.2d 39 (2d Dept. 1989) (no presumption where co-defendant fired gun and threw something out of car that was never recovered); People v. Velez, 100 A.D.2d 603, 473 N.Y.S.2d 556 (2d Dept. 1984) (presumption applied where someone's hand dropped gun); People v. Guest, 142 Misc.2d 1014, 538 N.Y.S.2d 971 (Crim. Ct. N.Y. Co., 1989) (where known person threw drugs from car, presumption not applicable).

2. Possession Of Drugs In Open View In A Room

a. PL §220.25(2) - "The presence of a narcotic drug, narcotic preparation marihuana or phencyclidine in open view in a room, other than in a public place, under circumstances evincing an intent to unlawfully mix, compound, package or otherwise prepare for sale such controlled substance is presumptive evidence of knowing possession thereof by each and every person in close proximity to such controlled substance at the time such controlled substance was found...." The presumption does not apply when a person is authorized to possess the substance or when the substance is concealed upon the person of an occupant. See also People v. Rosado, 96 A.D.3d 547 (1st Dept. 2012) (drug factory presumption does not apply to charge of seventh-degree possession of controlled substance).

b. Close Proximity - Depending on the circumstances, the presumption may apply even when the respondent was not in the room where the drugs were found. See People v. Jiminez, 292 A.D.2d 196, 738 N.Y.S.2d 344 (1st Dept. 2002), lv denied 98 N.Y.2d 698, 747 N.Y.S.2d 416 (presumption applied where defendant was walking around the end of a wall, behind which was a hallway leading to the room in which the crack was found); People v. Garcia, 156 A.D.2d 710, 549 N.Y.S.2d 462 (2d Dept. 1989), lv denied 76 N.Y.2d 735, 558 N.Y.S.2d 897 (1990) (defendant in bathroom, and drug paraphernalia, weapons and $50,000 worth of cocaine found in main room); People v. Massene, 137 A.D.2d 624, 524 N.Y.S.2d 512 (2d Dept. 1988) (defendant in living room, and drugs found in kitchen were visible from living room); People v. McCall, 137 A.D.2d 561, 524 N.Y.S.2d 301 (2d Dept. 1988) (defendant lying behind bar, 40-50 feet from drugs).

c. Circumstances Evincing Intent To Sell - See, e.g., People v. Tejeda, 73 N.Y.2d 958, 540 N.Y.S.2d 985 (1989) (presumption applied where defendant was walking towards living room, where there was a residue of cocaine in a dish on a coffee table and grains of rice on the floor).

d. Open View - See, e.g., People v. Rodriguez, 104 A.D.2d 832, 480 N.Y.S.2d 155 (2d Dept. 1984) (presumption not applicable where cocaine was in opaque bag on window sill behind curtain).

3. Possession Of Weapon In Car

a. PL §265.15(3) - "The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, defaced rifle or shotgun [or one of a number of other specified weapons] is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found...." The presumption is not applicable to licensed and hired drivers, or when a person is licensed to possess the weapon or the weapon is concealed upon the person of an occupant. PL §265.15(3). These exceptions do not exist when a presumption arises from the presence of a weapon in a stolen car. PL §265.15(2).

b. Weapon Concealed Upon Occupant - See cases cited in II(B)(1)(c), supra.

c. Location Of Weapon In Car - See, e.g., People v. Perrington, 89 A.D.3d 529 (1st Dept. 2011) (automobile presumption not rebutted by fact that pistol was found in woman's purse where pistol's grip was protruding from unfastened purse located in middle of rear seat); People v. Lynch, 116 A.D.2d 56, 500 N.Y.S.2d 236 (1st Dept. 1986) (presumption applied where defendant was in rear seat, and sat facing a gun which was protruding from a tear in the back of the front seat); People v. Davis, 104 A.D.2d 1046, 480 N.Y.S.2d 954 (2d Dept. 1984) (presumption applied where defendant sat behind driver, and weapons were recovered from under driver's seat).

The presumption might apply even if the weapon was not in the passenger compartment. See People v. Garcia, 281 A.D.2d 234, 722 N.Y.S.2d 13 (1st Dept. 2000), lv denied 96 N.Y.2d 862, 730 N.Y.S.2d 36 (2001) (probable cause to arrest existed where defendant was passenger and gun was found under hood); People v. Hicks, supra, 138 A.D.2d 519 (presumption applied where gun was found in carburetor; court notes that driver could "pop" hood lock and gain access to gun). But see People v. Wilt, 105 A.D.2d 1089, 482 N.Y.S.2d 629 (4th Dept. 1984) (no presumption where gun was found in trunk); People v. Nix, 39 Misc.3d 628 (Crim. Ct., Bronx Co., 2013) (possession charge facially defective where it was alleged that defendant was in front passenger seat of vehicle which had partially open trunk with butt of shotgun exposed);

People v. Wade, 122 Misc.2d 50, 469 N.Y.S.2d 571 (Sup. Ct. Kings Co., 1984) (defendant was back seat passenger, and gun was found in glove compartment; presumption not applicable).

d. "Occupant" Of Car - The presumption does not apply to a person who was observed merely sitting or leaning on a car. See People v. Beaudonvine, 136 Misc.2d 179, 518 N.Y.S.2d 342 (Sup. Ct. Kings Co., 1987); see also People v. Maye, 64 A.D.3d 795, 882 N.Y.S.2d 696 (2d Dept. 2009), lv denied 13 N.Y.3d 837 (presumption applied where defendant was in car shortly before gun was discovered under circumstances which made it unlikely that weapon was placed in car after defendant exited).

4. Unauthorized Use Of A Motor Vehicle - PL §165.05(1) ("person who [takes, operates, exercises control over, rides in or otherwise uses a vehicle] without the consent of the owner is presumed to know that he does not have such consent"). See Matter of Raquel M., 99 N.Y.2d 92, 752 N.Y.S.2d 268 (2002); People v. Roby, 39 N.Y.2d 69, 382 N.Y.S.2d 739 (1976); People v. McCaleb, 25 N.Y.2d 394, 306 N.Y.S.2d 889 (1969); Matter of Stephen R., 182 A.D.2d 92, 586 N.Y.S.2d 794 (1st Dept. 1992) (presumption rebutted by prosecution evidence that vehicle was undamaged and driver produced documents).

5. Criminal Possession Of Stolen Property - PL §165.55(1) ("person who knowingly possesses stolen property is presumed to possess it with intent to benefit himself or a person other than an owner thereof or to impede the recovery by an owner thereof").

6. Intent To Use Weapon Unlawfully - PL §265.15(4) (unauthorized possession of explosives, or possession of any "dagger, dirk, stiletto, dangerous knife or any other weapon, instrument, appliance or substance designed, made or adapted for use primarily as a weapon," is presumptive evidence of intent to use the same unlawfully).

7. Presumption Of Sanity - The respondent is presumed to have been sane at the time the acts were allegedly committed. Under PL §§25.00(1) and 40.15, the respondent must rebut the presumption by proving insanity by a preponderance of

the evidence. See People v. Kohl, 72 N.Y.2d 191, 532 N.Y.S.2d 45 (1988) (constitutionality of burden of proof upheld).

C. Case Law-Created Rules

1. Person Intends The Ordinary Natural Consequences Of His Or Her Acts - There "is a rebuttable presumption that one intends the natural and probable consequences of one's own act." Richardson, §3-138. See People v. Getch, 50 N.Y.2d 456, 429 N.Y.S.2d 579 (1980). But see People v. Green, 50 N.Y.2d 891, 430 N.Y.S.2d 267 (1980) (courts would be better advised not to charge the inference); People v. Torres, 46 A.D.3d 925, 849 N.Y.S.2d 90 (2d Dept. 2007), lv denied, 10 N.Y.3d 817 (trial courts should use language similar to that recommended by the Committee on Criminal Jury Instructions; in determining whether intent has been established, jury "may consider the person's conduct and all of the circumstances surrounding that conduct, including, but not limited to … was that result the natural, necessary and probable consequence of that conduct").

2. Recent And Exclusive Possession Of Fruits Of Crime

a. Generally - The court may infer from evidence of the respondent's unexplained or falsely explained possession of recently stolen property that the respondent is guilty either of the theft, or of the knowing receipt and possession of stolen property. But see State v. James, 315 S.W.3d 440 (Tenn. 2010) (exclusive and unexplained possession of recently stolen property permits jury to infer burglary only when there is rational connection between possession and participation, guilt more likely than not flows from possession, and there is some other evidence corroborating burglary that warrants inference); People v. Moore, 291 A.D.2d 336, 738 N.Y.S.2d 332 (1st Dept. 2002) (grand larceny and possession charges dismissed where complainant's wallet was stolen after he fell asleep in subway station and defendant was found with the wallet and some of its contents 29-49 minutes later outside another subway station); People v. Keelan, 189 A.D.2d 625, 592 N.Y.S.2d 350 (1st Dept. 1993), lv denied 81 N.Y.2d 972, 598 N.Y.S.2d 774 (inference was "deprived of much, if not all, of its force" where complainant may have lost wallet or defendant may have found it after someone else had stolen it). If the evidence forecloses a reasonable conclusion that the

respondent acquired possession after the theft, the court need not consider the inference of criminal possession. See People v. Baskerville, 60 N.Y.2d 374, 469 N.Y.S.2d 646 (1983) (where defendant offered explanation for possession of robbery proceeds, jury should have been given choice between robbery and criminal possession inference); People v. Dobbins, 92 A.D.2d 593, 459 N.Y.S.2d 484 (2d Dept. 1983); Richardson, §3-136.

b. "Recent And Exclusive" - There are "cases in which possession is so far removed in time from the taking or the evidence of shared rather than exclusive possession so strong that no inference instruction would be proper." People v. Baskerville, supra, 60 N.Y.2d at 383. See Matter of Douglas R., 23 A.D.3d 664, 805 N.Y.S.2d 401 (2d Dept. 2005) (finding reversed where respondent was found in possession of stolen license plate 4 months after theft; facts do not appear in decision, but can be found in JRD brief); People v. Schillaci, 68 A.D.2d 124, 416 N.Y.S.2d 300 (2d Dept. 1979); People v. Mobley, 33 A.D.2d 888, 307 N.Y.S.2d 523 (4th Dept. 1969). But see People v. Combo, 275 A.D.2d 936, 713 N.Y.S.2d 414 (4th Dept. 2000), lv denied 95 N.Y.2d 933, 721 N.Y.S.2d 609 (inference properly charged to jury where there was 10-day period between theft and recovery of item from defendant); People v. Mitchell, 176 A.D.2d 897, 575 N.Y.S.2d 361 (2d Dept. 1991) (defendant found in possession 6 weeks after crime; inference applied); People v. Robins, 125 A.D.2d 721, 509 N.Y.S.2d 889 (2d Dept. 1987) (defendant found in possession 2 weeks after theft; inference applied).

It has been held that the inference may apply even when the contraband was possessed by another individual, with whom the accused acted in concert. People v. Harris, 304 A.D.2d 839, 757 N.Y.S.2d 878 (2d Dept. 2003), lv denied 100 N.Y.2d 582, 764 N.Y.S.2d 392 (2003).

3. Missing Witness Inference

a. Defense Witness - When a witness under the respondent's control is not called, is knowledgeable about a material issue, and might be expected to give favorable evidence, the court may "infer that the missing witness would not have supported or corroborated [the respondent's] evidence," but "may not speculate about

what the witness would have said," or "assume that the witness could have provided positive evidence corroborating or filling gaps in the [prosecution's] proof." People v. Paylor, 70 N.Y.2d 146, 518 N.Y.S.2d 102, 103 (1987). The court must advise counsel during trial that it may employ such an inference. See People v. Magett, 196 A.D.2d 62, 608 N.Y.S.2d 434 (1st Dept. 1994); see also People v. Manzi, _A.D.3d_, 978 N.Y.S.2d 202 (1st Dept. 2014) (court, apparently believing that defendant should have anticipated missing witness issue, erred in denying defendant one-day adjournment to produce witness before granting People's request for missing witness charge). However, without laying the foundation required for a formal inference, a prosecutor may in good faith make summation comments concerning the accused's failure to call witnesses. See People v. Tankleff, 84 N.Y.2d 992, 622 N.Y.S.2d 503 (1994).

b. Prosecution Witness - The court may infer that a missing prosecution witness' testimony would have been unfavorable. See People v. Gonzalez, 68 N.Y.2d 424, 509 N.Y.S.2d 796 (1986).

c. Within "Control" Of Party - An inference may be drawn if the witness is "available" to both sides, but is favorable to or under the influence of one side. Richardson, §3-140; People v. Hall, 18 N.Y.3d 122 (2011) (instruction warranted where victim's cousin and two other witnesses were friendly with victim and could have been expected to support his version; it was irrelevant that they were also available to defense since "inference is not rebutted when the opposing party chooses not to call the same witness — a witness who, by definition, the opposing party would expect to be hostile"); People v. Gonzalez, supra, 68 N.Y.2d 424 (law enforcement officers, informants, and spouse or other close relatives of a complainant are within prosecutor's "control"). See also People v. Savinon, 100 N.Y.2d 192, 761 N.Y.S.2d 144 (2003) (although relationship between defendant and friend had ended after rape allegedly witnessed by friend, and friend had seen complainant socially after the rape, defendant and witness had been friends and business associates and were sufficiently bonded that defendant had sex with witness present; counsel's statement that witness was unavailable was insufficient, since witness met with defendant and counsel during trial and could have been produced had defendant truly wanted him); People v. Keen, 94

N.Y.2d 533, 707 N.Y.S.2d 380 (2000) (missing witness charge proper where defendant failed to call ex-girlfriend, who was mother of his child; termination of intimate relationship did not remove witness from defendant's "control"); People v. Paulin, 70 N.Y.2d 685, 518 N.Y.S.2d 790 (1987) (common law husband of complainant; jury charge was required); People v. Khan, 31 Misc.3d 130(A) (App. Term, 2d, 11th & 13th Jud. Dist., 2011) (prosecutor asserted that witness could not be located, that he had conducted Lexis locator search, and that he had attempted to call witness's aunt living in Guyana but was unable to contact her, but, although People had been informed by complaining witness's wife that missing witness had indicated he intended to move back to Florida from New York, no search was conducted of criminal, motor vehicles or social services records within New York and Florida); People v. Smith, 71 A.D.3d 1174, 898 N.Y.S.2d 599 (2d Dept. 2010), lv denied 15 N.Y.3d 778 (no charge regarding complainant's boyfriend where, at time of trial, witness and complainant were no longer dating each other, witness had been arrested and spent time in jail for assaulting complainant, order of protection obtained by complainant against witness was in effect, and witness was not in contact with anyone involved in case, and had indicated unwillingness to cooperate and discontinued his phone service); People v. Ingram, 71 A.D.3d 786, 896 N.Y.S.2d 446 (2d Dept. 2010), lv denied 15 N.Y.3d 751 (court improperly denied defendant's application for charge with respect to co-defendant who had pleaded guilty and initially had identified two people other than defendant as perpetrators before later implicating defendant at plea allocution; prosecutor's suggestion that witness might perjure herself at trial did not establish People's lack of control over witness); People v. Onyia, 70 A.D.3d 1202, 894 N.Y.S.2d 610 (3rd Dept. 2010) (witness's status as victim's girlfriend, and as victim of robbery given that she was present while gun-wielding intruders stormed an apartment, rendered her under People's control; unavailability not established where prosecutor did not explain efforts he undertook to locate witness, and no police or investigators were asked to assist); People v. Rawls, 65 A.D.3d 978, 885 N.Y.S.2d 417 (1st Dept. 2009), lv denied 14 N.Y.3d 773 (defendant's request for missing witness charge denied where witness's casual acquaintance with victim did not place him within People's control); People v.

Kass, 59 A.D.3d 77, 874 N.Y.S.2d 475 (2d Dept. 2008) (law assumes that confidential informant who plays major role in events leading to defendant's arrest would, if called, testify favorably to prosecution and adversely to defendant); People v. Vanhoesen, 31 A.D.3d 805, 819 N.Y.S.2d 319 (3rd Dept. 2006) (lack of control not established where People merely claimed that informant was "not happy" and "won't cooperate at this point"); People v. Carrington, 30 A.D.3d 175, 815 N.Y.S.2d 560 (1st Dept. 2006) (court properly issued missing witness charge where defense counsel's conclusory statement that defendant's relationship with girlfriend had terminated did not establish that witness should no longer be presumed to be favorable); People v. Marsalis, 22 A.D.3d 866, 803 N.Y.S.2d 152 (2d Dept. 2005) (trial court erred in failing to give a missing witness charge regarding complainant's brother, who allegedly was assaulted by defendant and was favorably disposed to People, and unavailability not established where only effort People made to locate brother was to ask complainant if he knew brother's address and/or telephone number, and complainant testified that, although he did not know where brother lived, he saw him occasionally, including one time during week before trial, and that brother had recently been released from jail); People v. Soto, 297 A.D.2d 567, 747 N.Y.S.2d 160 (1st Dept. 2002), lv denied 99 N.Y.2d 564, 754 N.Y.S.2d 217 (2002) (charge properly given to jury regarding defendant's friend and next door neighbor); People v. Lewis, 294 A.D.2d 376, 741 N.Y.S.2d 705 (2d Dept. 2002), lv denied 98 N.Y.2d 698, 747 N.Y.S.2d 417 (2002) (witness not available to People where he refused to testify at defendant's first trial and had to be produced in handcuffs pursuant to material witness order); People v. Gardine, 293 A.D.2d 287, 740 N.Y.S.2d 52 (1st Dept. 2002), lv denied 98 N.Y.2d 651, 745 N.Y.S.2d 509 (2002) (while concluding that child who may have witnessed murder was not within People's control, court notes that People's ability to force child to testify over parent's objection may be more theoretical than practical); People v. Chery, 192 Misc.2d 18, 742 N.Y.S.2d 769 (App. Term, 9th & 10th Jud. Dist., 2002), lv denied 98 N.Y.2d 636, 744 N.Y.S.2d 765 (2002) (unavailability not established by statement of prosecutor that, after speaking to officer, he concluded that witness was unable to testify); People v. Neil, 289 A.D.2d 611, 733 N.Y.S.2d 528 (3rd Dept. 2001) (defendant had right to charge as to physician

who allegedly examined victim and documented injuries consistent with sexual assault); People v. McKenzie, 281 A.D.2d 236, 721 N.Y.S.2d 649 (1st Dept. 2001), lv denied 97 N.Y.2d 642, 735 N.Y.S.2d 499 (inference appropriate with respect to passenger who was in defendant's car at time of crime where he was defendant's friend, and defense counsel had interviewed him and placed him on witness list); People v. Jefferson, 281 A.D.2d 433, 722 N.Y.S.2d 32 (2d Dept. 2001) (girlfriend of deceased victim was under People's control); People v. Smith, 279 A.D.2d 259, 719 N.Y.S.2d 33 (1st Dept. 2001), lv denied 96 N.Y.2d 835, 729 N.Y.S.2d 456 (victim not within prosecution's control where he was in Texas and ability to subpoena him was questionable); People v. Townley, 245 A.D.2d 322, 667 N.Y.S.2d 261 (2d Dept. 1997), lv denied 91 N.Y.2d 898, 669 N.Y.S.2d 13 (1998) (charge should have been given regarding complainant's neighbor, who testified before Grand Jury that defendant cut screen to gain entry to house); People v. Rodriguez, 191 A.D.2d 654, 595 N.Y.S.2d 785 (2d Dept. 1993) (charge required with respect to prosecution witness' child); People v. Santiago, 187 A.D.2d 255, 589 N.Y.S.2d 422 (1st Dept. 1992), lv denied 81 N.Y.2d 794, 594 N.Y.S.2d 741 (1993) (no showing that friend of defendant's girlfriend was within defendant's control); People v. Skeeters, 180 A.D.2d 834, 580 N.Y.S.2d 451 (2d Dept. 1992), lv denied 79 N.Y.2d 1007, 584 N.Y.S.2d 462 (no showing that fourth victim was unavailable); People v. Mendez, 138 A.D.2d 637, 526 N.Y.S.2d 220 (2d Dept. 1988) (although defendant testified to hostile relationship, there was no evidence that witness was favorable to prosecution); People v. Erts, 138 A.D.2d 506, 525 N.Y.S.2d 899 (2d Dept. 1988) (partner of undercover; charge required); People v. Morales, 126 A.D.2d 575, 510 N.Y.S.2d 693 (2d Dept. 1987) (defendant's girlfriend; charge upheld); People v. Walker, 105 A.D.2d 720, 481 N.Y.S.2d 388 (2d Dept. 1984) (missing third victim lived in Massachusetts; no charge); People v. Modeste, 1 Misc.3d 315, 764 N.Y.S.2d 561 (Sup. Ct., Kings Co., 2003) (no charge for either party where missing victim, defendant's boyfriend, had immigration concerns).

d. Cumulative Testimony - An inference may be inappropriate where other witnesses have testified. Compare People v. Rosario, 191 A.D.2d 243, 595 N.Y.S.2d 5 (1st Dept. 1993), lv denied 81 N.Y.2d 1019, 600 N.Y.S.2d 207 (no inference

as to second "ghost" officer in "buy and bust"); People v. Hernandez, 159 A.D.2d 722, 553 N.Y.S.2d 205 (2d Dept. 1990) (charge improper where defendant's relatives lived in Puerto Rico) and People v. Nieves, 124 A.D.2d 603, 507 N.Y.S.2d 747 (2d Dept. 1986) (charge as to defendant's wife improper where defendant and 3 alibi witnesses testified) with People v. Khan, 31 Misc.3d 130(A) (defendant entitled to missing witness charge regarding second witness to incident); People v. Onyia, 70 A.D.3d 1202 (testimony of victim's girlfriend not cumulative where other witnesses' testimony was inconsistent and thus girlfriend's testimony could have been helpful) and People v. Demagall, 63 A.D.3d 34, 876 N.Y.S.2d 541 (3rd Dept. 2009), lv denied 12 N.Y.3d 924 (reversible error where court refused to give charge as to first expert People retained to examine defendant and precluded defense from asking jury to draw inference).

e. Knowledge Of Witness - It must be shown that the witness has relevant knowledge. See People v. Kitching, 78 N.Y.2d 532, 577 N.Y.S.2d 231 (1991) (officer could see drug sale); People v. Dianda, 70 N.Y.2d 894, 524 N.Y.S.2d 381 (1987) (no showing that informant was with defendant and undercover); People v. Ortiz, 193 A.D.2d 449, 597 N.Y.S.2d 682 (1st Dept. 1993), aff'd 83 N.Y.2d 989, 616 N.Y.S.2d 333 (1994) (no showing that undercover saw sale). See also People v. Smith, 225 A.D.2d 1030, 639 N.Y.S.2d 232 (4th Dept. 1996) (prosecutor's assertion that witness claimed to have no recollection did not establish lack of knowledge).

f. Unavailability Of Witness Due To Invocation Of Fifth Amendment - If a witness is not called because it is known that the witness intends to invoke the privilege against self incrimination, the fact-finder should not speculate regarding the witness' failure to testify. See People v. Thomas, 51 N.Y.2d 466, 434 N.Y.S.2d 941 (1980). But see People v. Macana, 84 N.Y.2d 173, 615 N.Y.S.2d 656 (1994) (missing witness inference upheld where defendant failed to substantiate his claim that his father would testify if not for risk of self-incrimination); People v. Doyle, 273 A.D.2d 69, 709 N.Y.S.2d 57 (1st Dept. 2000), lv denied 95 N.Y.2d 889, 715 N.Y.S.2d 381 (no error in missing witness charge where defendant failed to establish that his "life-long" friend would invoke privilege; witness was not involved in crimes charged, and might have incriminated himself only as to possession of a small quantity

of unrecovered drugs).

g. Infant Witness - If the missing witness is a child of "tender years," the court may consider that fact when deciding whether to draw an inference. See People v. Edwards, 161 A.D.2d 151, 554 N.Y.S.2d 553 (1st Dept. 1990). See also People v. Stepney, 42 Misc.3d 139(A) (App. Term, 2d Dept., 2014) (no missing witness charge where parents either did not respond to police requests for interview or refused to permit child to testify); People v. Moore, 41 A.D.3d 737, 839 N.Y.S.2d 767 (2d Dept. 2007), lv denied 9 N.Y.3d 879 (no missing witness charge regarding five-year-old son of complainant, who was presumed to be incapable of being sworn and could not be deemed knowledgeable about material issue); People v. Gardine, supra, 293 A.D.2d 287 (child was unavailable where child and parent refused to cooperate with People).

h. Respondent's Failure To Testify - The judge may not consider the respondent's failure to testify. People v. Ayala, 173 A.D.2d 718, 570 N.Y.S.2d 609 (2d Dept. 1991).

i. Comments During Summation - Even without a missing witness inference, counsel may comment on summation regarding a failure to call a witness if counsel establishes that the witness would have provided material and non-cumulative testimony. See People v. Williams, 5 N.Y.3d 732, 800 N.Y.S.2d 360 (2005); but see State v. Hill, 974 A.2d 403 (N.J. 2009) (inference should generally not operate against defendants since it could improperly assist State in proving elements beyond a reasonable doubt, and prosecutorial comment that relieves State of burden of proof or suggests obligation on part of defendant to prove innocence is improper).

4. Mailing And Delivery - When issuing a warrant for a respondent who has failed to appear in response to a mailed notice, the court ordinarily presumes the notice was delivered. Indeed, under the law, a letter which is shown to have been addressed, stamped and mailed is presumed to have been delivered to the addressee. Even absent proof of delivery to postal authorities, the presumption applies if it is established that the letter was placed in a receptable for outgoing mail, and would have been mailed pursuant to regular office practice. Richardson, §3-128. See Bossuk v. Steinberg, 58 N.Y.2d 916, 460 N.Y.S.2d 509 (1983); Nassau Insurance Company v.

Murray, 46 N.Y.2d 828, 414 N.Y.S.2d 47 (1978); People v. Outram, 22 Misc.3d 131(A), 880 N.Y.S.2d 875 (App. Term, 2d & 11th Jud. Dist., 2009) (People could not rely on presumption that defendant received license suspension order since New York City-based DMV employee who testified had no personal knowledge of procedures of Albany DMV office which handled mailing of orders); Krieger v. City of New York, 118 Misc.2d 537, 461 N.Y.S.2d 171 (Sup. Ct. Queens Co., 1983). Although it does not create a presumption, habit evidence can help prove that a mailing occurred. See People v. Johnson, 190 A.D.2d 910, 593 N.Y.S.2d 589 (3rd Dept. 1993) (although evidence of routine transmission of notices of readiness to The Legal Aid Society did not create presumption, it was evidence of transmission).

III. Expert Testimony

Ordinarily, expert testimony may be admitted when the subject of the testimony is beyond the understanding of the fact-finder. See People v. Cronin, 60 N.Y.2d 430, 470 N.Y.S.2d 110 (1983). But see Federal Rules, 702 (expert may testify if it will assist trier of fact). Occasionally, lay testimony will suffice even though a subject appears at first blush to be an appropriate subject for an expert. See People v. Santi, 3 N.Y.3d 234, 785 N.Y.S.2d 405 (2004) (patient-witnesses could testify about effects of anesthesia); see also People v. Abdul, 244 A.D.2d 237, 665 N.Y.S.2d 406 (1st Dept.1997), lv denied 91 N.Y.2d 939, 671 N.Y.S.2d 719 (1998) (shoe print evidence involves a physical comparison, not a novel scientific technique); Carmichael v. Samyang Tire, Inc., 131 F.3d 1433 (11th Cir. 1997) (scientific expert is one who relies on the application of scientific principles, rather than on skill-based or experience-based observation).

Also, a lay opinion may be given when the subject matter is not beyond the understanding of the fact-finder but is such that it would be impossible to accurately describe the facts without stating an opinion or impression. People v. Haynes, 39 A.D.3d 562, 833 N.Y.S.2d 193 (2d Dept. 2007); United States v. Kaplan, 490 F.3d 110 (2d Cir. 2007) (lay opinion regarding defendant's knowledge is admissible only when testimony is rationally based on facts witness himself perceived).

Under the Frye test [Frye v.United States, 293 F. 1013 (D.C. Cir. 1923)], the

proponent of novel scientific evidence must establish that the "accepted techniques, when properly performed, generate results accepted as reliable within the scientific community generally." People v. Wesley, 83 N.Y.2d 417, 422, 611 N.Y.S.2d 97, 100 (1994); see also People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255 (1983); Lugo v. New York City Health and Hospitals Corporation, 89 A.D.3d 42 (2d Dept. 2011) Frye inquiry is directed at basis for opinion and does not examine whether expert's conclusion is sound, and court's job is not to decide who is right and who is wrong, but rather to decide whether or not there is sufficient scientific support for expert's theory; absence of medical literature directly on point pertains to weight to be given to testimony, but does not preclude admissibility of testimony based on reasonable extrapolations from legitimate empirical data).

In federal court, the Frye test has been superseded by the Federal Rules. Daubert v. Dow Pharmaceuticals, 509 U.S. 579, 113 S.Ct. 2786 (1993) (Frye test has been superseded by Federal Rules, which require showing of relevance and reliability); see also Kumho Tire Company v. Carmichael, 526 U.S. 137, 119 S.Ct. 1167 (1999) (Daubert holding applies to testimony by non-scientific experts); Parker v. Mobil Oil Corp., 7 N.Y.3d 434, n.4, 824 N.Y.S.2d 584 (2006) (Daubert cases are instructive to the extent that they address reliability of expert's methodology).

It must also be shown that the specific procedures used were adequate. See People v. Wesley, supra, 83 N.Y.2d 417. On appeal, "abuse of discretion" is the standard of review of a trial court's ruling on the admissibility of expert testimony. See, e.g., General Electric Company v. Joiner, 522 U.S. 136, 118 S.Ct. 512 (1997) (abuse of discretion standard, not a more stringent standard, applies even when exclusion of evidence is outcome-determinative).

An expert may rely on personal knowledge or facts which are in the record. People v. Jones, 73 N.Y.2d 427, 541 N.Y.S.2d 340 (1989).

An expert may also base an opinion on other facts, including out-of-court statements by third party sources, if the facts are of a kind accepted in the profession as a reliable basis for an opinion and there is independent evidence establishing the reliability of the out-of-court material, or the facts come from a witness who is subject to

cross-examination. See People v. Sugden, 35 N.Y.2d 453, 363 N.Y.S.2d 923 (1974); see also People v. Goldstein, 6 N.Y.3d 119, 810 N.Y.S.2d 100 (2006), cert denied 547 U.S. 1159, 126 S.Ct. 2293 (psychiatric profession accepts use of hearsay); People v. Demagall, _A.D.3d_, 978 N.Y.S.2d 416 (3d Dept. 2014) (in murder prosecution in which defendant raised insanity defense, new trial ordered where People's expert testified to another expert's statements relating to defendant's malingering and regarding contents of mental health records after People indicated intent to call other expert to testify, but People later decided not to call expert); People v. Assi, 63 A.D.3d 19, 877 N.Y.S.2d 231 (1st Dept. 2009), aff'd 14 N.Y.3d 335 (court recognizes that experts in fracture analysis may rely on photographs rather than examination of broken property); People v. Czarnowski, 268 A.D.2d 701, 702 N.Y.S.2d 398 (3rd Dept. 2000) (pharmacist testifying about chemical composition of pills could rely in part on package inserts and pharmaceutical reference manuals); Matter of Omar B., 175 A.D.2d 834, 573 N.Y.S.2d 301 (2d Dept. 1991) (psychiatrist could rely on records which were not in evidence); In re Colarusso, 7 Misc.3d 1025(A), 801 N.Y.S.2d 231 (Sup. Ct., Franklin Co., 2005) (in civil commitment proceeding, testimony by doctor excluded where conversation with respondent's aunt essentially provided factual predicate for opinion); Federal Rules, 803(18) (to the extent it is called to expert's attention on cross or is relied upon on direct, published treatise, periodical, etc. established as reliable by witness, other expert, or judicial notice may be admitted).

Even when hearsay upon which the expert relied in formulating an opinion is purportedly offered only to show the basis for the opinion and not for its truth, there may still be a right of confrontation violation if there is a risk that the fact-finder will consider the hearsay for its truth. In People v. Goldstein, supra, 6 N.Y.3d 119, the Court of Appeals found reversible error where the prosecutor's expert was permitted to describe facts she had obtained in interviews of third parties; while acknowledging that the prosecution met its burden to show that reliance on this type of hearsay was accepted by the psychiatric profession, the Court concluded that "there should be at least some limit on the right of the proponent of an expert's opinion to put before the fact-finder all the information, not otherwise admissible, on which the opinion is based," or else "a

party might effectively nullify the hearsay rule by making that party's expert a 'conduit for hearsay,'" and that in the case at hand the statements were offered for their truth and were testimonial under Crawford v. Washington). See also Matter of Floyd Y., 22 N.Y.3d 95 (2013) (in Mental Hygiene Law Article 10 Sex Offender Management and Treatment Act proceeding, court applies Due Process Clauses and Mathews v. Eldridge balancing test, and holds that hearsay basis of expert's opinion is admissible if proponent demonstrates that hearsay is reliable and court determines that probative value in helping fact-finder evaluate expert's opinion substantially outweighs prejudicial effect of hearsay; court notes that rule excluding all basis hearsay would undermine truth-seeking function by keeping foundation for expert's opinion hidden, that to extent fact-finder's assessment might turn on acceptance of basis evidence as true, respondent has opportunity to present competing view of basis evidence through respondent's expert and court can instruct jury about proper consideration of basis evidence, and criminal charges that resulted in acquittal are more prejudicial than probative and charges that resulted in neither acquittal nor conviction require close scrutiny); State v. McLeod, 66 A.3d 1221 (N.H. 2013) (Confrontation Clause not violated when expert testifies regarding independent judgment based upon inadmissible testimonial hearsay about which expert does not testify on direct examination; even though defendant may be "forced" to elicit hearsay in order to cross examine expert, criminal process often involves making of difficult judgments); United States v. Johnson, 587 F.3d 625 (4th Cir. 2009), cert denied 130 S.Ct. 2128 (expert witness's reliance on evidence that Crawford v. Washington would bar if offered directly is problem only where witness is used as conduit for testimonial hearsay); Howard v. Walker, 406 F.3d 114 (2d Cir. 2005) (habeas petitioner's right of confrontation was violated where trial court allowed expert to base testimony on statements otherwise inadmissible pursuant to Bruton v. United States); but see People v. Martich, 30 A.D.3d 305, 818 N.Y.S.2d 48 (1st Dept. 2006) (no Confrontation Clause issue where expert's brief narration of history taken from victim was admitted to explain basis of opinion, but victim was subject to cross-examination); State v. Jones, 603 S.E.2d 168 (NC Ct. App., 2004), appeal dism'd, 607 S.E.2d 660 (lab analysis was admitted not for truth, but as basis for expert

opinion).

Where a medical expert's conclusions are based on an examination of x-rays, the failure to introduce the x-rays into evidence usually is error. Compare Hambsch v. New York City Transit Authority, 63 N.Y.2d 723, 480 N.Y.S.2d 195 (1984) (error to permit physician to testify based on reading of x-ray which was not in evidence) and Wagman v. Bradshaw, supra, 292 A.D.2d 84, 87 with Karayianakis v. L & E. Grommery, Inc., 141 A.D.2d 610, 529 N.Y.S.2d 358 (2d Dept. 1988) (no error in failure to introduce x-rays where medical findings were based on expert's clinical observations and a physical examination, and x-rays, for the most part, served to confirm conclusions). In addition, an expert may not rely primarily on the opinions of other experts who have not been called to testify. See People v. Wlasiuk, 32 A.D.3d 674, 821 N.Y.S.2d 285 (3rd Dept. 2006); O'Shea v. Sarro, 106 A.D.2d 435, 482 N.Y.S.2d 529 (2d Dept. 1984); Borden v. Brady, 92 A.D.2d 983, 461 N.Y.S.2d 497 (3rd Dept. 1983) (non-testifying doctor's report containing opinion relevant to crucial issue was not merely a "link in the chain of data").

"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." CPLR §4515. Since the basis of the opinion may or may not be adequate, it is better to have the expert specify the factual basis before eliciting an opinion. Richardson, §7-310, at p. 475. See People v. Jones, supra, 73 N.Y.2d 427 (expert must testify to facts outside record before giving opinion).

Although the witness must be qualified through training, education, knowledge or experience, see, e.g., People v. Morehouse, 5 A.D.3d 925, 774 N.Y.S.2d 100 (3rd Dept., 2004), lv denied 3 N.Y.3d 644 (sexual assault nurse qualified through training and experience); People v. Munroe, 307 A.D.2d 588, 763 N.Y.S.2d 691 (3rd Dept. 2003) (nurse practitioner was properly qualified to give medical opinion), the court need not formally "certify" the witness as an expert. See People v. Jean-Laurent, 51 A.D.3d 818, 859 N.Y.S.2d 658 (2d Dept. 2008), lv denied, 11 N.Y.3d 737; People v. Lamont, 21

A.D.3d 1129, 800 N.Y.S.2d 480 (3rd Dept. 2005) (there is legitimate criticism of practice of declaring witness an expert since it bolsters the witness and gives the witness the imprimatur of the court in front of the jury); People v. Abrams, 232 A.D.2d 240, 649 N.Y.S.2d 5 (1st Dept. 1996), lv denied 88 N.Y.2d 1066, 651 N.Y.S.2d 410.

Specific Subjects Of Expert Testimony

A. Bite Marks - See People v. Middleton, 54 N.Y.2d 42, 444 N.Y.S.2d 581 (1980); People v. Bethune, 105 A.D.2d 262, 484 N.Y.S.2d 577 (2d Dept. 1985) (witness' inability to positively attribute defendant's scar to the victim's bite did not preclude admission of evidence).

B. Blood Stains - See People v. Mountain, 66 N.Y.2d 197, 495 N.Y.S.2d 944 (1985) (evidence of similarity of defendant's blood type to that of assailant is admissible, even if blood type is common, unless potential prejudice outweighs probative value); People v. Crosby, 116 A.D.2d 731, 498 N.Y.S.2d 31 (2d Dept. 1986) (testimony, based on technique called electrophoresis, that victim's blood type occurred in .4% of the population and was consistent with blood found on defendant was admissible).

It might be noted that a lay witness may identify a bloodstain. See People v. Mathews, 176 A.D.2d 1135, 575 N.Y.S.2d 952 (3rd Dept. 1991). See also People v. Whitaker, 289 A.D.2d 84, 734 N.Y.S.2d 149 (1st Dept. 2001) (testimony of blood spatter expert properly admitted).

C. Credibility Of Witnesses - An expert may not testify that a witness is telling the truth, or vouch for a witness' general credibility. See People v. Ciaccio, 47 N.Y.2d 431, 418 N.Y.S.2d 371 (1979) (error where expert testified that witness' version was more credible than defendant's); United States v. Knapp, 73 M.J. 33 (Armed Forces U.S. Ct. App., 2014) (investigator improperly allowed to testify that specialized training made him able to identify "nonverbal cues during interviews" indicating that defendant had lied during interrogation); People v. Blond, 96 A.D.3d 1149 (3d Dept. 2012) (court properly precluded defendant from calling social workers to testify that they had conducted statement validity analysis test of victim for use in Family Court, where such testimony is authorized); People v. Major, 154 A.D.2d 225, 545 N.Y.S.2d 923 (1st Dept.

1989) (error where witness testified that sex crime victim did not consent); Matter of Anthony B., 122 A.D.2d 870, 505 N.Y.S.2d 916 (2d Dept. 1986) (doctor improperly testified that victim's personality was one of the reasons he concluded that she had been raped). Cf. Kravitz v. Long Island Medical Center, 113 A.D.2d 577, 581, 497 N.Y.S.2d 51, 54 (2d Dept. 1985) (it "is questionable at best whether the present state of the art is so exact as to allow such testimony in any case"). But see People v. Jones, 261 A.D.2d 920, 690 N.Y.S.2d 366 (4th Dept. 1999), lv denied 93 N.Y.2d 972, 695 N.Y.S.2d 58 (no error where expert was permitted to testify about his perception of the truthfulness of the information defendant provided, but not defendant's general credibility); People v. Doczy, 210 A.D.2d 425, 620 N.Y.S.2d 408 (2d Dept. 1994), lv denied 85 N.Y.2d 936, 627 N.Y.S.2d 999 (1995) (expert permitted to opine as to truthfulness of defendant's statements during psychiatric interview).

However, expert testimony may be admitted to explain unusual behavior which might undermine a witness' credibility. See People v. Fisher, 53 N.Y.2d 907, 440 N.Y.S.2d 630 (1981) (testimony concerning "repression" offered to explain witness' initial failure to identify killer); People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1976) (teacher explained complainant's mental deficiency to aid jury in evaluating witness' behavior and testimony). But see People v. Smith, 127 A.D.2d 864, 512 N.Y.S.2d 244 (2d Dept. 1987) (officer not qualified to testify that victim repressed and blocked out event).

In People v. Washington, 238 A.D.2d 263, 657 N.Y.S.2d 24 (1st Dept. 1997), the court upheld the exclusion of expert testimony regarding the susceptibility of young children to suggestion. See also People v. Johnston, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3rd Dept. 2000), lv denied 95 N.Y.2d 935 (no error in preclusion of the testimony of psychologist concerning children's susceptibility to suggestive interrogation; trial court rationally concluded that subject matter was within jurors' common knowledge and experience, and found that such opinions had not received general acceptance in field of psychology); People v. Kanani, 272 A.D.2d 186, 709 N.Y.S.2d 505 (1st Dept. 2000), lv denied 95 N.Y.2d 935 (People established that expert's theories were highly controversial and had been rejected by other courts and experts); but see Jenkins v.

Commonwealth, 308 S.W.3d 704 (Ky. 2010) (expert testimony regarding suggestive interviewing techniques which can affect reliability or accuracy of child witness's memory or recall is admissible); Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (rejecting First Department's reasoning, court notes that sufficient consensus exists to warrant conclusion that use of coercive or highly suggestive interrogation techniques can create significant risk that interrogation will distort child's recollection).

D. Credibility Of Confession - See People v. Bedessie, 19 N.Y.3d 147 (2012) (since false confessions that precipitate wrongful conviction manifestly harm defendant, crime victim, society and criminal justice system, and experts in psychiatry and psychology or social sciences may educate jury about factors of personality and situation that scientific community considers to be associated with false confessions, expert testimony should be admitted in appropriate case but may not include testimony as to whether particular defendant's confession was or was not reliable, and expert's proffer must be relevant to the defendant and interrogation before the court; in this case, judge properly determined that testimony would not assist jury in evaluating voluntariness and truthfulness of defendant's confession or in reaching verdict); Miller v. State, 770 N.E.2d 763 (Indiana 2002) (although expert may not opine regarding credibility of particular witness, trial court erred in excluding in its entirety testimony by an expert in the field of "social psychology of police interrogation and false confessions"); Matter of Ariel R., 98 A.D.3d 414 (1st Dept. 2012) (reversible error where court refused to allow respondent's treating psychiatrist to render opinion at Huntley hearing as to whether respondent could have understood juvenile Miranda warnings; although psychiatrist did not perform tests specifically addressing this issue, the evidence he had, including his evaluations of respondent's receptive communication skills and IQ, was sufficient to enable him to form opinion as to whether respondent had adequate language and cognitive skills to understand the Miranda warnings, and any deficiencies in the testing went to the weight of the testimony rather than to admissibility); People v. Kogut, 10 Misc.3d 305, 806 N.Y.S.2d 366 (Sup. Ct., Nassau Co., 2005) (upon Frye hearing, court holds that defendant may present testimony by expert who, along with others, had developed body of empirical data questioning

accuracy of investigator's assessment of truthfulness of suspect in initial interview phase, and confirmed through laboratory experiments that behavior of interviewer can influence behavior of suspect; expert's findings, based upon generally accepted social psychology principles, established that phenomenon of false confessions does occur, and evidence of study should be admissible to explain behavior that might appear unusual to lay juror not familiar with phenomenon); People v. Philips, 180 Misc.2d 934, 692 N.Y.S.2d 915 (Sup. Ct., Queens Co., 1999) (court rejects defendant's attempt to present expert testimony regarding general nature of false confessions, and defendant's personal history and its relationship to his confessions; although the testimony was beyond the range of ordinary lay knowledge, the court found no evidence that the testimony would be based on accepted scientific principles).

E. Capacity To Waive Miranda Rights

Although some New York family court judges have admitted expert testimony regarding a particular child's ability to comprehend the Miranda warnings, at least two appellate courts have upheld the exclusion of testimony based on the "Grisso" test. State v. Griffin, 869 A.2d 640 (Conn., 2005) (defendant failed to establish that expert testimony regarding "Grisso" protocol was sufficiently reliable); People v. Hernandez, 46 A.D.3d 574, 846 N.Y.S.2d 371 (2d Dept. 2007), lv denied, 11 N.Y.3d 737 (no error where expert was permitted to testify concerning defendant's mental retardation and studies showing effect retardation has on person's ability to make intelligent waiver of Miranda rights, but court precluded testimony regarding defendant's performance on battery of tests known as "Grisso instrument; tests have not been generally accepted by New York courts and, even if general acceptance among forensic psychologists has been established, defendant failed to demonstrate reliability of procedures followed where validity of test result was undermined by significant differences between vocabulary used in test and that used in actual warnings and expert did not administer other tests normally considered necessary in order to render reliable opinion); People v. Cole, 24 A.D.3d 1021, 807 N.Y.S.2d 166 (3rd Dept. 2005), lv denied 6 N.Y.3d 832 (trial court did not err in ruling, following Frye hearing, that defendant could not present expert testimony from forensic psychologist regarding administration and results of

"Grisso test" used to measure accused's ability to comprehend Miranda warnings; record supports court's determination that tests had not gained sufficient acceptance for reliability and relevance in the scientific community, and that vocabulary used to gauge defendant's understanding of Miranda warnings differed substantially from warnings defendant received). See also People v. Casiano, 40 A.D.3d 528, 837 N.Y.S.2d 76 (1st Dept. 2007) (psychiatric testimony involved no special knowledge or skill outside range of ordinary intelligence or training and was equivalent to opinion that defendant's waiver was not knowing and voluntary).

F. Respondent's State Of Mind During Crime - See People v. Williams, 97 N.Y.2d 735, 742 N.Y.S.2d 597 (2002) (trial court properly excluded testimony offered to support justification defense by showing that defendant demonstrated paranoid delusional thinking and behavior at time of murder and believed victim was going to rob him); People v. Aphaylath, 68 N.Y.2d 945, 510 N.Y.S.2d 83 (1986) (court improperly excluded testimony concerning Laotian culture where defendant's extreme emotional disturbance defense was based on stresses from his refugee status; expert testimony need not be based upon contact with defendant); People v. Cronin, supra, 60 N.Y.2d 430 (court improperly excluded testimony concerning ability to form intent after using alcohol and drugs); People v. Murphy, 79 A.D.3d 1451, 913 N.Y.S.2d 815 (3d Dept. 2010) (testimony excluded where subclinical PTSD was not recognized syndrome, disease or mental defect, and specific symptoms -- hypervigilance, emotional numbing, and sense of helplessness in face of stress -- were within jury's range of knowledge and intelligence); People v. Florestal, 53 A.D.3d 164, 860 N.Y.S.2d 86 (1st Dept. 2008), lv denied, 11 N.Y.3d 788 (trial court erred in refusing to allow defense expert to render opinion as to whether defendant's state of mind was one of "depraved indifference" to plight of her child); People v.Madera, 24 A.D.3d 278, 808 N.Y.S.2d 181 (1st Dept. 2005), lv denied 6 N.Y.3d 815 (reversible error where trial court excluded testimony regarding ability of cocaine to produce psychotic, delusional and paranoid state in which burglary defendant could truly believe his life was in danger when he entered premises); United States v. Mull, 40 Fed. Appx. 300 (8th Cir. 2002) (effects of cocaine use on witness' ability to perceive and recall was within jury's common understanding);

People v. Eberle, 265 A.D.2d 881, 697 N.Y.S.2d 218 (3rd Dept. 1999) (expert improperly permitted to testify that infant died from “homicidal” suffocation); People v. Real, 137 A.D.2d 416, 524 N.Y.S.2d 208 (1st Dept. 1988) (court improperly excluded testimony concerning effect of angel dust on ability to form intent); People v. Fish, 235 A.D.2d 578, 652 N.Y.S.2d 124 (3rd Dept. 1997), lv denied 89 N.Y.2d 1092, 660 N.Y.S.2d 386 (court properly excluded testimony by "alcoholism expert" since effect of alcohol on mental state is within ken of juror); People v. Wilson, 133 A.D.2d 179, 518 N.Y.S.2d 690 (2d Dept. 1987) (court improperly admitted testimony from psychologist who merely observed defendant in court and reviewed documents which were not shown to be of a type typically relied on by experts); People v. DeSarno, 121 A.D.2d 651, 503 N.Y.S.2d 877 (2d Dept. 1986) (since expert testified about effect of personality disorder on defendant's state of mind and behavior, court did not err in precluding testimony concerning state of mind just before shooting); People v. Miller, 116 A.D.2d 595, 497 N.Y.S.2d 455 (2d Dept. 1986) (speculative conclusion that it was "possible" defendant was delusional at time of crime was inadmissible). See also Federal Rules, 704(b) (expert may not express opinion as to existence of mental state required for guilt); United States v. DiDomenico, 985 F.2d 1159 (2d Cir. 1993) (evidence of "dependent personality disorder" inadmissible to show lack of guilty knowledge).

G. DNA Tests - See People v. Wesley, supra, 83 N.Y.2d 417 (DNA profiling evidence generally accepted as reliable by scientific community); People v. Rios, 102 A.D.3d 473 (1st Dept. 2013), lv denied 20 N.Y.3d 1103 (no error in admission of analyst’s testimony indicating that no two people can have same DNA profile); People v. Ko, 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003) (evidence based on mitochondrial analysis is admissible); People v. Morales, 227 A.D.2d 648, 643 N.Y.S.2d 217 (2d Dept. 1996), lv denied 89 N.Y.2d 926, 654 N.Y.S.2d 729 (polymerase-chain-reaction method accepted as reliable); People v. Golub, 196 A.D.2d 637, 601 N.Y.S.2d 502 (2d Dept. 1993), lv denied 82 N.Y.2d 895, 610 N.Y.S.2d 162; State v. Tester, 968 A.2d 895 (Vt., 2009) (error where DNA match evidence admitted without additional evidence of frequency with which matches might occur by chance); United States v. Jakobetz, supra, 955 F.2d 786; People v. Styles, 40 Misc.3d 1205(A) (Sup. Ct., Kings

Co., 2013) (computer program used to calculate probabilities that suspect contributed DNA to mixture - the Forensic Statistical Tool - does not constitute novel or experimental technique that requires Frye hearing); People v. Owens, 187 Misc.2d 838, 725 N.Y.S.2d 178 (Sup. Ct., Monroe Co., 2001) (without Frye hearing, court finds admissible evidence based on Short Tandem Repeat DNA profiling); People v. Klinger, 185 Misc.2d 574, 713 N.Y.S.2d 823 (County Ct., Nassau Co., 2000) (mitochondrial DNA evidence is admissible); People v. Keene, 156 Misc.2d 108, 591 N.Y.S.2d 733 (Sup. Ct. Queens Co., 1992) (evidence rejected where analysis included method not accepted in scientific community); People v. Huang, 145 Misc.2d 513, 546 N.Y.S.2d 920 (County Ct. Nassau Co., 1989) (evidence admissible); People v. Castro, 144 Misc.2d 956, 545 N.Y.S.2d 985 (Sup. Ct. Bronx Co., 1989); see also People v. Peck, 16 Misc.3d 126(A), 841 N.Y.S.2d 827 (App. Term, 9th & 10th Jud. Dist., 2007) (results of blood test improperly admitted where People did not establish compliance with New York Health Department regulations requiring that blood be drawn into, or subsequently deposited into, container which contains solid anticoagulant).

It has been held that DNA evidence, by itself, can support a conviction. People v. Rush, 242 A.D.2d 108, 672 N.Y.S.2d 362 (2d Dept. 1998).

H. Drug Analysis

1. Use Of Known Standards - See People v. Hushie, 145 A.D.2d 506, 535 N.Y.S.2d 445 (2d Dept. 1988) (chemist's opinion was competent even though some tests involved comparison to known standards whose reliability was not shown, since other tests did not involve use of known standards); People v. Flores, 138 A.D.2d 512, 526 N.Y.S.2d 125 (2d Dept. 1988); People v. Branton, 67 A.D.2d 664, 412 N.Y.S.2d 35 (2d Dept. 1979) (expert opinion improperly accepted where reliability of samples was not established); People v. Miller, 57 A.D.2d 668, 393 N.Y.S.2d 679 (3rd Dept. 1977).

2. Factual Basis For Opinion - See People v. Jones, supra, 73 N.Y.2d 427 (expert failed to state reason for conclusion that tested substance was "controlled substance"); People v. Moon, 256 A.D.2d 24, 682 N.Y.S.2d 133 (1st Dept. 1998), lv denied 93 N.Y.2d 974, 695 N.Y.S.2d 61 (1999) (chemist properly relied on colleague's

test results); People v. Shaw, 176 A.D.2d 832, 574 N.Y.S.2d 1015 (2d Dept. 1991), lv denied 79 N.Y.2d 832, 580 N.Y.S.2d 212 (chemist could rely on mass spectrometry test she did not perform).

3. Conditions At Laboratory - See People v. Conneely, 39 Misc.3d 138(A) (App. Term, 2d Dept., 2012) (order vacating conviction for driving while intoxicated reversed where court relied on "well documented problems with the Nassau County Police Department Laboratory," but maintenance and calibration of breathalyzer machine were not implicated by testing irregularities identified at lab or referenced by statements of public officials regarding lab and its closure); People v. Marino, 99 A.D.3d 726 (2d Dept. 2012) (motion to set aside verdict denied where defendant failed to show that newly discovered evidence of crime lab's violations of professional standards would probably change result at new trial; this case involved blood alcohol testing, but there was no evidence of misconduct or compromised analysis outside of lab's drug chemistry section); People v. Parker, 84 A.D.3d 1508 (3d Dept. 2011), lv denied 18 N.Y.3d 927 (no requirement that prosecution submit calibration records to establish accuracy of scale used to weigh cocaine; forensic scientist testified that balances were tested for accuracy every week using standardized weights, and calibrated every six months by service representative); People v. Dudley, 279 A.D.2d 330, 719 N.Y.S.2d 241 (1st Dept. 2001) (court properly precluded defense questioning regarding police laboratory's receipt of only provisional accreditation); but cf. People v. Baker, 51 A.D.3d 1047, 856 N.Y.S.2d 707 (3rd Dept. 2008) (insufficient foundation for evidence of defendant's blood alcohol where there was no proof that gas chromatograph had been properly calibrated before it was used to test defendant's blood; general statements about what expert typically does with blood sample are insufficient in absence of testimony that he actually took such measures with regard to blood sample at issue); People v. Conneely, 35 Misc.3d 430 (Dist. Ct., Nassau Co., 2011) (DWI conviction vacated due to systemic lab error problems in Nassau County Police Department Laboratory).

4. Scientific Acceptance - See People v. Whalen, 1 A.D.3d 633, 766 N.Y.S.2d 458 (3rd Dept. 2003), lv denied 1 N.Y.3d 603 (2004) (results of "EMIT" test

conducted by probation officer properly admitted at violation of probation hearing; given acceptance of test by courts, no scientific proof of reliability was necessary).

I. Fingerprints - See United States v. Baines, 573 F.3d 979 (10th Cir. 2009) (although there is no evidence that fingerprint analysis has been subject to testing that would meet standards of science, there is little that guides and limits experts' subjective judgments and little evidence of independent peer review, and technique has not been accepted by community of unbiased experts, there is overwhelming acceptance by experts in the same field, fingerprint analysis has been used extensively by law enforcement agencies all over the world for almost a century and analysts have undergone demanding training culminating in proficiency examinations, and there is a low error rate); State v. Langill, 945 A.2d 1 (N.H. 2008) (conclusions of expert who relied on "ACE-V" methodology was sufficiently reliable under Daubert standard despite expert's failure to take notes documenting application of the methodology or failure to employ blind verification by expert who was unaware of her conclusion); United States v. Mitchell, 365 F.3d 215 (3rd Cir. 2004) (latent fingerprint evidence sufficiently reliable to satisfy Daubert); United States v. Crisp, 324 F.3d 261 (4th Cir. 2003) (fingerprint evidence satisfies Daubert); United States v. Rogers, 26 Fed. Appx. 171 (4th Cir. 2001) (court notes that many courts have refused to hold evidentiary hearing on admissibility). United States v. Plaza, 188 F.Supp.2d 549 (E.D. Pa., 2002) (upon Government's motion for re-consideration of its earlier ruling (179 F.Supp.2d 492) excluding fingerprint evidence, court concludes that process employed by FBI is sufficiently reliable); People v. Donaldson, 107 A.D.2d 758, 484 N.Y.S.2d 123 (2d Dept. 1985) (police officer's practical experience qualified him to testify as expert); People v. Hyatt, 2001 WL 1750613 (Sup. Ct., Kings Co., 2001) (court rejects as "junk science" testimony of defense expert who was a historian and a social scientist and whose theories regarding the invalidity of latent fingerprint analysis had not been sufficiently tested).

J. Identification - For many years, appellate courts in New York found no abuse of discretion in the exclusion of expert testimony regarding the factors influencing perception, memory, and the reliability of eyewitness identifications. See People v. Young, 7 N.Y.3d 40, 817 N.Y.S.2d 576 (2006) (while testimony would have assisted

jury and could have been admitted, corroborating evidence diminished importance of testimony); People v. Fratello, 92 N.Y.2d 565, 684 N.Y.S.2d 149 (1998), cert denied 526 U.S. 1068 (testimony regarding night visual perception was properly excluded); People v. Mooney, 76 N.Y.2d 827, 560 N.Y.S.2d 115 (1990); People v. Perry, 251 A.D.2d 895, 674 N.Y.S.2d 844 (3rd Dept. 1998); People v. Wright, 161 A.D.2d 743, 558 N.Y.S.2d 842 (2d Dept. 1990); People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dept. 1988); see also People v. Alexander, 94 N.Y.2d 382, 705 N.Y.S.2d 551 (1999) (prosecutor improperly commented on reliability of intra-racial identifications); State v. Coley, 32 S.W.2d 831 (Tenn. 2000); United States v. Lumpkin, 192 F.3d 280 (2d Cir. 1999) (testimony that confidence in identification is not good predictor of accuracy was properly excluded); United States v. Kime, 99 F.3d 870 (8th Cir. 1997) (testimony regarding lineup identifications excluded); Government of Virgin Islands v. Sanes, 57 F.3d 338 (3rd Cir. 1995) (testimony explaining why voice identification is not as accurate as eyewitness identification).

However, there has been strong movement in the other direction. First, in People v. Lee, 96 N.Y.2d 157, 726 N.Y.S.2d 361 (2001), the Court of Appeals, while finding that the trial court did not abuse its discretion in excluding the evidence, concluded that psychological studies regarding the accuracy of eyewitness testimony are not within the ken of the typical juror, and that a court may not exclude such evidence as per se inadmissible.

Then, in People v. LeGrand, 8 N.Y.3d 449, 835 N.Y.S.2d 523 (2007), the court held that "where the case turns on the accuracy of eyewitness identifications and there is little or no corroborating evidence connecting the defendant to the crime, it is an abuse of discretion for a trial court to exclude expert testimony on the reliability of eyewitness identifications if that testimony is (1) relevant to the witness's identification of defendant, (2) based on principles that are generally accepted within the relevant scientific community, (3) proffered by a qualified expert and (4) on a topic beyond the ken of the average juror"). See also People v. Oddone, _N.Y.3d_, 2013 WL 6499305 (2013) (proposition that eyewitnesses routinely overestimate, by large margin, duration of relatively brief events is generally accepted scientific principle and not within ken of

average juror); People v. Santiago, 17 N.Y.3d 661 (2011) (reversible error in pretrial exclusion of expert testimony on studies showing that eyewitness confidence is poor predictor of identification accuracy and studies regarding confidence malleability, testimony on effects of post-event information on eyewitness memory, and testimony on inaccuracy of identifications of Hispanic people by non-Hispanic Caucasians appears relevant and is beyond ken of average juror and court also should have given more consideration to whether proposed testimony concerning exposure time, lineup fairness, forgetting curve, and simultaneous versus sequential lineups was relevant and beyond ken of average juror, but testimony concerning weapon focus, effects of lineup instructions, wording of questions, and unconscious transference would have been irrelevant since victim was not aware that assailant had weapon and there is no evidence of improper lineup instructions, suggestive wording, or presence of defendant's image in photographs victim saw prior to identifying him in photographic array; court also abused discretion when, after defense had rested, court denied defendant's renewed request to call expert witness where People had introduced corroborative evidence of two other witness's identifications, but one witness saw only part of perpetrator's face and identified defendant with only 80% confidence and identification from photographs of lineup may have been tainted by memory of photograph of defendant he had seen in newspaper, and other witness's identification may have been influenced by memory of police artist's sketch of assailant, which calls into question independence of evidence from victim's identification); People v. Muhammad, 17 N.Y.3d 532 (2011) (no error in exclusion of expert testimony where victim was only witness who implicated defendant and identification was not corroborated, but victim knew defendant for over a decade prior to shooting and spoke to him shortly before altercation and recognized defendant at time of attack); State v. Henderson, 27 A.3d 872 (N.J. 2011) (relying on scientific evidence suggesting that memory is malleable and causes eyewitness misidentifications, court sets out new guidelines for admissibility of identification evidence; first, when defendants can show evidence of suggestiveness, all relevant system and estimator variables should be explored at pretrial hearings, and, second, court system should develop enhanced jury

charges on eyewitness identification); People v. Abney, 13 N.Y.3d 251, 889 N.Y.S.2d 890 (2009) (in People v. Abney, court should have admitted testimony regarding witness confidence, and conducted Frye hearing as to testimony regarding effect of event stress, exposure time, event violence and weapon focus, and cross-racial identification, where there was no evidence other than one witness's identification to connect defendant to crime, and she did not describe him as possessing any unusual or distinctive features or physical characteristics; in People v. Allen, no error in exclusion of testimony where case did not depend exclusively on one witness's testimony, another witness identified defendant as knife-wielding robber who searched him and stood nearby throughout course of robbery, and defendant was not a stranger to either witness); People v. Nazario, 100 A.D.3d 783 (2d Dept. 2012), lv denied 20 N.Y.3d 1063 (fact that victim was confronted by defendant on clear, sunny day, and had unobstructed view of defendant at close range, did not constitute corroborating evidence); Young v. Conway, 698 F.3d 69 (2d Cir. 2012), rehearing en banc denied 715 F.3d 79, cert denied 134 S.Ct. 20 (concluding that State courts erred in finding independent source for in-court identification, Second Circuit relies on and discusses social science research presented by Innocence Project); United States v. Brownlee, 454 F.3d 131 (3rd Cir. 2006) (trial court erred in admitting expert to testify regarding some matters but not others); United States v. Amador-Galvan, 9 F.3d 1414 (9th Cir. 1993) (under Daubert, evidence not per se inadmissible); United States v. Smith, 736 F.2d 1103 (6th Cir. 1984) (expert testimony may now be generally accepted); but see People v. LeGrand, 94 A.D.3d 99 (1st Dept. 2012) (no error where trial court precluded defense expert from testifying about effect of "weapon focus" on eyewitness identifications; while witnesses did take notice of knife when they saw defendant stab cab driver, none of them were close enough to be threatened by it, and they got clear look at assailant after stabbing, when knife was no longer point of focus); People v. Zohri, 82 A.D.3d 493, 918 N.Y.S.2d 109 (1st Dept. 2011) (no error in denial of request to present expert testimony where police testimony placed defendant very close to scene of crime within 15 minutes after it occurred, and established that he resembled perpetrator the victim described, both in clothing and in physical appearance); People v.

Santiago, 75 A.D.3d 163, 900 N.Y.S.2d 273 (1st Dept. 2010) (no error in trial court's refusal to allow defendant to present expert testimony regarding identifications or order Frye hearing; plurality notes, inter alia, that victim and two other witnesses independently described and identified defendant and all three witnesses had ample opportunity to observe defendant at close quarters in well-lit setting and noticed defendant before any criminality, while concurring judge finds no support for proposition that trial courts properly can exclude expert testimony when identification testimony can be regarded as "reliable" and this court "should not try to read the tea leaves in [the Court of Appeals' decisions] and determine whether multiple identifications can cross-corroborate each other so as to provide more than a 'little . . . corroborating evidence connecting the defendant to the crime'"); United States v. Bartlett, 567 F.3d 901 (7th Cir. 2009), cert denied 130 S.Ct. 1137 (court properly excluded testimony about high error rates where two people who identified defendant were strangers to him but four others knew him well; although jurors have beliefs about fallibility of memory, expert evidence still may be vital since jurors' beliefs may be mistaken, but using expert to explore issue may sidetrack trial); People v. Chisolm, 57 A.D.3d 223, 868 N.Y.S.2d 643 (1st Dept. 2008) (testimony properly excluded where only one of two closely related incidents involved identification issue, videotape and defendant's admission placed him in close spatial and temporal proximity to crime, and witness had good opportunity to view perpetrator, gave detailed description matching defendant soon after incident, and identified defendant from videotape and in lineup); People v. Allen, 53 A.D.3d 582, 861 N.Y.S.2d 775 (2d Dept. 2008), lv denied, 11 N.Y.3d 829 (testimony properly precluded where there was corroborating evidence unrelated to description by eyewitnesses).

Before and after appellate courts loosened the reins, trial judges have been willing to exercise discretion and admit expert testimony. See, e.g., People v. Norstrand, 35 Misc.3d 367 (Sup. Ct., Monroe Co., 2011) (defense expert permitted to explain problems associated with: identification of strangers; cross-race effect; exposure duration; other perceptual factors; flashbulb memory; event stress; recovered memories; lineup issues; and confidence malleability); People v. Abney, 31 Misc.3d 1231(A) (Sup. Ct., N.Y. Co., 2011) (expert permitted to testify regarding event stress,

weapon focus, event duration, confidence malleability, effect of post-event information on accuracy of identification, and correlation between confidence and accuracy of identification, but not regarding own-race bias); People v. Banks, 16 Misc.3d 929, 842 N.Y.S.2d 313 (County Ct., West. Co., 2007) (expert may testify regarding low correlation between confidence of witness and accuracy of identification, mug-shot bias, relation between exposure time and retention, and weapons focus but may not testify as to phenomena of stress, partial disguise or cross-race bias, and expert is limited to setting forth relevant psychological factors and interpreting research data but may not give opinion as to accuracy of any identification or whether psychological phenomena actually influenced identifications or failures to identify; court rejects People's argument that relevant scientific community should be membership of American Psychological Association or American Psychology Law Society, since appropriate scientific community consists of psychologists who have conducted research in field of eyewitness identification); People v. Williams, 14 Misc.3d 571, 830 N.Y.S.2d 452 (Sup. Ct., Kings Co., 2006) (double-blind lineups, mugshot exposure, confidence malleability, weapon focus, cross-racial identification, exposure duration phenomena); People v. Radcliffe, 196 Misc.2d 381, 764 N.Y.S.2d 773 (Sup. Ct., Bronx Co., 2003) (cross-racial identification); People v. Smith, 191 Misc.2d 765, 743 N.Y.S.2d 246 (Sup. Ct., N.Y. Co., 2002) (court denies People's motion for Frye hearing); People v. Drake, 188 Misc.2d 210, 728 N.Y.S.2d 636 (Sup. Ct., N.Y. Co., 2001); United States v. Hines, 55 F.Supp.2d 62 (D.Mass. 1999) (cross-racial identification); United States v. Jordan, 924 F.Supp. 443 (W.D.N.Y. 1996) (court admits testimony in area of human memory and perception); People v. Beckford, 141 Misc.2d 71, 532 N.Y.S.2d 462 (Sup. Ct. Kings Co., 1988); People v. Brooks, 128 Misc.2d 608, 490 N.Y.S.2d 692 (County Ct. West. Co., 1985); see also People v. Radcliffe, 191 Misc.2d 545, 743 N.Y.S.2d 229 (Sup. Ct., Bronx Co., 2002) (when offering expert testimony, defendant "should 1) ... set forth the pertinent alleged facts of the identification and any corroborative evidence; 2) set forth the name and qualifications of the witness and the proffered testimony; 3) correlate the proffered testimony with the facts of the case to demonstrate the relevance of the expert testimony; 4) explain whether the testimony involves 'novel

scientific theories and techniques,' and if it does, include an offer of proof as to its general acceptance by the relevant scientific community; and 5) explain why the testimony is warranted if an existing standard jury instruction ... would appear to cover the area of the proferred expert testimony"); but see People v. Chuyn, 33 Misc.3d 1233(A) (Sup. Ct., N.Y. Co., 2011) (defendant presented no authority for presentation of expert testimony at independent source hearing); People v. Nazario, 20 Misc.3d 1143(A), 872 N.Y.S.2d 692 (Sup. Ct., Queens Co., 2008) (court refuses to admit expert testimony on cross-racial identifications, stress, correlation between confidence and accuracy of identifications, confidence malleability, and reliability of show-ups compared to line-ups where only procedure conducted was prompt show-up in close geographic and temporal proximity to crime, and complainant dealt directly with defendant in broad daylight and spoke with him twice in short period of time and was the actual victim and not a mere witness); People v. Carrieri, 4 Misc.3d 307, 777 N.Y.S.2d 627 (Sup. Ct., Queens Co., 2004) (while rejecting expert testimony, court notes that experts have not yet agreed as to the extent to which “own-race” bias affects identification); People v. Smith, 2 Misc.3d 1007(A), 784 N.Y.S.2d 923 (Sup. Ct., N.Y. Co., 2004) (issues raised by defendant are not yet appropriate areas for expert testimony); People v. Santiago, 2 Misc.3d 652, 769 N.Y.S.2d 874 (Sup. Ct., Bronx Co., 2003) (expert testimony rejected since issues actually present in case do not lend themselves to such testimony and some aspects of testimony have been rejected after Frye analysis); People v. Trinidad, 188 Misc.2d 324, 728 N.Y.S.2d 905 (Sup. Ct., Kings Co., 2001) (defense request for funding for expert denied where defendant’s motion to suppress was denied and there was no reason to conclude that expert testimony is needed); People v. Green, 151 Misc.2d 194, 573 N.Y.S.2d 113 (Sup. Ct. N.Y. Co., 1991) (court refuses to bar identification as "scientifically unreliable").

It is possible that courts will be less likely to admit expert testimony in nonjury proceedings. See People v. Fratello, 243 A.D.2d 340, 663 N.Y.S.2d 169 (1st Dept. 1997), aff’d 92 N.Y.2d 565, 684 N.Y.S.2d 149 (1998), cert denied 526 U.S. 1068.

K. Arson - See People v. Rivers, 18 N.Y.3d 222 (2011) (no error in admission of expert testimony ruling out accidental and natural causes of fires and concluding that

one fire was intentionally set; previous rule prohibiting expert testimony concerning whether fire was intentionally set appeared as dictum at time when fire investigations involved far less technical expertise than they do today); People v. Jackson, 65 N.Y.2d 265, 491 N.Y.S.2d 138 (1985) (conflicting opinions created credibility question for jury); People v. Howard, 92 A.D.3d 1219 (4th Dept. 2012) (error where fire marshal testified regarding six categories of motivation for setting fire, including revenge and crime concealment, since People failed to demonstrate that categories are generally accepted in scientific community or that subject is beyond ordinary ken of trier of fact); People v. Maxwell, 116 A.D.2d 667, 497 N.Y.S.2d 735 (2d Dept. 1986) (experts allowed to opine that fires were not chemically, mechanically, electrically or naturally caused).

L. Polygraph And Other Credibility Tests - Since the scientific community has not endorsed the reliability of polygraph tests, the results of such tests are usually excluded. See People v. Leone, 25 N.Y.2d 511, 307 N.Y.S.2d 430 (1969). See also Gosciminski v. State, _So.3d_, 2013 WL 5313183 (Fla. 2013) (upon fresh look at admissibility of polygraph results under Frye v. United States, court concludes that relevant scientific community still considers procedure to be unreliable); People v. Angelo, 88 N.Y.2d 217, 644 N.Y.S.2d 460 (1996) (expert could not testify that opinion was based in part on results of polygraph exam); State v. A.O., 965 A.2d 152 (NJ, 2009) (given continuing doubts about reliability of polygraph evidence, court bars admission of polygraph evidence based on stipulation entered into without counsel); United States v. Cordoba, 194 F.3d 1053 (9th Cir. 1999) (after holding earlier [104 F.3d 225] that evidence is not per se inadmissible, court, relying on Daubert, upholds exclusion of evidence); United States v. Kwong, 69 F.3d 663 (2d Cir. 1995), cert denied 517 U.S. 1115, 116 S.Ct. 1343 (1996); People v. Tarsia, 50 N.Y.2d 1, 427 N.Y.S.2d 944 (1980) (court notes that voice stress evaluation tests are considered unreliable). In United States v. Scheffer, 523 U.S. 303, 118 S.Ct. 1261 (1998), the Supreme Court discussed the present state of polygraph evidence while upholding a per se rule against the admission of such evidence in military court martial proceedings. Although four justices expressed strong doubts concerning the validity of polygraph evidence, a dissenting justice found the per se rule unconstitutional, and four concurring justices

questioned the wisdom of a per se rule.

Other courts have been more receptive to polygraph evidence. See, e.g., United States v. Gilliard, 133 F.3d 809 (11th Cir. 1998) (evidence not inadmissible per se, but there was insufficient evidence of acceptance in scientific community of technique used); United States v. Posado, 57 F.3d 428 (5th Cir. 1995) (court notes improvement in technique); see also People v. Yavru-Sakuk, N.Y.L.J., 4/2/01, p. 35, col. 1 (App. Term, 2d & 11th Jud. Dist.) (concurring judge notes that issue should be revisited given growing acceptance of tests), rev'd on other grounds 98 N.Y.2d 56, 745 N.Y.S.2d 787 (2002); People v. Kogut, 10 Misc.3d 305, 806 N.Y.S.2d 366 (Sup. Ct., Nassau Co., 2005) (where defendant claimed he confessed after detective's misrepresentation that he had failed polygraph exam, defendant could introduce evidence that he passed exam); People v. Miller, 2 Misc.3d 1006(A), 784 N.Y.S.2d 923 (County Ct., Chemung Co., 2004) (polygraph evidence may be considered for purposes of motion to dismiss in interests of justice).

In United States v. Semrau, 693 F.3d 510 (6th Cir. 2012), the court, citing concerns regarding the reliability of the evidence and the potential for juror confusion, held that results from a functional magnetic resonance imaging lie detection test were not admissible to prove the veracity of the defendant's denials of wrongdoing.

M. Syndrome Evidence

1. Rape Trauma Syndrome - Testimony by an expert concerning the symptoms and behavior associated with rape trauma syndrome is admissible to help the fact-finder evaluate unusual behavior, such as delayed reporting, which might otherwise be misunderstood. However, such evidence may not be admitted solely to prove that the victim was raped. See People v. Taylor, 75 N.Y.2d 277, 552 N.Y.S.2d 883 (1990) (evidence admissible to explain behavior jury might find unusual or inconsistent with charge, but not to show that victim's symptoms are consistent with those exhibited by other victims); People v. Whitehead, 142 A.D.2d 745, 531 N.Y.S.2d 48 (3rd Dept. 1988) (admissible to rebut defendant's evidence that victim told others that she had not been raped); Pulinario v. Goord, 291 F.Supp.2d 154 (E.D.N.Y., 2003) (trial court improperly precluded defendant from offering expert testimony because

defendant lied to prosecutor's psychiatrist). But see People v. Harris, 249 A.D.2d 775, 672 N.Y.S.2d 153 (3rd Dept. 1998) (no error in admission of physician's testimony that victim's injuries were consistent with forcible intercourse). It is not yet clear whether rape trauma syndrome testimony is admissible to counter a defense of consent.

It has been held that male rape trauma syndrome evidence is also admissible. See People v. Yates, 168 Misc.2d 101, 637 N.Y.S.2d 625 (Sup. Ct., N.Y. Co. 1995).

2. Child Sexual Abuse Syndrome - See People v. Spicola, 16 N.Y.3d 441 (2011) (no error in admission of expert testimony regarding Child Sexual Abuse Accommodation Syndrome where defendant attacked boy's credibility by citing his failure to report alleged abuse promptly and his willingness to continue to associate with defendant, and expert testified that CSAAS was not a diagnosis, that it includes a range of behaviors observed in cases of validated child sexual abuse that seem counterintuitive to a lay person, that the presence or absence of particular behavior was not substantive evidence that sexual abuse had, or had not, occurred, and that he was not venturing an opinion as to whether sexual abuse took place in this case); People v. Cintron, 75 N.Y.2d 249, 552 N.Y.S.2d 68 (1990) (testimony admitted with respect to reactions of child abuse victims to courtroom procedures); People v. Keindl, 68 N.Y.2d 410, 509 N.Y.S.2d 790 (1986) (where defendant was charged with endangering welfare of minor, expert testimony was admissible to explain how children abused by step-parents suffer psychologically; in People v. Taylor, supra, 75 N.Y.2d 277, court noted that Keindl involved rebuttal of defense evidence of delayed reporting); People v. Gopaul, 112 A.D.3d 966 (2d Dept. 2013) (no error in admission of testimony regarding adolescent sexual abuse to explain issue of delayed disclosure, counter defense claim that complainant fabricated allegations when her parents objected to her having a boyfriend, and explain why complainant did not recall with specificity when certain incidents occurred and why victims of adolescent sexual abuse may manifest "flat affect" when testifying); People v. Mehmood, 112 A.D.3d 850 (2d Dept. 2013) (expert improperly allowed to testify that truthfulness of child's disclosure of sexual abuse can be analyzed by looking at whether content is specific and not age-appropriate knowledge, and that child's allegations of oral sexual conduct, sexual contact between

males, or reciprocal contact would be "rather unique and idiosyncratic," and more believable than "just a global statement that I was touched"); People v. Persaud, 98 A.D.3d 527 (2d Dept. 2012), lv denied 20 N.Y.3d 1014 (no error in admission of testimony about "blending," which occurs when child or adolescent sexual abuse victim and perpetrator perform same acts more than once in same place and makes it difficult for adolescent to sequentially separate distinct elements of what occurred); People v. Ballerstein, 52 A.D.3d 1192, 860 N.Y.S.2d 718 (4th Dept. 2008) (no error in admission of testimony that victim was acting out sexually, and that behavior could be sign of sexual abuse but there could be other explanations); People v. Shay, 210 A.D.2d 735, 620 N.Y.S.2d 189 (3rd Dept. 1994), lv denied 85 N.Y.2d 980 (expert improperly permitted to testify about behavior by victim that was associated with sexual abuse of children rather than just behavior that might be unusual or beyond ken of juror); People v. Gonzalez, 226 A.D.2d 214, 640 N.Y.S.2d 547 (1st Dept. 1996) (testimony admitted to explain why victim did not provide full account each time she was questioned); People v. Singh, 186 A.D.2d 285, 588 N.Y.S.2d 573 (2d Dept. 1992) (expert improperly testified that symptoms were consistent with those exhibited by child sexual abuse victims); People v. Wellman, 166 A.D.2d 302, 560 N.Y.S.2d 643 (1st Dept. 1990), lv denied 78 N.Y.2d 958, 573 N.Y.S.2d 653 (1991) (testimony admitted to explain why 6-year-old victim did not immediately identify defendant); People v. Smith, 153 A.D.2d 995, 545 N.Y.S.2d 616 (3rd Dept. 1989); People v. Coffey, 140 A.D.2d 861, 528 N.Y.S.2d 692 (3rd Dept. 1988); People v. Benjamin R., 103 A.D.2d 663, 481 N.Y.S.2d 827 (4th Dept. 1984) (evidence concerning reluctance of intrafamilial sexual abuse victims to reveal crime was properly admitted after defense counsel cross-examined victim about delay in reporting); United States v. Gillespie, 852 F.2d 475 (9th Cir. 1988) (court properly admitted testimony regarding anatomically correct dolls). Cf. People v. Falzone, 150 A.D.2d 249, 541 N.Y.S.2d 415 (1st Dept. 1989) (court improperly admitted testimony concerning child prostitution syndrome; testimony conveyed impression that child who was coerced by defendant exhibited same characteristics as other child prostitutes).

It has been held that the accused may not offer expert testimony that the child sexual abuse complainant did not manifest the usual demeanor of a rape victim. People

v. Wells, 118 Cal.App.4th 179 (Calif. Ct. App., 1st Dist. 2004).

3. Battered Person Syndrome/Domestic Violence - See People v. Roblee, 83 A.D.3d 1126, 920 N.Y.S.2d 467 (3d Dept. 2011) (no error in admission of expert testimony regarding domestic violence to explain victim's delay in seeking aid or attention immediately following attack); People v. Abdul, 76 A.D.3d 563, 906 N.Y.S.2d 594 (2d Dept. 2010), lv denied 15 N.Y.3d 892 (improper for expert to state that child abuse syndrome was cause of death where prosecution's theory was not that cumulative effect of numerous minor injuries caused death); People v. Franklin, 5 A.D.3d 219, 772 N.Y.S.2d 825 (1st Dept. 2004), lv denied 3 N.Y.3d 640 (expert properly permitted to answer hypothetical question, based on facts in evidence, to explain victim's behavior after assault); People v. Lovelace, 287 A.D.2d 652, 731 N.Y.S.2d 745 (2d Dept. 2001) (trial court erred in refusing to allow expert and social worker to testify that defendant suffered from battered child syndrome); People v. White, 4 Misc.3d 797, 780 N.Y.S.2d 727 (Dist. Ct., Nassau Co., 2004) (testimony not admissible since jury could evaluate complainant's testimony and her minimal delay in reporting); People v. Seeley, 186 Misc.2d 715, 720 N.Y.S.2d 315 (Sup. Ct., Kings Co., 2000) (expert would be allowed to testify that defendant is a Battered Person); People v. Colberg, 182 Misc.2d 798, 701 N.Y.S.2d 608 (County Ct., Sullivan Co., 1999) (male defendant permitted to present evidence that he suffered from "Battered Syndrome"); People v. Ellis, 170 Misc.2d 945, 650 N.Y.S.2d 503 (Sup. Ct., N.Y. Co., 1996) (expert testimony admissible to aid jury in evaluating complainant's recantation); People v. Torres, 128 Misc.2d 129, 488 N.Y.S.2d 358 (Sup. Ct. Bronx Co., 1985) (admissible in support of justification defense).

4. Shaken Baby Syndrome - See People v. Scoon, 303 A.D.2d 525, 756 N.Y.S.2d 100 (2d Dept. 2003), lv denied 100 N.Y.2d 624, 767 N.Y.S.2d 408 (2003) (no Frye hearing required where testimony concerned amount of time between shaking and onset of symptoms; testimony was supported by medical literature and caselaw).

5. Neonaticide Syndrome - See People v. Wernick, 89 N.Y.2d 111, 651 N.Y.S.2d 392 (1996) (defense failed to establish that defendant's denial of pregnancy and post-birth reactive psychosis is pattern of behavior generally recognized

in relevant scientific community).

6. Munchausen Syndrome By Proxy - See People v. Coulter, 2003 WL 22469713 (App. Term, 9th & 10th Jud. Dist., 2003), lv denied 1 N.Y.3d 570 (admission of expert testimony from psychiatrist and pediatrician upheld).

7. Parental Alienation Syndrome - People v. Fortin, 289 A.D.2d 590, 735 N.Y.S.2d 819 (2d Dept. 2002) (trial court, after Frye hearing, properly refused to admit evidence because defendant failed to establish general acceptance).

N. Forcible Sexual Assault And Other Injuries - See People v. Oddone, _N.Y.3d_, 2013 WL 6499305 (2013) (no error where doctor permitted to testify that victim's neck had been compressed for "something in the range of 2, 3, 4 minutes"; court rejects defendant's contention that expert who is scientist can express no opinion based on own experience and must rely only on published studies or texts); People v. Clyde, 18 N.Y.3d 145 (2011) (harmless error in admission of testimony from physicians that injuries met definition of "physical injury" and created risk of "serious physical injury"); Velazquez v. Commonwealth, 557 S.E.2d 213 (Va. 2002) (expert invaded province of jury by testifying that injuries were consistent with non-consensual intercourse); People v. Simmons, 93 A.D.3d 739 (2d Dept. 2012) (no error in admission of testimony that lack of physical trauma was not inconsistent with occurrence of forcible sexual assault); People v. Vaello, 91 A.D.3d 548 (1st Dept. 2012) (licensed nurse practitioner who was certified as sexual assault nurse examiner permitted to testify about relationship between victim's genital injury and forcible sexual intercourse); People v. Momplaisir, 84 A.D.3d 437 (1st Dept. 2011), lv denied 17 N.Y.3d 808 (no error in admission of testimony by certified sexual assault nurse that victim's injuries had been recently acquired and that abrasions on victim's labia were consistent with forcible penetration); People v. Seymore, 79 A.D.3d 477, 912 N.Y.S.2d 51 (1st Dept. 2010) (no error where court permitted eyewitness who happened to be experienced boxer and trainer of boxers to testify that punch delivered while holding heavy object would be more effective than empty-handed punch); People v. Welch, 71 A.D.3d 1329, 897 N.Y.S.2d 546 (3rd Dept. 2010), lv denied 15 N.Y.3d 811 (no error where sexual assault nurse examiner testified that she had never found injuries similar to the victim's

in cases of consensual intercourse and that her review of research literature indicated that physical injuries occurred in only 10% of consensual cases); People v. Babb, 68 A.D.3d 887, 890 N.Y.S.2d 610 (2d Dept. 2009), lv denied 14 N.Y.3d 769 (defense counsel erred in failing to object to testimony by expert that some of victim's wounds were defensive); State v. Lenin, 967 A.2d 915 (N.J. Super. Ct., App. Div., 2009) (testimony regarding dynamics between victim, offender and location of incident was not beyond ken of jury); People v. Colon, 61 A.D.3d 772, 876 N.Y.S.2d 525 (2d Dept. 2009), lv denied 13 N.Y.3d 743 (witness was "expert" where she had been midwife for twenty-seven years and trained as sexual assault forensic examiner); People v. Jean-Laurent, 51 A.D.3d 818, 859 N.Y.S.2d 658 (2d Dept. 2008), lv denied, 11 N.Y.3d 737 (emergency medical technician properly allowed to opine that injuries were caused by two blows from blunt instrument; experience may substitute for training); People v. Menendez, 50 A.D.3d 1061, 856 N.Y.S.2d 647 (2d Dept. 2008), lv denied, 10 N.Y.3d 937 (sexual assault nurse properly permitted to testify that large percentage of victims exhibit no injuries to sexual organs); People v. Heath, 49 A.D.3d 970, 853 N.Y.S.2d 400 (3rd Dept. 2008), lv denied, 10 N.Y.3d 959 (no error in admission of testimony that "injuries to the face and head of this victim were a personal attack on the victim" and that injury pattern did not indicate "knockdown drag-out brawl, with arms flinging [but rather] was designed to humiliate and injure the face of the victim in particular," since testimony explained nature of attack, a subject within pathologist's area of competence, and not defendant's state of mind; however, it was error to allow pathologist to opine that death was homicide); People v. Rosario, 34 A.D.3d 370, 824 N.Y.S.2d 296 (1st Dept. 2006), lv denied 8 N.Y.3d 949 (no error where nurse practitioner who had examined large number of child sex abuse victims was permitted to give expert testimony about matters going beyond her own examination of victim); People v. Morehouse, 5 A.D.3d 925, 774 N.Y.S.2d 100 (3rd Dept., 2004), lv denied 3 N.Y.3d 644 (People established proper foundation for testimony by sexual assault nurse that lacerations in victim's vaginal area and tear in hymenal tissue were consistent with forcible compulsion); People v. Shelton, 307 A.D.2d 370, 763 N.Y.S.2d 79 (3rd Dept. 2003), lv denied 100 N.Y.2d 626, 767 N.Y.S.2d 410 (2003) (no error where emergency

room physician testified that lack of physical trauma was not inconsistent with rape); People v. Crandall, 306 A.D.2d 748, 763 N.Y.S.2d 847 (3rd Dept. 2003), lv denied 100 A.D.2d 619, 767 N.Y.S.2d 402 (2003) (court erred in permitting People's expert to opine that cervical abrasion was consistent with forcible insertion of defendant's fingers, while refusing to let defendant present rebuttal testimony that abrasion was consistent with consensual contact); People v. Lin You, 2002 WL 32076964 (App. Term, 2d & 11th Jud. Dist., 2002) (reversible error where court refused to permit defense expert to testify regarding cause of injury to defendant, who was claiming justification; doctor's lack of specific expertise as to blunt trauma injuries went to weight, not admissibility); People v. McKee, 299 A.D.2d 575, 749 N.Y.S.2d 337 (3rd Dept. 2002), lv denied 100 N.Y.2d 596, 766 N.Y.S.2d 172 (2003) (defendant opened door to introduction of normally inadmissible testimony that bruises and abrasions sustained by rape complainant were consistent with the application of force); People v. Albizu, 294 A.D.2d 205, 743 N.Y.S.2d 74 (1st Dept. 2002), lv denied 98 N.Y.2d 708, 749 N.Y.S.2d 5 (2002) (emergency room physician properly permitted to opine that injuries were caused by flat, heavy object with at least one sharp edge, possible a "two-by-four"); People v. Paun, 269 A.D.2d 546, 703 N.Y.S.2d 256 (2d Dept. 2000), lv denied 95 N.Y.2d 801, 711 N.Y.S.2d 169 (emergency room physician, who was engaged in practice that required him to examine and treat rape victims, was properly allowed to testify as to significance of presence or absence of signs of trauma to woman's body following rape).

O. Criminal Modus Operandi - Compare People v. Smith, 2 N.Y.3d 8, 776 N.Y.S.2d 209 (2004) (trial court erred in allowing expert testimony as to money handling aspects of drug operations where there was no evidence that defendant acted with others); United States v. Mejia, 545 F.3d 179 (2d Cir. 2008) (reversible error in admission of testimony by investigator regarding structure, background and activities of gang where much of the material was within grasp of average juror and Government could have introduced other evidence to establish those facts; when officer strays beyond bounds of proper expert testimony, his purported expertise can narrow from organized crime to the particular gang involved in the case); United States v. Cruz, 363

F.3d 187 (2d Cir. 2004) (what defendant meant when he said that he was present at the scene to "do a deal," and was there "to watch somebody's back while he did a deal," was not a proper subject of expert testimony); United States v. Dukagjini, 326 F.3d 45 (2d Cir. 2002) (although expert may testify about meaning of coded conversations about drugs, court erred in allowing expert to testify regarding the general meaning of conversations and the facts of the case); United States v. Castillo, 924 F.2d 1227 (2d Cir. 1991) (dealers' use of guns to force customers to sniff cocaine to flush out undercovers not beyond ken of jury); People v. Torres, 49 A.D.3d 326, 853 N.Y.S.2d 73 (1st Dept. 2008), lv denied, 10 N.Y.3d 871 (error to permit detective to testify that "user would never walk around with twelve glassines on them. That's what a seller walks around with or would have in their possession"); People v. Ingram, 2 A.D.3d 211, 770 N.Y.S. 294 (1st Dept. 2003), lv denied 2 N.Y.3d 741 (2004) (opinion regarding whether defendant possessed drugs with intent to sell was not beyond knowledge of typical juror); People v. Johnson, 300 A.D.2d 677, 753 N.Y.S.2d 91 (2d Dept. 2002), lv denied 100 N.Y.2d 562, 763 N.Y.S.2d 820 (2003) (error to admit undercover's testimony that buy money is recovered in "very small percentage" of cases); People v. Wright, 283 A.D.2d 712, 725 N.Y.S.2d 711 (3rd Dept. 2001), lv denied 96 N.Y.2d 926, 732 N.Y.S.2d 644 (police could testify that only drug sellers secrete cocaine in rectum and that users carry smaller amounts of cocaine than defendant possessed, but could not testify that quantity of drugs found on defendant was indicative of a seller); People v. Reinat, 271 A.D.2d 622, 707 N.Y.S.2d 181 (2d Dept. 2000) (testimony regarding practices of drug selling operations, which was offered to explain failure to recover pre-recorded buy money from defendant, was inadmissible since the mere presence of a woman in the vicinity of the sale did not establish that defendant was part of a drug selling operation); People v. Pratt, 266 A.D.2d 318, 698 N.Y.S.2d 283 (2d Dept. 1999), lv denied 94 N.Y.2d 883, 705 N.Y.S.2d 16 (2000) (court erred in admitting testimony that apartment in which defendant was found was a drug factory); People v. Bethea, 261 A.D.2d 629, 691 N.Y.S.2d 79 (2d Dept. 1999), lv denied 93 N.Y.2d 1014, 697 N.Y.S.2d 572 (expert testimony regarding roles of participants in street-level drug transactions was inadmissible where there was no evidence that anyone other than defendant was

involved; also, there was no reason to suppose that the evidence was beyond the grasp of the jury); People v. Colon, 238 A.D.2d 18, 667 N.Y.S.2d 692 (1st Dept. 1997), lv granted 91 N.Y.2d 946, 671 N.Y.S.2d 726 (1998) (expert testimony regarding roles of participants in street-level conspiracy to sell drugs was inadmissible where there was no evidence that defendant was involved in conspiracy); People v. Vizzini, 183 A.D.2d 302, 591 N.Y.S.2d 281 (4th Dept. 1992) (witness not qualified to explain defendants' cryptic language) and People v. Raco, 68 A.D.2d 258, 416 N.Y.S.2d 849 (3rd Dept. 1979) (testimony regarding modus operandi of auto theft rings improperly admitted)

with People v. Hicks, 2 N.Y.3d 750, 778 N.Y.S.2d 745 (2004) (no error where officer testified that packaging of drugs was inconsistent with personal use and was consistent with what officer had encountered in previous drug sale arrests); People v. Gonzalez, 99 N.Y.2d 76, 751 N.Y.S.2d 830 (2002) (testimony admitted for purpose of explaining absence of pre-recorded buy money and sellers' respective roles in street-level drug sales); People v. Brown, 97 N.Y.2d 500, 743 N.Y.S.2d 374 (2002) (testimony regarding roles of individuals involved in street sales of narcotics admissible to help jury understand how it could be that seller is arrested without buy money or additional drugs); People v. Graves, 85 N.Y.2d 1024, 630 N.Y.S.2d 972 (1995) (evidence of habits of drug dealers, which was offered to explain why defendant did not have "buy money" or drugs on him when arrested shortly after sale, was "at least marginally relevant"); Gutierrez v. State, 32 A.3d 2 (Md. 2011) (expert testimony about history, hierarchy, and common practices of street gang admissible as proof of motive where evidence establishes that crime was gang-related and probative value not outweighed by unfair prejudice to defendant); People v. Bright, 111 A.D.3d 575 (1st Dept. 2013) (no error in admission of background testimony about pickpocketing methods of "lush workers" who target sleeping victims on trains and in train stations); People v. Walters, 103 A.D.3d 557 (1st Dept. 2013), lv denied 21 N.Y.3d 10 (testimony regarding drug sellers' use of nearby hidden stash of drugs); People v. Green, 92 A.D.3d 953 (2d Dept. 2012) (no error in admission of testimony concerning witnesses' understanding of rap lyrics found in defendant's bedroom, which was relevant to consciousness of guilt, knowledge and intent, and testimony concerning structure of defendant's gang and defendant's place in

gang hierarchy, which was relevant to context of lyrics and explained relationship between defendant and co-conspirators and their motives and intent); People v. Peguero, 88 A.D.3d 589 (1st Dept. 2011), lv denied 18 N.Y.3d 927 (no error in admission of expert testimony concerning circumstances that indicate intent to sell drugs, including expert's opinion that defendant was drug seller); People v. James, 83 A.D.3d 504, 921 N.Y.S.2d 63 (1st Dept. 2011) (no error in admission of expert testimony about quantities of drugs likely to be possessed by sellers, as opposed to mere buyers, which was relevant to element of intent to sell); People v. Lantigue, 67 A.D.3d 521, 889 N.Y.S.2d 146 (1st Dept. 2009), lv denied 13 N.Y.3d 940 (where stolen car had undamaged ignition contained working key that did not belong to owner and defendant told police car belonged to cousin, court properly admitted expert testimony about how thief could have used code to obtain duplicate key); United States v. Joseph, 542 F.3d 13 (2d Cir. 2008) (trial court instructed to give more thorough consideration to admitting expert testimony regarding role-playing in context of sexually explicit conversations on Internet); People v. Encarnacion, 20 Misc.3d 135(A), 867 N.Y.S.2d 377 (App. Term, 1st Dept., 2008) (trial court did not err in admitting expert testimony concerning typical patterns of behavior exhibited by shoplifters); People v. Hough, 51 A.D.3d 818, 856 N.Y.S.2d 863 (2d Dept. 2008) (court properly admitted expert testimony regarding whether quantity of PCP found in defendant's possession was consistent with packaging for street sale, as opposed to personal use); People v. Cruz, 46 A.D.3d 567, 846 N.Y.S.2d 376 (2d Dept. 2007), lv denied, 10 N.Y.3d 763 (no error in admission of expert testimony regarding customs and practices of Mexican-American gangs, such as violence at family gatherings when gang members "know the DJ there or . . . will grab the DJ's microphone and . . . shout out their gang" and there is a rival gang member there); People v. Hooper, 48 A.D.3d 292, 852 N.Y.S.2d 78 (1st Dept. 2008), lv denied, 10 N.Y.3d 864 (no error where court permitted arresting officer to testify that in his experience, which encompassed hundreds of buy and bust operations, there were "many times" when prerecorded buy money was not recovered); People v. Andrade, 6 A.D.3d 257, 774 N.Y.S.2d 700 (1st Dept. 2004), lv denied 3 N.Y.3d 670 (court properly admitted testimony as to market value of heroin and opinion that amount

of money recovered from defendant was consistent with amount he would have received for drugs recovered from buyers); People v. Berry, 5 A.D.3d 866, 773 N.Y.S.2d 181 (3rd Dept. 2004), lv denied 3 N.Y.3d 637 (no error in admission of police testimony as to whether quantity and packaging of cocaine were consistent with intent to sell); People v. Garcia, 309 A.D.2d 514, 764 N.Y.S.2d 696 (1st Dept. 2003) (evidence that defendants entered and left store in between transaction and arrest was sufficient bases for officer's brief testimony about methods used by dealers to distance themselves from money and drugs); People v. Resek, 307 A.D.2d 804, 763 N.Y.S.2d 282 (1st Dept. 2003) (in 3-2 decision, court upholds admission of testimony that quantity of drugs recovered from defendant was "consistent with selling"); People v. Hicks, 301 A.D.2d 538, 754 N.Y.S.2d 648 (2d Dept. 2003), lv granted 100 N.Y.2d 595, 766 N.Y.S.2d 170 (2002) (no error in admission of testimony that packaging of heroin recovered from defendant was not consistent with personal use); People v. Edwards, 295 A.D.2d 270, 743 N.Y.S.2d 872 (1st Dept. 2002), lv denied 99 N.Y.2d 557, 764 N.Y.S.2d 209 (2002) (evidence that defendant's gang engaged in random ritual slashings to earn advancement within gang established motive for defendant's unprovoked attack on fellow prisoner); People v. Rhodes, 289 A.D.2d 342, 734 N.Y.S.2d 569 (2d Dept. 2001), lv denied 97 N.Y.2d 732, 740 N.Y.S.2d 706 (2002) (police testimony regarding burglars tools properly admitted); People v. Cancer, 249 A.D.2d 696, 671 N.Y.S.2d 775 (3rd Dept. 1998), lv denied 91 N.Y.2d 1005, 676 N.Y.S.2d 133 (no error in admission of testimony that drug dealers use beepers to facilitate transactions); People v. Santiago, 243 A.D.2d 328, 663 N.Y.S.2d 535 (1st Dept. 1997), lv denied 91 N.Y.2d 879, 668 N.Y.S.2d 578 (court properly admitted opinion concerning the likelihood that nonparticipants in a drug operation would be permitted access to the packaging site); People v. Rivera, 236 A.D.2d 428, 654 N.Y.S.2d 147 (2d Dept. 1997) (officer properly permitted to testify concerning use of screwdrivers and vice-grip pliers to gain forcible entry into vehicles); People v. Badia, 232 A.D.2d 241, 649 N.Y.S.2d 2 (1st Dept. 1996), lv denied 89 N.Y.2d 1088, 660 N.Y.S.2d 381 (1997) (detective permitted to testify concerning "body over" process used by car thieves to put illegal identification numbers on stolen vehicles); People v.

McDonald, 231 A.D.2d 647, 647 N.Y.S.2d 795 (2d Dept. 1996), lv denied 89 N.Y.2d 926, 654 N.Y.S.2d 728 (detective properly permitted to testify that burglary appeared to be staged); United States v. Tapia-Ortiz, 23 F.3d 738 (2d Cir. 1994) (testimony about weight, purity and price of cocaine was admissible, and, although testimony about traffickers' use of cash, beepers and nicknames to conceal identities had "common sense aspect," expert testimony may explain non-esoteric matters when defense attacks government's version as improbable); People v. Garcia, 196 A.D.2d 433, 601 N.Y.S.2d 482 (1st Dept. 1993), aff'd 83 N.Y.2d 817, 611 N.Y.S.2d 490 (1994) (officer permitted to testify about role of "money man," "hawker" and "hand-to-hand" man in drug sale); People v. Taylor, 18 F.3d 55 (2d Cir. 1994) (testimony that heroin users usually have one glassine admissible as evidence of intent to distribute 237 glassines); People v. Van Huse, 187 A.D.2d 684, 590 N.Y.S.2d 520 (2d Dept. 1992), lv denied 81 N.Y.2d 894, 597 N.Y.S.2d 956 (1993) (practice of placing crack inside rolling paper); People v. Carpenter, 187 A.D.2d 519, 589 N.Y.S.2d 912 (2d Dept. 1992), lv denied 81 N.Y.2d 1012, 595 N.Y.S.2d 737 (1993) (use of beepers in crack trade); People v. Siu Wah Tse, 91 A.D.2d 350, 458 N.Y.S.2d 589 (1st Dept. 1983) (Chinatown youth gangs).

Testimony that does not require expertise may be admissible as lay opinion testimony. See, e.g., United States v. Diaz, 637 F.3d 592 (5th Cir. 2011) (no error in admission of lay opinion testimony by government agent who opined that defendant was at scene of drug transaction acting as "lookout"); United States v. Diaz, 420 Fed.Appx. 456 (5th Cir. 2011) (no error in admission of testimony by member of a drug trafficking organization regarding meaning and relevance of drug ledgers); United States v. Santiago, 560 F.3d 62 (1st Cir. 2009) (testimony regarding meaning of code words or phrases used by drug defendants admissible where opinion was based on experience with criminal enterprise); but see United States v. Glenn, 312 F.3d 58 (2d Cir. 2002) (drug dealer's opinion testimony regarding manner in which drug dealers carry handguns was inadmissible where witness lacked sufficient first-hand knowledge, and was not offered as an expert).

P. "Profile" Evidence - Either the respondent or the prosecutor may wish to present expert testimony concerning personality traits associated with certain criminal

behavior as part of an effort to show that respondent does or does not fit the "profile," but several courts have excluded such evidence. See People v. Williams, 20 N.Y.3d 579 (2013) (testimony concerning abusers' behavior properly admitted to assist in explaining why victims may accommodate abusers and why they wait before disclosing abuse, but it was error to permit prosecutor to tailor hypothetical questions to include facts of case because it went beyond explaining victim behavior and implied that expert found complainants' testimony to be credible); People v. Diaz, 20 N.Y.3d 569 (2013) (no error in admission of expert testimony regarding behavior of sexual abusers where, although some testimony discussed behavior similar to that alleged by complainant, expert spoke of behavior in general terms and stated that she was not aware of facts of case, did not speak with complainant and was not rendering opinion as to whether sexual abuse took place); United States v. Gillespie, supra, 852 F.2d 475 (trial court improperly admitted expert testimony regarding characteristics of child molesters; such testimony is of low probativity and is inherently prejudicial); \People v. Neer, 129 A.D.2d 829, 513 N.Y.S.2d 566 (3rd Dept. 1987), lv denied 70 N.Y.2d 652, 518 N.Y.S.2d 1045 (trial court did not err in refusing to admit testimony of a purported expert through which defendant hoped to establish that he did not fit profile of typical child batterer); People v. Franks, 195 Misc.2d 698, 761 N.Y.S.2d 459 (County Ct., Nassau Co., 2003) (there was no showing that relevant scientific community had accepted test as reliable, and expert relied on polygraph results, which are inadmissible); People v. Berrios, 150 Misc.2d 229, 568 N.Y.S.2d 512 (Sup. Ct. Bronx Co. 1991) (court rejects defendant's offer of evidence that he does not match child abuser profile). But see People v. Riback, 13 N.Y.3d 416, 892 N.Y.S.2d 832 (2009) (no error where court allowed expert to explain what term "sexual fetish" means and give examples, none of which described specific behavior defendant allegedly exhibited, but court erred in allowing expert to define "pedophilia" and "central characteristics" of "pedophile" since, "[u]nfortunately, it is difficult to imagine that this information was unknown to the jurors"); State v. Davis, 645 N.W.2d 913 (Wis. 2002) (evidence that defendant lacks characteristics of sex offender may be introduced in appropriate case).

Q. Accident Reconstruction - A qualified expert may give testimony concerning

the point of impact and other circumstances surrounding an automobile accident. See, e.g., People v. Battease, 124 A.D.2d 807, 509 N.Y.S.2d 39 (2d Dept. 1986).

R. Firearm Identification - See Commonwealth v. Heang, 942 N.E.2d 927 (Mass. 2011) (after discussing recent report issued by National Research Council that raises concerns about validity of forensic ballistics evidence, court finds no error in admission of expert evidence where judge ruled that expert could testify "to a degree of scientific certainty" that recovered projectiles were fired by gun in question, but also had to admit he could not exclude possibility that projectiles were fired by another nine millimeter firearm); Jones v. United States, 27 A.3d 1130 (D.C. Ct. App. 2011) (Frye hearing not required since pattern matching is not new and courts have long been admitting such evidence); People v. Givens, 30 Misc.3d 475, 912 N.Y.S.2d 855 (Sup. Ct., Bronx Co., 2010) (court rejects defendant's claim, in support of which he submitted articles, federal court decisions and report issued by National Academy of Sciences, that expert testimony as to firearms and toolmark identification is no longer generally accepted in relevant scientific and legal communities); United States v. Glynn, 578 F.Supp.2d 567 (SDNY, 2008) (since ballistics examination suffers from greater uncertainty than certain other kinds of forensic evidence, Government could introduce opinion testimony by firearms analyst to effect that it was "more likely than not" that bullet recovered from victim's body and shell casings recovered from crime scenes came from firearms linked to defendant, but expert could not employ language "to a reasonable degree of ballistic certainty").

S. Handwriting Comparison - Pettus v. United States, 37 A.3d 213 (D.C. Ct. App., 2012) (forensic handwriting comparison and expert opinions meet Frye standard; 2009 National Research Council Committee Report suggests need to identify flaws in and improve certain forensic science disciplines, but Report does not imply absence of reliable methodology underlying handwriting comparison); People v. Callicut, 101 A.D.3d 1256 (3d Dept. 2012), lv denied 20 N.Y.3d 1096 (handwriting analysis testimony admissible under CPLR 4536, and no error where witness was permitted to opine that defendant wrote letters rather than just testify as to similarities and differences between disputed and known writings).

IV. Examination Of Witnesses

A. Order Of Proof - The prosecution ordinarily presents all its evidence before it closes, at which point the defense presents its evidence. See People v. Smith, 183 A.D.2d 653, 584 N.Y.S.2d 795 (1st Dept. 1992), lv denied 80 N.Y.2d 910, 588 N.Y.S.2d 835 (defense evidence may not be considered if court reserves decision on motion to dismiss after People's case); see also Johnson v. State, 969 A.2d 262 (Md., 2009) (prohibition against "anticipatory rehabilitation" and/or "strawman rebuttal" evidence was violated).

Rebuttal evidence may be presented to refute new facts raised by the defense, but may not be presented merely to corroborate what prosecution witnesses have already said. Richardson, §6-504; see United States v. Barrow, 400 F.3d 109 (2d Cir. 2005) (rebuttal is not limited to direct contradiction, but may included any evidence that fairly counters and casts doubt on factual assertions advanced); but see FCA §342.1(4) (in the interest of justice, court may permit rebuttal evidence "which is not technically of a rebuttal nature but more properly a part of the offering party's original case"); People v. Dennis, 55 A.D.3d 385, 866 N.Y.S.2d 28 (1st Dept. 2008) (no error where prosecutor was permitted to ask questions on re-direct that prosecutor had simply forgotten to ask on direct).

Rebuttal cannot be used to "correct" a witness' testimony in a manner which undercuts a defense strategy undertaken in reliance on earlier testimony. See Matter of Mario F., 216 A.D.2d 213, 629 N.Y.S.2d 229 (1st Dept. 1995) (court erred in permitting officer to change testimony as to where respondent was standing after defense investigator testified that respondent could not have been standing at location originally given by officer). Appropriate surrebuttal may also be permitted. See United States v. Murray, 736 F.3d 652 (2d Cir. 2013) (surrebuttal evidence improperly excluded where, until government offered rebuttal evidence, surrebuttal evidence had no relevance to issue being tried and defendant had no reason to offer evidence earlier); People v. Mancuso, 267 A.D.2d 252, 700 N.Y.S.2d 37 (2d Dept. 1999); FCA §342.1(4).

Although each side is ordinarily required to present all its evidence before it closes, the court has discretion to re-open a trial or hearing to receive further evidence

or permit further examination of a witness. Richardson, §6-504. See, e.g., People v. Kevin W., 22 N.Y.3d 287 (2013) (court precluded from reopening suppression hearing to give People opportunity to shore up evidentiary or legal position absent showing that People were deprived of full and fair opportunity to be heard); People v. Whipple, 97 N.Y.2d 1, 734 N.Y.S.2d 549 (2001) (trial court may re-open case to allow People to cure omission of element of crime where missing element is simple to prove and not seriously contested, and defense is not unduly prejudiced); People v. Ynoa, 223 A.D.2d 975, 636 N.Y.S.2d 888 (3rd Dept. 1996), lv denied 87 N.Y.2d 1027, 644 N.Y.S.2d 161 (trial court properly refused to permit People to re-open suppression hearing, since People had had full opportunity to present case); People v. Campbell, 148 A.D.2d 743, 539 N.Y.S.2d 476 (2d Dept. 1989) (court erred in denying defendant's motion to re-open Huntley hearing to introduce proof that interrogating officer knew defendant had counsel on pending case); People v. Washington, 145 A.D.2d 670, 536 N.Y.S.2d 812 (2d Dept. 1989) (reversal ordered where trial court refused to let defendant testify after closing arguments); Matter of Paul R., 131 A.D.2d 764, 516 N.Y.S.2d 790 (2d Dept. 1987) (court improperly re-opened prosecution case sua sponte after respondent's prima facie motion; however, error was harmless because sufficient evidence was presented before case was re-opened); People v. Parker, 125 A.D.2d 504, 509 N.Y.S.2d 586 (2d Dept. 1986) (court improperly refused to re-open larceny and trespass case during jury deliberations when defendant belatedly received evidence that he had rental agreement with owner of premises); People v. Hendricks, 114 A.D.2d 510, 494 N.Y.S.2d 729 (2d Dept. 1985) (court improperly refused to re-open case when defendant asked to testify during and after defense counsel's summation); People v. Cook, 103 A.D.2d 751, 477 N.Y.S.2d 219 (2d Dept. 1984) (error to permit prosecutor to re-open cross-examination after summations to ask defendant about prior convictions). The court also has the discretion to permit the respondent to re-open a pretrial suppression hearing during trial. See, e.g., People v. Corso, 135 A.D.2d 551, 521 N.Y.S.2d 773 (2d Dept. 1987).

The court may provisionally admit evidence which has not yet been shown to be relevant, if the proponent represents in good faith that the evidence will later be

connected. This is often called admitting evidence "subject to connection." See, e.g., United States v. Cote, 744 F.2d 913 (2d Cir. 1984) (government improperly offered evidence of other crimes when it knew or should have known that the evidence could not be connected to defendant).

B. Direct Examination - Leading questions are generally not permitted on direct examination. A leading question is one which suggests the desired answer by, for instance, stating facts which are not yet in the record and requiring a yes or no answer. Leading on direct is permitted during questioning concerning introductory matters, or when counsel seeks to focus the witness' attention on an event, such as a particular conversation, or when a witness, such as a sex crime victim, is hostile or unwilling to testify out of embarrassment, or where, because of infancy, illiteracy, illness, etc., the witness needs assistance in testifying. Richardson, §§ 6-223-232. See, e.g., In re Christopher T., 71 A.D.3d 464, 894 N.Y.S.2d 877 (1st Dept. 2010) (given age of the victim and sexual nature of charges, presentment agency needed to use leading questions to draw out facts); People v. Cuttler, 270 A.D.2d 654, 705 N.Y.S.2d 416 (3rd Dept. 2000), lv denied 95 N.Y.2d 795, 711 N.Y.S.2d 163 (no error where prosecutor was allowed to lead child victim in sexual abuse case); Matter of Jason FF., 224 A.D.2d 900, 638 N.Y.S.2d 226 (3rd Dept. 1996) (no error where court posed leading questions in attempt to "clarify and expedite" 8-year-old's testimony); People v. Tyrrell, 101 A.D.2d 946, 475 N.Y.S.2d 937 (3rd Dept. 1984) (leading permissible during examination of child sex abuse victim).

Hostility may arise out of a witness' interest in the case, or the witness' demonstrated reluctance to testify on the stand. See, e.g., People v. Collins, 33 A.D.2d 844, 305 N.Y.S.2d 893 (3rd Dept. 1969) (witness, who was living with one of defendant's accomplices, had had the accomplice's child and was pregnant by him again, was a hostile witness; thus, prosecutor was properly allowed to lead). See also Federal Rules, 611(c) (leading permitted when witness is “identified with an adverse party”).

If objections to questions are repeatedly sustained, and the reason is unclear, counsel should ask for an explanation and indicate that such guidance might enable

counsel to properly rephrase the question. See People v. Keough, 51 A.D.2d 808, 380 N.Y.S.2d 267 (2d Dept. 1976) (trial court should have explained reason for sustaining prosecutor's objections to testimony by defense witnesses).

C. Cross-Examination

1. Scope - In a delinquency case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination. See People v. Mann, 41 A.D.3d 977, 839 N.Y.S.2d 247 (3rd Dept. 2007), lv denied 9 N.Y.3d 924 (no error in trial court's ruling permitting People's cross-examination to go beyond defendant's "very limited" direct testimony that consisted of denial of allegations and his version of his movements through the house on the night in question; People's questions concerning fact that child's mother had refused to engage in type of conduct defendant was accused of perpetrating upon victim was relevant to defendant's possible motivation for alleged crimes); People v. Gonzalez, 131 A.D.2d 873, 517 N.Y.S.2d 530 (2d Dept. 1987); People v. Kennedy, 70 A.D.2d 181, 420 N.Y.S.2d 23 (2d Dept. 1979). However, once the parties proceed to redirect and re-cross, inquiry as of right is limited to new material brought out on the preceding examination; other inquiries are governed by the discretion of the trial court. See People v. Melendez, 55 N.Y.2d 445, 449 N.Y.S.2d 946 (1982); People v. Bruno, 111 A.D.3d 488 (1st Dept. 2013) (court erred when it refused to permit defense counsel to conduct re-cross-examination of crime scene detective after co-defendant's counsel inquired into new areas on cross-examination); People v. Gonzalez, supra, 131 A.D.2d 873; People v. Bethune, 105 A.D.2d 262, 484 N.Y.S.2d 577 (2d Dept. 1984). If the cross-examiner goes beyond the permissible bounds of cross-examination, he or she adopts the witness and is bound by the rules concerning the impeachment of one's own witness. Richardson, §6-427. See, e.g., Tarulli v. Salanitri, 34 A.D.2d 962, 312 N.Y.S.2d 55 (2d Dept. 1970).

2. Right Of Confrontation

a. Inability To Cross-Examine - When adequate cross-examination is precluded by a witness' illness or condition, absence, or unjustified refusal to answer questions, the direct examination is rendered incompetent and must be stricken. Richardson, §6-302. See People v. Cole, 43 N.Y. 508 (1871); Diocese of

Buffalo v. McCarthy, 91 A.D.2d 213, 458 N.Y.S.2d 764 (4th Dept. 1983), lv denied 59 N.Y.2d 605, 466 N.Y.S.2d 1025. But see People v. Montes, 16 N.Y.3d 250, 920 N.Y.S.2d 756 (2011) (no Confrontation Clause violation where, after prosecution witness testified inconsistently with another prosecution witness, first witness could not be recalled to testify because she had had breakdown and twice attempted suicide); Randolph v. State, 878 A.2d 461 (Del. 2005) (no violation of the juvenile's right of confrontation under Crawford v. Washington where complainant's out-of-court statements regarding sexual assault were admitted, but complainant, who did testify and was cross-examined, could not acknowledge that defendant had assaulted her or what statements she previously made; the mere fact that the witness had difficulty answering questions and provided nonsensical answers did not make her unavailable for confrontation purposes); Johnson v. State, 878 A.2d 422 (Del., 2005) (defendant's right of confrontation was violated where court admitted out-of-court statements made by declarant who testified, but had limited recollection; witness was not rendered unavailable for right of confrontation purposes); People v. Carusso, 94 A.D.3d 529 (1st Dept. 2012) (defendant not entitled to mistrial where, after victim testified that defendant demanded money during robbery, People disclosed police report indicating that victim attributed demand for money to co-defendant, but victim had returned to native country and was not available to be recalled; trial court permitted defendant to elicit prior inconsistent statement through detective and precluded prosecutor from eliciting evidence that report was inaccurate, and thus defendant was in better position than if he had been able to use statement to cross-examine victim because he was able to offer it statement for its truth); Vasquez v. Kirkland, 572 F.3d 1029 (9th Cir. 2009), cert denied 130 S.Ct. 1086 (no Confrontation Clause violation where prosecution's key witness was deaf, could not speak and had never learned sign language, and communicated by using combination of signs, gestures, facial expressions, and lip reading); People v. Kwok Chan, 110 A.D.2d 158, 493 N.Y.S.2d 778 (2d Dept. 1985).

On the other hand, the accused can waive the right to cross-examine, and the court may be obligated to let stand the direct testimony of a witness who has become unavailable for cross-examination. See People v. Cummings, 191 A.D.2d 1012, 595

N.Y.S.2d 167 (4th Dept. 1993) (reversible error where court struck testimony damaging to People's case).

b. Memory Lapse Of Witness - See United States v. Owens, 484 U.S. 554, 108 S.Ct. 838 (1988) (no constitutional violation where complainant recalled identifying defendant but had no recollection of the assailant or why he identified defendant); Delaware v. Fensterer, 474 U.S. 15, 106 S.Ct. 292 (1985) (no violation where expert could not recall basis of his opinion); Goforth v. State, 70 So.3d 174 (Miss. 2011) (Confrontation Clause violated where witness whose prior statement was admitted as recorded recollection testified, but had total loss of memory with respect to underlying events); Woodall v. State, 336 S.W.3d 634 (Tex. Ct. of Crim. App., 2011) (memory loss does not render witness "absent" for Confrontation Clause purposes if witness is present in court and testifying); State v. Biggs, 333 S.W.3d 472 (Mo. 2011) (same as Woodall); State v. Delos Santos, 238 P.3d 162 (Hawaii, 2010) (right of confrontation not violated where witness whose hearsay statements are admitted cannot remember subject matter of statements or making statements at all); State v. Legere, 958 A.2d 969 (N.H. 2008) (Confrontation Clause no bar to admission of witness's prior hearsay statement where witness testifies at trial but claims lack of memory); State v. Holliday, 745 N.W.2d 556 (Minn. 2008) (Crawford v. Washington does not bar introduction of hearsay statements when witness is present but cannot recall and be effectively cross-examined regarding statements; Confrontation Clause is satisfied by declarant's appearance at trial, and it is for fact-finder to evaluate declarant's credibility in light of memory infirmities); see also Turner v. Commonwealth, 726 S.E.2d 325 (Va. 2012) (in determining whether preliminary hearing testimony is admissible because witness is unavailable due to lack of memory, court has obligation to conduct inquiry and observe witness's demeanor to ensure witness has not feigned loss of memory in attempt to avoid testifying).

c. Hypnotically Refreshed Testimony - When a witness' ability to recollect has been enhanced through hypnosis, only the witness' prehypnotic recollections are admissible. The respondent is entitled to notice of the hypnosis and a pretrial hearing to determine what effect the hypnosis may have on the respondent's

ability to conduct meaningful cross-examination. See People v. Tunstall, 63 N.Y.2d 1, 479 N.Y.S.2d 192 (1984); People v. Hughes, 59 N.Y.2d 523, 466 N.Y.S.2d 255 (1983); see also Rock v. Arkansas, 483 U.S. 44, 107 S.Ct. 2704 (1987) (per se exclusion of hypnotically refreshed testimony violated defendant's right to testify); People v. Sutton, 908 N.E.2d 50 (Ill., 2009) (prosecution witness was "available" for cross where there was no evidence that witness could not differentiate between what he was able to recall before hypnosis and that which hypnosis elicited). Statements made under hypnosis that differ from the subject's pre-hypnosis statements are not admissible for impeachment. People v. Hults, 76 N.Y.2d 190, 557 N.Y.S.2d 270 (1990).

d. Right To Face Witness

i. In-Court Testimony - See Coy v. Iowa, 487 U.S. 1012, 108 S.Ct. 2798 (1988) (right of confrontation violated where, in the absence of any individualized finding that the witnesses needed protection, they testified from behind a screen that blocked defendant's sight); People v. Tuck, 75 N.Y.2d 778, 552 N.Y.S.2d 85 (1989) (there was error, albeit harmless, where 7-year-old witness faced away from defendant and towards jury so her testimony would be audible); United States v. De Jesus-Casteneda, 705 F.3d 1117 (9th Cir. 2013), rehearing denied 712 F.3d 1283, cert denied 133 S.Ct. 2788 (no Confrontation Clause violation where confidential informant testified in disguise, wearing wig and mustache, which furthered important state interest in preserving witness's safety); Morales v. Artuz, 281 F.3d 55 (2d Cir. 2002) (no right of confrontation violation where witness wore dark sunglasses because of justified fear of defendant; court notes that Supreme Court precedents did not involve this type of slight disguise); People v. Smith, 11 Misc.3d 1087(A), 819 N.Y.S.2d 850 (Sup. Ct., N.Y. Co., 2006) (witness permitted to wear "Afro" wig and false beard and mustache where, inter alia, eyewitness to a murder had been murdered after telling the victim's father that defendant shot his son).

ii. Closed-Circuit Television - CPL article 65, which has been incorporated by reference in FCA §343.1(4), authorizes the court to permit a "child witness" (under 14 years of age) to testify from a testimonial room over live 2-way closed-circuit television if the child is found to be "vulnerable." A child is "vulnerable" if

the court finds by clear and convincing evidence that, as a result of extraordinary circumstances, it is likely that the child will suffer serious mental or emotional harm if required to testify in court, and that the use of closed-circuit television will help prevent, or diminish the likelihood or extent of, harm to the child. CPL §65.10(1).” A child witness should be declared vulnerable when the court, in accordance with the provisions of this section, determines by clear and convincing evidence that the child witness would suffer serious mental or emotional harm that would substantially impair the child witness` ability to communicate with the finder of fact without the use of live, two-way closed-circuit television.” CPL §65.20(2).

The constitutionality of article 65 was upheld in People v. Cintron, 75 N.Y.2d 249, 552 N.Y.S.2d 68 (1990) (court also notes that, although the statute permits the court to make a "vulnerability" finding during trial after the court observes the child, such a finding must be based on clear and convincing evidence, and may not be based solely on the subjective impressions of the judge). See also People v. Costa, 160 A.D.2d 889, 554 N.Y.S.2d 930 (2d Dept. 1990) (court improperly based vulnerability finding on observations of child, who cried on the witness stand, clung to his grandmother, was reluctant to answer questions, and stated that he did not like being in court and was frightened); People v. Henderson, 156 A.D.2d 92, 554 N.Y.S.2d 924 (2d Dept. 1990), lv denied 76 N.Y.2d 736, 558 N.Y.S.2d 898 (court improperly found 5 and 6-year-old alleged sex crime victims to be "vulnerable" where expert gave no specific reasons why the children would suffer harm if forced to testify, and videotape indicates that children were not generally reluctant to testify); Matter of Noel O., 19 Misc.3d 418, 855 N.Y.S.2d 318 (Fam. Ct., Queens Co., 2008) (five-year-old complainant found to be "vulnerable witness" where charges were "particularly heinous" in that it was alleged that 14 ½ year-old respondent inserted tongue into mouth of 5 year-old complainant, placed fingers on her vagina and forced her to touch his penis; respondent had family-like relationship with complainant and her family in that her mother is respondent’s godmother and he had regular contact with complainant, whom he has known for her entire life; and that according to expert testimony, complainant would be particularly susceptible to psychological harm if she were to testify in respondent's presence in courtroom).

In People v. Wrotten, 14 N.Y.3d 33, 896 N.Y.S.2d 711 (2009), cert denied 130 S.Ct. 2520, a Court of Appeals majority held that the trial court had inherent power, and authority under Judiciary Law § 2-b, to permit an adult complainant who was living in California to testify via real-time, two-way video after the court found that because of age and poor health, the witness was unable to travel to New York. However, the Court noted that because live televised testimony is not the equivalent of in-person testimony, televised testimony requires a case-specific finding of necessity and is an exceptional procedure to be used only in exceptional circumstances. See also People v. Wrotten, 73 A.D.3d 637, 901 N.Y.S.2d 265 (1st Dept. 2010), lv denied 15 N.Y.3d 811, cert denied 131 S.Ct. 1020 (live, two-way video properly used where trial court found by clear and convincing evidence that complainant "would be in serious danger of suffering serious health problems or possibly death by his traveling and testifying"; although medical risk can be "serious" without being more likely than not to come to fruition, defendant never contended that "serious" risk was insufficient to warrant a finding that complainant was unable to travel, and thus court did not decide whether greater degree of risk is required).

Confrontation Clause issues do not arise when it is the defendant who wishes to present video testimony. See People v. Novak, 41 Misc.3d 733 (County Ct., Sullivan Co., 2013) (court permits defense witness who could not travel from Florida to testify via live, two-way video conference through Skype, noting that Skype communication is reliable, accurate and widely used in society and commerce).

e. Identity Of Witness – A witness' name may be withheld upon a showing that the witness has a justifiable fear for his or her personal safety; the burden shifts to the respondent to establish the materiality of the name. See, e.g., People v. Waver, 3 N.Y.3d 748, 788 N.Y.S.2d 630 (2004) (People failed to satisfy burden of showing need for anonymity); People v. Frost, 100 N.Y.2d 129, 760 N.Y.S.2d 753 (2003) (witness' identity properly withheld due to fear for safety after in camera hearing in absence of defendant and defense counsel; defendant had opportunity to cross examine and prosecutor indicated that witness had no criminal record and that Rosario and Brady material had been disclosed); People v. Stanard, 42 N.Y.2d 74, 396

N.Y.S.2d 825 (1977) (identity of relocated witnesses withheld); United States v. Ramos-Cruz, 667 F.3d 487 (4th Cir. 2012) (court did not err in concluding there was danger to El Salvadorian citizens who testify in United States courts against members of the gang); People v. Waite, 52 A.D.3d 237, 859 N.Y.S.2d 162 (1st Dept. 2008) (by agreeing to closure of courtroom to general public for testimony of the undercover officers on condition that defendants' family members be allowed into courtroom, defendants did not concede grounds required for officers to testify anonymously; showing that undercover officer would be endangered by revealing name in open court can establish not only basis for limited closure, but also grounds for anonymous testimony, but no such showing was made); People v. Washington, 40 A.D.3d 228, 835 N.Y.S.2d 142 (1st Dept. 2007), lv denied 9 N.Y.3d 927 (defense counsel's offer to keep officers' true names secret from client and others would not guarantee secrecy); People v. Medina, 288 A.D.2d 61, 732 N.Y.S.2d 411 (1st Dept. 2001) (officer's "unique" name withheld); People v. Remgifo, 150 A.D.2d 736, 541 N.Y.S.2d 605 (2d Dept. 1989) (undercover narcotics officer's name withheld); People v. Presto, 131 A.D.2d 707, 517 N.Y.S.2d 36 (2d Dept. 1987) (same as Remgifo). See also People v. Griffin, 207 A.D.2d 844, 616 N.Y.S.2d 628 (2d Dept. 1994), lv denied 85 N.Y.2d 909, 627 N.Y.S.2d 332 (1995) (counsel was improperly precluded from asking witness his address).

f. Waiver Of Right - See United States v. Plitman, 194 F.3d 59 (2d Cir. 1999) (no violation of defendant's right of confrontation where defense counsel stipulated to admission of IRS agent's account of conversation with witness who lived in Venezuela).

g. Location Of Police Observation Post – Compare United States v. Harley, 682 F.2d 1018 (D.C. Cir. 1982) (location withheld to protect safety of owner or tenant); In re Tomicko M., 272 A.D.2d 155, 710 N.Y.S.2d 20 (1st Dept. 2000), lv denied 95 N.Y.2d 762, 715 N.Y.S.2d 215 (disclosure properly denied at fact-finding hearing where court permitted extensive cross examination regarding ability to observe) and Matter of Chris C., 172 Misc.2d 416, 658 N.Y.S.2d 929 (Fam. Ct., Bronx Co. 1997) (court finds compelling interest justifying denial of disclosure where cooperative owners and tenants who gave permission will be protected from reprisals; court does allow

respondent to cross-examine with respect to distance, height, the use of vision-enhancing articles, and other matters) with United States v. Jimenez, 464 F.3d 555 (5th Cir. 2006) (defendant's right of confrontation violated where court prohibited defense counsel from cross-examining officer as to exact location from which he saw alleged drug sale, which was defendant's only means of testing officer's reliability); State v. Reed, 6 P.3d 43 (Wash. 2000) (defendant had right to confront and cross-examine officer at trial about location of police observation post from which officer observed cocaine sale); In re Darryl G., N.Y.L.J., 8/13/98, p. 23, col. 3 (Fam. Ct., N.Y. Co.), aff'd 264 A.D.2d 690, 695 N.Y.S.2d 355 (1999) (disclosure of observation post location denied for purposes of suppression hearing since court would permit defense counsel to cross-examine officer extensively about ability to observe, distances, etc., but court grants disclosure for purposes of fact-finding hearing since officer's testimony will be determinative of guilt or innocence) and Matter of James B., 146 Misc.2d 532, 551 N.Y.S.2d 439 (Fam. Ct. N.Y. Co., 1990). See also People v. Wright, 279 A.D.2d 286, 718 N.Y.S.2d 828 (1st Dept. 2001), lv denied 96 N.Y.2d 808, 726 N.Y.S.2d 387 (defendant not entitled to ascertain specific place on undercover's body where he had secreted a radio transmitter).

h. Adequacy Of Police Investigation - People v. Hayes, 17 N.Y.3d 46 (2011) (no error where court precluded defense from challenging thoroughness of police investigation by showing that police failed to interview bystanders who made statements that were helpful to defense; court declines to impose affirmative obligation upon police to obtain exculpatory information for defendants); People v. Badia, 94 A.D.3d 622 (1st Dept. 2012) (reversible error where court unduly restricted cross-examination of witness concerning police investigation into another participant in crime and defense theory was that defendant had unwittingly agreed to aid in drug enterprise at other participant's behest); Watson v. Greene, 640 F.3d 501 (2d Cir. 2011) (potential for unfair prejudice to prosecution outweighed probative value, and justified limitation on cross-examination, where defense counsel sought to cross-examine lead detective about hearsay information police had regarding another suspect in effort to show that police prematurely concluded that defendant was

shooter and failed to adequately investigate other suspect).

D. Examination Of Witnesses By Judge - A judge may attempt to clarify testimony and expedite proceedings, but may not become excessively involved in examining witnesses, or communicate his or her views to the jury. See, e.g., People v. Yut Wai Tom, 53 N.Y.2d 44, 439 N.Y.S.2d 896 (1982); People v. Zayas, 88 A.D.3d 918 (2d Dept. 2011) (judge improperly interrupted defense counsel's cross-examination to clarify witness's earlier testimony, and then read to jury from his personal notes concerning what witness had said); People v. Melendez, 31 A.D.3d 186, 815 N.Y.S.2d 551 (1st Dept. 2006) (no reversal where excessive questioning did not make it appear that judge was advocate for People or assist People in proving case); People v. Rodriguez, 22 A.D.3d 412, 802 N.Y.S.2d 358 (1st Dept. 2005), lv denied 6 N.Y.3d 758 (no error where judge, with jury absent, advised prosecutor to ask certain questions of police chemist after determining that prosecutor's inexperience was undermining orderly presentation of evidence); People v. Retamozzo, 25 A.D.3d 73, 802 N.Y.S.2d 426 (1st Dept. 2005) (conviction reversed where judge, inter alia, elicited testimony helpful to prosecution and devalued defense efforts, and, during defense case, repeatedly asked questions communicating skepticism); People v. Chatman, 14 A.D.3d 620, 789 N.Y.S.2d 208 (2d Dept. 2005) (judge improperly elicited testimony regarding defendant's failure to mention alibi to police, and questioned alibi witnesses extensively); People v. Prado, 1 A.D.3d 533, 767 N.Y.S.2d 129 (2d Dept. 2003) (majority concludes that judge's "reassuring" and "cajoling" conduct with reticent 11-year-old witness was not inappropriate); People v. Reid, 296 A.D.2d 335, 744 N.Y.S.2d 405 (1st Dept. 2002), lv denied 98 N.Y.2d 731, 749 N.Y.S.2d 482 (2002) ("better course" would have been for court to restrain itself from trying to clarify ambiguities regarding time between defendant's apprehension and arrest); People v. Brown, 262 A.D.2d 570, 694 N.Y.S.2d 666 (2d Dept. 1999), aff'd 95 N.Y.2d 776, 710 N.Y.S.2d 837 (no error where court accused defense counsel of mischaracterizing testimony, but counsel had been aggressive and confrontational); People v. Melendez, 227 A.D.2d 646, 643 N.Y.S.2d 607 (2d Dept. 1996) (reversible error where court assumed role of prosecutor with prosecution witnesses and asked pointed questions during defense counsel's

cross which revealed court's assessment of credibility); Rivas v. Brattesani, 94 F.3d 802 (2d Cir. 1996) (defendants denied fair trial where judge, inter alia, commented on question asked by defense counsel by stating, "Come off it, will you counsel," and then stated to jury, "That, by the way, ladies and gentlemen, is pretty silly"); United States v. Filani, 74 F.3d 378 (2d Cir. 1996) (judge cross-examined defendant "more in the manner of a prosecutor than an impartial judge"); People v. Mendez, 225 A.D.2d 1051, 639 N.Y.S.2d 219 (4th Dept. 1996) (judge questioned defense witnesses, but rarely questioned prosecution witnesses); People v. Grant, 185 A.D.2d 896, 586 N.Y.S.2d 1019 (2d Dept. 1992) (judge developed identification testimony, and appeared to endorse complainant's credibility); People v. Williams, 177 A.D.2d 527, 575 N.Y.S.2d 915 (2d Dept. 1991) (judge encouraged witness to make identification); People v. Eldridge, 151 A.D.2d 966, 542 N.Y.S.2d 65 (4th Dept. 1989) (judge forced defendant to accuse witnesses of lying); People v. Cruz, 100 A.D.2d 518, 473 N.Y.S.2d 21 (2d Dept. 1984) (judge emphasized key elements of People's case); People v. Buckheit, 95 A.D.2d 814, 463 N.Y.S.2d 536 (2d Dept. 1983) (judge elicited incriminating evidence).

Arguably, judges have more discretion at bench trials. Compare Matter of Kyle FF., 85 A.D.3d 1463 (3d Dept. 2011) (reversible error where, even though parties agreed with recommendation made by Probation Department, court called and extensively questioned author of pre-dispositional report, secured production of additional documentary evidence, and, according essentially no weight to underlying recommendation and parties' expressed wishes, crafted placement disposition based almost entirely upon proof court elicited; it is function of court to protect record at trial, not make it, and court must take care to avoid assuming function or appearance of advocate); Matter of Jacqulin M., 83 A.D.3d 844 (2d Dept. 2011) (reaching unpreserved issue in interests of justice, court finds reversible error where family court judge extensively participated in direct and cross-examination of prosecution witnesses and elicited testimony which strengthened prosecution's case, and summoned probation officer assigned to respondent's case, and indicated to defense counsel that unless he agreed to stipulate as to what probation records would reflect, records would be admitted through probation officer's testimony even though neither prosecutor nor

defense counsel intended to call probation officer as witness or offer records and stipulation had effect of rebutting portion of respondent's testimony; judge assumed parties' traditional role of deciding what evidence to present and offered no explanation on record as to why he felt compelled to do so) and Matter of Yadiel Roque C., 17 A.D.3d 1168, 793 N.Y.S.2d 857 (4th Dept. 2005) (adjudication reversed due to court's extensive examination of witnesses) with Matter of Samantha K., 61 A.D.3d 1322, 877 N.Y.S.2d 517 (3rd Dept. 2009) (in PINS proceeding, court did not err in asking questions related to foundation for admission of attendance record; "In this nonjury setting, the questions merely facilitated the orderly and expeditious progress of the hearing"); Matter of Thomas B., 57 A.D.3d 1455, 870 N.Y.S.2d 688 (4th Dept. 2008) (court erred at probation violation hearing by reminding presentment agency to have witness make in-court identification, but error was harmless) and People v. McRae, 284 A.D.2d 657, 728 N.Y.S.2d 516 (3rd Dept. 2001), lv denied 96 N.Y.2d 921, 732 N.Y.S.2d 638 (People called additional witness after court cited burden at suppression hearing).

In People v. Arnold, 98 N.Y.2d 63, 745 N.Y.S.2d 782 (2002), the Court of Appeals, while finding reversible error where the court *called its own witness* at a bench trial, concluded that the court's discretion to call a witness should be exercised sparingly, and that the court should explain its reasons for doing so and invite comment from the parties, so that the court can weigh what it aims to accomplish against claims of prejudice and an appellate court will have a basis for review).

At the other end of the spectrum is judicial inattentiveness during a proceeding. See, e.g., People v. Degondea, 3 A.D.3d 148, 769 N.Y.S.2d 490 (1st Dept. 2003).

E. Impeachment

1. Ability Of Witness To Perceive And Recall - The impairment of a witness' ability to perceive and recall events because of drug or alcohol use, mental illness, or some other disability, may be proved by way of extrinsic evidence. Richardson, §6-418. See, e.g., People v. Freeland, 36 N.Y.2d 518, 369 N.Y.S.2d 649 (1975) (narcotics addiction); People v. Baranek, 287 A.D.2d 74, 733 N.Y.S.2d 704 (2d Dept. 2001) (mental illness); People v. Davis, 225 A.D.2d 449, 639 N.Y.S.2d 350 (1st Dept. 1996), lv denied 88 N.Y.2d 965, 647 N.Y.S.2d 719 (mental disability, including

"confabulatory tendencies"); United States v. Sasso, 59 F.3d 341 (2d Cir. 1995) (no error where trial court refused to permit defendants to cross-examine witness concerning use of antidepressant drugs); People v. Freshley, 87 A.D.2d 104, 451 N.Y.S.2d 73 (1st Dept. 1982) (mental illness); People v. Knatz, 76 A.D.2d 889, 428 N.Y.S.2d 709 (2d Dept. 1980) (drug use on day of incident and day of trial); see also People v. Novak, 41 Misc.3d 737 (County Court, Sullivan Co., 2013) (out of abundance of caution in protecting defendant's Sixth Amendment rights, court ordered that defense expert could observe prosecution witness's testimony; that defendant could consult with expert regarding cross-examination strategies; that expert could not testify regarding observations of witness during testimony, opinion of witness's veracity, or opinion of witness's emotional or mental condition during his testimony or confession; and that defendant could present expert testimony regarding generally accepted opinion as to the ability of persons with same diagnoses as witness to perceive, recall and relate events); but see People v. Billups, 132 A.D.2d 612, 518 N.Y.S.2d 9 (2d Dept. 1987) (expert had not examined witnesses and could only speculate about effect of methadone); Drake v. Woods, 547 F.Supp.2d 253 (SDNY, 2008) (no error in trial court's refusal to allow defense counsel to cross-examine witness about mental health history where prosecution represented that witness suffered from no serious psychiatric problems that would affect her perception and consulted therapist on only three occasions to discuss "the general issues of her life").

A witness' failure to recall the reasons for an opinion, an identification, etc., could give rise to a right of confrontation claim. But see United States v. Owens, supra, 484 U.S. 554 (no violation where witness forgot reasons for past belief that defendant was assailant); Delaware v. Fensterer, supra, 474 U.S. 15 (no violation where expert forgot basis of opinion).

In People v. Washington, 238 A.D.2d 263, 657 N.Y.S.2d 24 (1st Dept. 1997), the court upheld the exclusion of expert testimony regarding the susceptibility of young children to suggestion. See also People v. Johnston, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3rd Dept. 2000) (same as Washington); People v. Kanani, 272 A.D.2d 186, 709 N.Y.S.2d 505 (1st Dept. 2000) (same as Washington; defendant failed to meet burden

under Frye); but see Washington v. Schriver, 255 F.3d 45 (2d Cir. 2001) (while affirming denial of habeas relief, Second Circuit criticizes First Department's reasoning in People v. Washington, supra).

A related issue is whether the court should conduct a pretrial hearing to determine whether the child's testimony should be suppressed because of unduly suggestive interviewing. Compare People v. Montalvo, 34 A.D.3d 600, 825 N.Y.S.2d 101 (2d Dept. 2006), lv denied 8 N.Y.3d 883 (in absence of non-speculative evidence of undue suggestion, court properly denied defendant's motion to suppress); People v. Wilson, 255 A.D.2d 612, 679 N.Y.S.2d 732 (3rd Dept. 1998), lv denied 93 N.Y.2d 981, 695 N.Y.S.2d 68 (1999) (defendant not entitled to pretrial hearing); People v. Britton, 39 Misc.3d 1225(A) (Sup. Ct., Kings Co., 2013) (in prosecution arising out of defendant's alleged sexual abuse of 11-year-old niece, court denies motion for pre-trial "taint" hearing where defendant alleged that witness was interviewed more than once, did not report abuse immediately, and spoke with adults; court notes that those circumstances are common) and People v. Jones, 185 Misc.2d 899, 714 N.Y.S.2d 876 (Sup. Ct., Kings Co., 2000) (court denies defendant's motion for pretrial hearing) with Woyak v. State, 226 P.3d 841 (Wyo. 2010) (court declines to endorse separate pretrial "taint" hearing, since taint issue can be addressed adequately at competency hearing); Commonwealth v. Delbridge, 855 A.2d 27 (PA 2003) (if there is some evidence of suggestiveness, taint may be raised at pretrial competency hearing); State v. Michaels, 642 A.2d 1372 (NJ 1994) (given improper interrogations substantial likelihood that evidence from them was unreliable, State required to prove by clear and convincing evidence at pretrial hearing that evidence retained sufficient reliability to warrant admission) and People v. Michael M., 162 Misc.2d 803, 618 N.Y.S.2d 171 (Sup. Ct. Kings Co., 1994) (court may hold pretrial hearing).

2. Failure Of Alibi Witness To Promptly Come Forward - Evidence of an alibi witness' failure to promptly come forward to the authorities is admissible if the prosecutor establishes that the witness was aware of the charges, recognized that he or she had exculpatory information, was familiar with the means of contacting the authorities, and had a relationship with the respondent that would provide a motive to

help. See People v. Dawson, 50 N.Y.2d 311, 428 N.Y.S.2d 914 (1980) (court should instruct jury that witness had no duty to volunteer information and that delay can only be considered insofar as it affects witness' credibility, and should call bench conference to ascertain whether witness refrained from speaking on advice of defendant's counsel); People v. Shelton, 100 A.D.3d 662 (2d Dept. 2012), lv denied 20 N.Y.3d 1014 (People arguably established that witness was familiar with means to make information available due to community activism and contacts at District Attorney's office, but she testified, in effect, that she did not believe defendant was involved with gunshots and People failed to establish reasonable motive for acting to exonerate defendant since she testified that she had first met him that evening); People v. Hooks,110 A.D.2d 909, 488 N.Y.S.2d 459 (2d Dept. 1985) (trial court improperly precluded defense counsel from showing that he advised witness not to come forward); see also People v. Jenkins, 88 N.Y.2d 948, 647 N.Y.S.2d 157 (1996) (probative value outweighed potential for prejudice where witness testified that he had known defendant had been in jail since his arrest and had spoken to defendant while he was in jail). If an alibi witness testifies that he or she made a statement to the police at the time of the arrest, the prosecution may elicit rebuttal testimony to show that the witness did not come forward. People v. Knight, 80 N.Y.2d 845, 587 N.Y.S.2d 588 (1992).

The prosecution may not impeach the witness if the witness' attempts to communicate have been thwarted. See People v. Miller, 227 A.D.2d 346, 643 N.Y.S.2d 74 (1st Dept. 1996), aff'd 89 N.Y.2d 1077, 659 N.Y.S.2d 837 (1997) (impeachment permissible where ADA refused to speak to witnesses with defense counsel present but offered to talk alone or after witnesses secured counsel).

It has been held that the Dawson rule does not apply to a witness's contacts with other civilians. People v. Trinidad, 57 A.D.3d 219, 868 N.Y.S.2d 61 (1st Dept. 2008).

3. Bad Acts

a. Nature Of Acts - Immoral, vicious and criminal acts which reflect upon character and show a witness to be unworthy of belief may be used for impeachment.

But it is improper to ask a witness about misconduct which is not relevant to

credibility, such as failing to pay rent, gambling, etc. Richardson, §§ 6-406-407. See also People v. Sorge, 301 N.Y. 198 (1950); Matter of Andrew O., 16 N.Y.3d 841 (2011) (reversible error where State's attorney attacked expert's credibility on basis of his religious beliefs and affiliation); People v. Garrett, 106 A.D.3d 929 (2d Dept. 2013), **lv granted** 21 N.Y.3d 1042 (hearing ordered upon defendant's motion to vacate judgment of conviction where People failed to disclose that unrelated federal civil action had been brought alleging that officer procured false confession to arson by repeatedly striking handcuffed plaintiff in head with telephone book); Longus v. United States, 52 A.3d 836 (D.C. Ct. App. 2012) (right of confrontation violated when court allowed defendant to ask detective whether he was under investigation by the U.S. Attorney for coaching witness to provide untruthful information during homicide investigation, but barred defense counsel from questioning detective about, or introducing evidence of, facts underlying allegations; corrupt behavior could show willingness to thwart discovery of truth); United States v. Alston, 626 F.3d 397 (8th Cir. 2010), cert denied 131 S.Ct. 1842 (defense precluded from inquiring into detective's termination from police department; even if detective lied to superiors, that was isolated event of different character since detective allegedly invented complex confession to secure drug conviction in this case, while he allegedly lied to superiors to protect himself from punishment); People v. White, 41 A.D.3d 1036, 838 N.Y.S.2d 248 (3rd Dept. 2007) (mere act of rapping is not prior bad act); People v. Daley, 9 A.D.3d 601, 780 N.Y.S.2d 423 (3d Dept. 2004) (court improperly precluded defendant from cross-examining correction officer about federal lawsuit brought against officer by inmate who asserted that officer had assaulted him); People v. Love, 307 A.D.2d 528, 762 N.Y.S.2d 162 (3rd Dept. 2003) (defendant allowed to question victim as to whether her children were taken into foster care as a result of her abuse or neglect, but not as to details of conduct); People v. Locicero, 119 A.D.2d 699, 500 N.Y.S.2d 821 (2d Dept. 1986) (prosecutor improperly asked defense witness about membership in motorcycle club); People v. Batista, 113 A.D.2d 890, 493 N.Y.S.2d 608 (2d Dept. 1985) (court improperly prevented defense counsel from cross-examining witness about marijuana possession); United States v. Polanco, 2011 WL 1795293 (SDNY 2011) (defendant precluded from cross-examining officer about

substantiated Civilian Complaint Review Board findings against him regarding the propriety of searches where there was no information suggesting that officer was found to be incredible); Matter of M. v. New York City Transit Authority, 4 Misc.3d 829, 781 N.Y.S.2d 865 (Sup. Ct., Richmond Co., 2004) (as a matter of public policy, court in civil action should exercise discretion to preclude impeachment with evidence of past heroin use and addiction of witness who is participating in chemical dependency treatment program); People v. Gonzalez, 193 Misc.2d 17, 748 N.Y.S.2d 233 (Sup. Ct., Bronx Co., 2002) (defendant entitled to ask prosecution witness about his status as illegal alien).

In addition, a witness may not be asked whether he/she has been arrested, indicted, or charged, or otherwise impeached with the mere fact that an accusation has been made. See, e.g., People v. Rodriguez, 28 Misc.3d 129(A), 911 N.Y.S.2d 695 (App. Term, 2d, 11th & 13th Jud. Dist., 2010), lv denied 16 N.Y.3d 745 (no error where court barred inquiries regarding whether complainant had "been under investigation by ACS"; record does not show good faith basis for inquiry, and witness cannot be impeached merely with fact of investigation); People v. Munquia, 23 A.D.3d 583, 806 N.Y.S.2d 595 (2d Dept. 2005), lv denied 6 N.Y.3d 778; People v. Grant, 234 A.D.2d 475, 651 N.Y.S.2d 564 (2d Dept. 1996).

b. Use Of Extrinsic Evidence - A witness' commission of prior bad acts is a collateral issue. Consequently, bad acts may not be proved extrinsically after a witness denies committing them. See Badr v. Hogan, 75 N.Y.2d 629, 555 N.Y.S.2d 249 (1990). However, the examiner is permitted some leeway while pressing the witness to change his or her answer. Richardson, §6-406.

A formal judicial finding that a witness lied can, like a conviction that is relevant to credibility, be proved even when the witness denies having committed the bad act. Compare United States v. Woodard, 699 F.3d 1188 (10th Cir. 2012) (defendant's right of confrontation violated where court refused to allow defendant to cross-examine government inspector about prior judicial determination that witness was not credible); United States v. White, 692 F.3d 235 (2d Cir. 2012) (reversible error in exclusion of evidence of prior judicial finding that detective gave incredible testimony at suppression hearing in another case) and United States v. Cedeno, 644 F.3d 79 (2d Cir. 2011) (trial

court erred in limiting cross-examination by barring use of state court's finding that witness had given false testimony in prior proceeding; court only considered whether prior finding addressed witness's veracity in that case or generally and whether the two sets of testimony involved similar subject matter, but court also should have considered whether prior lie was under oath in judicial proceeding or was made in less formal context, whether lie was about matter that was significant, how much time had elapsed since lie was told and whether there had been any intervening credibility determination regarding witness, apparent motive for lie and whether similar motive existed in this proceeding, and whether witness offered explanation for lie and, if so, whether explanation was plausible) with People v. Parker, 1067-12, NYLJ 1202620087710, at *1 (Co., WE, Decided September 12, 2013) (defendant not permitted to cross-examine officers regarding alleged perjury during federal criminal trial where it was impossible to decipher which witnesses federal judge concluded were lying).

c. Acts Committed By Juveniles Or Youthful Offenders - The Acts underlying a delinquency or Youthful Offender adjudication may be explored. See Matter of Roseangela C., 232 A.D.2d 633, 648 N.Y.S.2d 1013 (2d Dept. 1996); People v. Mills, 146 A.D.2d 810, 537 N.Y.S.2d 74 (2d Dept. 1989); People v. Scoon, 130 A.D.2d 597, 515 N.Y.S.2d 306 (2d Dept. 1987); People v. Brailsford, 106 A.D.2d 648, 482 N.Y.S.2d 907 (2d Dept. 1985) (defendant's PINS records could be used as source of questions). But see FCA §380.1(3) ("Except where specifically required by statute, no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under [FCA article 3]"). However, if the basis for impeachment is the illegal inspection of such records, the witness may refuse to answer. See People v. Hunter, 88 A.D.2d 321, 453 N.Y.S.2d 212 (2d Dept. 1982). In addition, a witness may not be asked about the underlying facts where the records have been sealed. See People v. Ellis, 184 A.D.2d 307, 584 N.Y.S.2d 569 (1st Dept. 1992), lv denied 80 N.Y.2d 929, 589 N.Y.S.2d 856; C.P.L. §160.60 (arrest and prosecution of matter terminated in favor of defendant "shall be deemed a nullity and the accused shall be restored, in contemplation of law, to the status he occupied before the arrest and prosecution").

d. Good Faith Basis Of Examiner - The examiner must have Some reliable information concerning the acts, and may not go on a fishing expedition hoping to hit on something relevant. See, e.g., People v. Andrew, 54 A.D.3d 618, 863 N.Y.S.2d 676 (1st Dept. 2008) (no error in trial court's refusal to allow defendant to question arresting detective regarding certain federal lawsuits where detective was one of several officers named as defendants in two actions involving single incident that occurred one year before charged incident and defense failed to establish good faith basis for eliciting underlying facts as prior bad acts); People v. Francis, 15 A.D.3d 318, 790 N.Y.S.2d 103 (1st Dept. 2005), lv denied 4 N.Y.3d 853 (no good faith basis where defendant attempted to cross-examine witness about a fight in which he was involved, but there was no showing that incident involved a "bad act"); People v. Crawford, 256 A.D.2d 141, 683 N.Y.S.2d 216 (1st Dept. 1998) (prosecutor improperly questioned defendant's alibi witness regarding alleged history of prostitution based on hunch that witness had used a name consistent with that on the rap sheet); People v. Colas, 206 A.D.2d 183, 619 N.Y.S.2d 702 (1st Dept. 1994), lv denied 85 N.Y.2d 907, 627 N.Y.S.2d 330 (1995) (inquiry was undertaken in bad faith where prosecutor questioned defendant about school assault that was never reported and did not result in arrest); People v. Morales, 147 A.D.2d 381, 537 N.Y.S.2d 804 (1st Dept. 1989) (no good faith basis for implying that defense witness was involved in the crime charged).

e. Witness' Invocation Of Fifth Amendment - See, e.g., People v. Siegel, 87 N.Y.2d 536, 640 N.Y.S.2d 831 (1995) (no error where court instructed jury that it could consider defense witness' assertion of privilege when evaluating his credibility; in fact, court could have stricken all of witness' direct testimony); People v. Chin, 67 N.Y.2d 22, 499 N.Y.S.2d 638 (1986) (since defendant adequately explored witness' open cases in order to show motive to please prosecutor, there was no right of confrontation violation); Federal Rules, 608(b) (testifying does not result in waiver of privilege); People v. Visich, 57 A.D.3d 804, 870 N.Y.S.2d 376 (2d Dept. 2008) (no right of confrontation violation where defendant attempted to cross-examine prosecution witnesses regarding uncharged crimes but witnesses invoked privilege against self-incrimination; trial court denied defendant's request to strike witnesses' direct testimony,

but charged jury that witnesses' invocation of privilege could be considered in determining credibility, and defendant also was able to explore each witness's bias and motivation to testify falsely through other evidence).

f. Dismissal Of Charges - The dismissal of formal charges does not necessarily preclude impeachment through questioning concerning the underlying acts. Compare People v. Watson, 111 A.D.2d 888, 491 N.Y.S.2d 24 (2d Dept. 1985) (defense counsel improperly precluded from questioning witness about 2 prior adjournments in contemplation of dismissal) and People v. Vandermeulen, 8 Misc.3d 812, 796 N.Y.S.2d 234 (County Ct., Sullivan Co., 2005) (where grand jury had refused to indict witness, defense precluded from asking witness regarding arrest and prosecution, but could ask witness about job suspension and pending administrative disciplinary proceeding) with People v. Parsons, 6 A.D.3d 364, 775 N.Y.S.2d 523 (1st Dept. 2004), lv denied 3 N.Y.3d 679 (no good faith basis for impeachment inquiry where police witness had been acquitted); People v. Plaisted, 2 A.D.3d 906, 767 N.Y.S.2d 518 (3rd Dept. 2003), lv denied 2 N.Y.3d 744 (2004) (defense counsel properly precluded from questioning witness without first demonstrating that absence of conviction was for reason other than acquittal or dismissal on merits); People v. Colas, supra, 206 A.D.2d 183 (defendant had been exonerated); People v. Ellis, 184 A.D.2d 307, 584 N.Y.S.2d 569 (1st Dept. 1992), lv denied 80 N.Y.2d 929, 589 N.Y.S.2d 856 (prosecution witness properly denied existence of prior sealed arrests) and People v. Booker, 134 A.D.2d 949, 521 N.Y.S.2d 953 (4th Dept. 1987) (improper to ask witness about charges on which he had been acquitted). However, a witness may never be asked whether he or she has been arrested, indicted, or tried for a crime. Richardson, §6-409.

4. Convictions

a. Nature Of Conviction - A witness may be impeached with a prior conviction that is relevant to an evaluation of the witness' credibility. See, e.g., People v. Memminger, 126 A.D.2d 752, 511 N.Y.S.2d 334 (2d Dept. 1987), lv denied 69 N.Y.2d 953, 516 N.Y.S.2d 1036 (defense improperly precluded from cross-examining witness about weapon possession and disorderly conduct charges); People v. Thompson, 120 A.D.2d 627, 502 N.Y.S.2d 232 (2d Dept. 1986) (trial court improperly

precluded cross-examination by defense about witness' 1969 assault conviction). Although the traditional rule has been that the conviction must be for a "crime," i.e., a misdemeanor or felony (see PL §10.00[6]), FCA §344.1(1) permits impeachment with a conviction for an "offense" (see PL §10.00[1]). Thus, it appears that a witness can be impeached with a violation. See People v. Grey, 41 A.D.2d 125, 341 N.Y.S.2d 485 (3rd Dept. 1973), aff'd 34 N.Y.2d 903, 359 N.Y.S.2d 286 (1974), cert denied 419 U.S. 1055, 95 S.Ct. 637 (1974). Although an "Alford" plea does not constitute an express admission of guilt, it has been held that it may be used for impeachment. People v. Miller, 91 N.Y.2d 372, 670 N.Y.S.2d 978 (1998).

b. Use Of Extrinsic Evidence - The existence of a witness' criminal conviction(s) is not a collateral matter. Thus, a conviction may be proved extrinsically after the witness denies its existence. Richardson, §6-409; see also People v. Scott, 47 A.D.3d 1016, 849 N.Y.S.2d 335 (3rd Dept. 2008), lv denied, 10 N.Y.3d 870 (court did not err in permitting People to inquire on cross-examination about statements defendant made to newspaper reporter denying involvement in hit-and-run automobile accident that severely injured four-year-old boy since other evidence established that defendant had pleaded guilty to leaving scene of accident as a result of the prior incident).

c. Underlying Facts - Consistent with the rule permitting Impeachment with prior bad acts, the examiner may explore with the witness the criminal acts underlying the conviction. But see People v. Fominas, 111 A.D.2d 868, 490 N.Y.S.2d 268 (2d Dept. 1985) (witness was properly allowed to raise Fifth Amendment, since his appeal from conviction was still pending). Similarly, where the witness pleaded guilty, there is no rule prohibiting questions regarding the original charges. People v. Boone, 304 A.D.2d 976, 759 N.Y.S.2d 778 (3rd Dept. 2003), lv denied 100 N.Y.2d 579, 764 N.Y.S.2d 389 (2003).

d. Delinquency and Youthful Offender Adjudications - Neither a youthful offender adjudication [see People v. Williams, 19 Misc.3d 139(A), 2008 WL 1902453 (App. Term, 2d & 11th Jud. Dist., 2008) (court erred in allowing prosecutor to elicit acknowledgment from defendant that prior case involved "violent felony," which

was tantamount to informing jury that defendant had been convicted of violent felony even though YO adjudication is not conviction)], nor an adjudication of juvenile delinquency is a conviction for purposes of the impeachment rule, and a juvenile delinquency adjudication may be introduced only to counter a delinquency respondent's offer of good character evidence. See FCA §344.1; Matter of Sean R., 145 A.D.2d 637, 536 N.Y.S.2d 162 (2d Dept. 1989). But see People v. Gray, 84 N.Y.2d 709, 622 N.Y.S.2d 223 (1995) (out-of-state conviction of juvenile may be used to impeach); People v. Harris, 901 N.E.2d 367 (Ill. 2008) (when defendant attempted to mislead jury by testifying, "I don't commit crimes," he opened door to introduction of juvenile adjudications for impeachment purposes); Federal Rules, 609(d).

e. Proof Of Conviction

i. Certificate Of Conviction - A properly authenticated (see CPLR 4540[c]) certificate establishing the entry of a judgment of conviction is presumptive evidence of the facts therein. See CPL §60.60(1). But see People v. Van Buren, 82 N.Y.2d 878, 609 N.Y.S.2d 170 (1993) (certificate contained defendant's name but failed to show defendant was the person named); People v. Parrino, 11 Misc.3d 80, 816 N.Y.S.2d 276 (App. Term, 9th & 10th Jud. Dist., 2006) (use of certificate to prove date of crime or some other matter of fact would violate Crawford v. Washington); People v. Vollick, 148 A.D.2d 950, 539 N.Y.S.2d 187 (4th Dept. 1989), aff'd 75 N.Y.2d 877, 554 N.Y.S.2d 473 (1990); People v. Hines, 90 A.D.2d 621, 456 N.Y.S.2d 235 (3rd Dept. 1982).

ii. Adjudicative Facts - The specific acts a person was found guilty of committing may be proved by introduction of the plea and sentencing minutes. See People v. Jacobs, 149 A.D.2d 112, 544 N.Y.S.2d 1011 (3rd Dept. 1989).

iii. Testimony Of Witness To Conviction - Proving a conviction by presenting eyewitness testimony concerning the events in court at the time of conviction "presents hearsay and best evidence problems." See People v. Conklin, 102 A.D.2d 829, 476 N.Y.S.2d 602 (2d Dept. 1984). The same would be true of testimony concerning a witness' out-of-court admission that he or she had a conviction. Richardson, §6-409.

f. Right Of Confrontation - A defendant's right to cross-Examination regarding a witness's convictions, and to other types of cross-examination aimed at the witness's credibility, is protected by the Constitution. Vasquez v. Jones, 486 F.3d 135 (6th Cir. 2007).

g. Finality Of Conviction - See United States v. Jackson, 549 F.3d 963 (5th Cir. 2008) (under Federal Rule of Evidence 609(e), defense witness could be impeached with conviction despite pendency of appeal from conviction).

5. Sandoval

a. Pretrial Ruling - The defendant in a criminal case has a right to a pretrial ruling concerning whether the prosecutor may, if the defendant takes the stand, ask questions concerning prior convictions or bad acts. See People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974); People v. Cross, 25 A.D.3d 1020, 807 N.Y.S.2d 711 (3rd Dept. 2006) (court erred in withholding Sandoval determination until after People rested); People v. Webb, 159 A.D.2d 289, 552 N.Y.S.2d 293 (1st Dept. 1990), lv denied 76 N.Y.2d 744, 558 N.Y.S.2d 906 (defendant not entitled to ruling concerning extent of cross-examination as to bad acts, only ruling which specifies the crimes which may be used). Although the prosecution will ordinarily be attempting to use the evidence for impeachment purposes, the accused is entitled to raise a pretrial challenge to use of the evidence for other purposes. Cf. People v. Felix-Torres, 281 A.D.2d 649, 721 N.Y.S.2d 415 (3rd Dept. 2001), appeal dism'd 97 N.Y.2d 681, 738 N.Y.S.2d 296 (trial court erred in ruling at Sandoval hearing that People could ask defendant whether he has a life-threatening disease in order to show that he had nothing to lose by committing murder).

There is a split of authority concerning the right of the accused to a "Sandoval hearing" prior to a bench trial. Compare Matter of Joshua P., 270 A.D.2d 272, 704 N.Y.S.2d 853 (2d Dept. 2000), lv denied 95 N.Y.2d 757, 713 N.Y.S.2d 1 (family court erred in refusing to hold Sandoval hearing); People v. Black, 183 A.D.2d 969, 583 N.Y.S.2d 799 (3rd Dept. 1992) (same judge may issue Sandoval ruling and hear trial) and People v. Oglesby, 137 A.D.2d 840, 525 N.Y.S.2d 304 (2d Dept. 1988) (defendant entitled to pretrial ruling) with People v. Stevenson, 163 A.D.2d 854, 558 N.Y.S.2d 383

(4th Dept. 1990) (Sandoval not applicable).

The respondent should request that a Sandoval hearing not be held before the trial judge. The respondent might also choose to wait until mid-trial to object to impeachment when there is a strong possibility that the respondent will not testify. Cf. People v. Delgado, 101 A.D.3d 1144 (2d Dept. 2012), lv denied 20 N.Y.3d 1097 (defendant deprived of effective assistance of counsel where, at nonjury trial, prosecutor attempted during People's case to obtain Sandoval ruling but defense counsel asked court not to make ruling until after defendant completed his testimony).

Finally, the respondent should insist upon a ruling on a Sandoval application before having to decide whether to testify at a pre-trial suppression hearing. But cf. People v. Thomas, 213 A.D.2d 73, 628 N.Y.S.2d 707 (2d Dept. 1995), aff'd 88 N.Y.2d 821, 644 N.Y.S.2d 491 (1996) (defendants were not entitled to Sandoval ruling prior to testifying before Grand Jury).

The Court of Appeals has held that one judge's Sandoval ruling does not constitute the "law of the case" and bind another judge who is ruling on the question when the accused is re-tried. People v. Evans, 94 N.Y.2d 499, 706 N.Y.S.2d 678 (2000); see also People v. Gomez, 67 A.D.3d 927, 899 N.Y.S.2d 134 (2d Dept., 2009), appeal w'drawn 14 N.Y.3d 800 (successor judge not bound by prior Sandoval ruling in same case).

b. Bad Acts And Convictions

i. Nature And Time Of Acts - The accused should not be questioned about acts which are too remote in time or which do not bear on credibility. See, e.g., State v. Black, 732 S.E.2d 880 (S.C. 2012) (manslaughter convictions, approximately 20 years old, not admissible to impeach witness's credibility; crimes of violence, which may result from myriad of causes, such as short temper, combative nature, or extreme provocation, generally do not relate to credibility); People v. Williams, 12 N.Y.3d 726, 877 N.Y.S.2d 731 (2009) (while "trial court might have been more discriminating," no error where court permitted People to elicit from defendant that he had one felony conviction and 45 misdemeanor convictions, but not go into underlying facts or circumstances); People v. Brothers, 95 A.D.3d 1227 (2d Dept. 2012)

(court erred in ruling that defendant, charged with four counts of robbery in first degree, could be asked on cross whether he had been convicted in 1998 of attempted robbery in second degree); People v. Woodard, 93 A.D.3d 944 (3d Dept. 2012) (no error in ruling permitting People to cross-examine defendant regarding 1981 conviction for felony assault); People v. Kevin Anderson, 83 A.D.3d 854, 921 N.Y.S.2d 156 (2d Dept. 2011) (reversible error where Sandoval ruling allowed prosecutor to inquire into underlying facts of defendant's prior narcotics conviction, but court allowed prosecutor to ask irrelevant and prejudicial questions concerning how drugs were packaged, source of drugs, name of defendant's supplier, where supplier lived, what supplier looked like, and what financial arrangements defendant had with supplier); People v. Minus, 38 A.D.3d 353, 833 N.Y.S.2d 16 (1st Dept. 2007), lv denied 9 N.Y.3d 848 (prosecutor properly given permission to question defendant about his lie to Criminal Justice Agency); People v. Morgan, 24 A.D.3d 950, 806 N.Y.S.2d 742 (3rd Dept. 2005), lv denied 6 N.Y.3d 815 (defendant's attempted intimidation of witness via threatening letter signed by "Grim Reaper" was probative of credibility, but probative value was outweighed by prejudice where defendant was compelled to show "Grim Reaper" tattoo to jury); People v. Young, 249 A.D.2d 576, 670 N.Y.S.2d 940 (3rd Dept. 1998), lv denied 92 N.Y.2d 908, 680 N.Y.S.2d 73 (reversible error where trial court permitted questioning regarding defendant's prior convictions dating back 18 years, and the underlying facts); People v. Hawes, 205 A.D.2d 319, 613 N.Y.S.2d 15 (1st Dept. 1994), lv denied 84 N.Y.2d 826, 617 N.Y.S.2d 147 (prosecutor improperly questioned defendant about poor school attendance and expulsion); People v. Roth, 157 A.D.2d 494, 549 N.Y.S.2d 682 (1st Dept. 1990), lv denied 75 N.Y.2d 924, 555 N.Y.S.2d 42 (improper to permit prosecutor to ask about acts which were remote in time and may have suggested a propensity to commit crime charged); People v. Livingston, 128 A.D.2d 645, 512 N.Y.S.2d 889 (2d Dept. 1987) (improper cross regarding gang membership); People v. Torres, 119 A.D.2d 508, 500 N.Y.S.2d 701 (1st Dept. 1986) (in drug sale case, defendant improperly asked about involvement in drug treatment program). See also Federal Rules, 609(b) (generally, conviction not admissible if more than 10 years have passed since date of conviction).

When the prior acts are very similar to the instant charges, the court must consider the risk of undue prejudice, but the accused is not shielded from impeachment merely because he or she specializes in a certain type of crime. See, e.g., People v. Hayes, 97 N.Y.2d 203, 738 N.Y.S.2d 663 (2002) (neither the similarity of defendant's prior convictions nor the alleged importance of his testimony required that impeachment be limited to the existence of the prior convictions); People v. Smith, 39 Misc.3d 20 (App. Term, 2d, 11th & 13th Dist., 2013), lv denied 21 N.Y.3d 1010 (court erred in allowing People to cross-examine defendant with respect to prior conviction for assault that was like charged offense); People v. Kucmierowski, 103 A.D.3d 755 (2d Dept. 2013), lv denied 21 N.Y.3d 1005 (court erred in ruling that People could question defendant as to prior conviction for driving while intoxicated and precluded prosecutor from questioning defendant about other convictions less similar to charged offense and more probative as to credibility); People v. Brothers, supra, 95 A.D.3d 1227 (court erred in ruling that defendant, charged with four counts of robbery in first degree, could be asked on cross whether he had been convicted in 1998 of attempted robbery in second degree); People v. Brightley, 56 A.D.3d 314, 867 N.Y.S.2d 90 (1st Dept. 2008) (fact that Florida incident had certain similarities to charged crime did not require preclusion of inquiry; concurring judge notes that prosecutor was properly permitted to ask whether defendant had been "convicted of possessing marihuana" and "selling it from such and such a location" despite fact that charged crimes arose out of defendant's involvement in sale of marihuana, but asserts that court abused discretion when it also allowed prosecutor to ask whether defendant participated in torturing someone since the charged offenses also involved acts of violence arising out of defendant's alleged involvement in business of selling marihuana); People v. Marquez, 22 A.D.3d 388, 802 N.Y.S.2d 665 (1st Dept. 2005) (in drug sale prosecution, no error where ruling permitted prosecutor to mention that defendant had drug-related conviction); People v. Long, 269 A.D.2d 694, 703 N.Y.S.2d 316 (3rd Dept. 2000), lv denied 94 N.Y.2d 950, 710 N.Y.S.2d 6 (error, albeit harmless, where court ruled that prosecutor could question defendant about underlying facts of conviction for assault which was similar to the assault charged); People v. Rivera, 216 A.D.2d 221, 629

N.Y.S.2d 228 (1st Dept. 1995) (reversible error where court permitted prosecutor to ask drug sale defendant about prior possession of similarly colored vials at nearby location); People v. Gottlieb, 130 A.D.2d 202, 517 N.Y.S.2d 978 (1st Dept. 1987) (in case involving assault of 63-year-old woman, prosecutor was improperly allowed to ask about prior assault of 77-year-old woman); People v. Coe, 95 A.D.2d 685, 463 N.Y.S.2d 795 (1st Dept. 1983) (prosecutor permitted to question defendant about burglary close in time and location to burglary charged).

ii. Prosecutorial Misconduct - The prosecutor must have a good faith basis for any questioning, see People v. DePasquale, 54 N.Y.2d 693, 442 N.Y.S.2d 973 (1981) (victim's brother provided information); People v. Simpson, 109 A.D.2d 461, 492 N.Y.S.2d 609 (1st Dept. 1985), and may not repeatedly challenge the respondent's denials in an effort to convince the court that those denials are untrue. See People v. Gottlieb, supra, 130 A.D.2d 202.

iii. Dismissal Of Charges - The respondent may not be impeached with bad acts which led to charges that were dismissed on the merits. See People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969) (since defendant had been acquitted, there was no good faith basis for the questioning); People v. Plaisted, 2 A.D.3d 906, 767 N.Y.S.2d 518 (3rd Dept. 2003), lv denied 2 N.Y.3d 744 (defense counsel properly precluded from questioning witness without first demonstrating that absence of conviction was for reason other than acquittal or dismissal on merits); United States v. Schwab, 886 F.2d 509 (2d Cir. 1989) (acquittal normally alters the balance between probative force and prejudice). However, a dismissal of charges in the absence of a determination on the merits does not preclude impeachment. See People v. Boone, 304 A.D.2d 976, 759 N.Y.S.2d 778 (3rd Dept. 2003), lv denied 100 N.Y.2d 579, 764 N.Y.S.2d 389 (2003) (defendant who entered into plea bargain could be questioned regarding original charge); People v. Alberti, 77 A.D.2d 602, 430 N.Y.S.2d 6 (2d Dept. 1980), cert denied 449 U.S. 1018, 101 S.Ct. 581 (same as Boone). See also People v. Strasser, 249 A.D.2d 781, 671 N.Y.S.2d 873 (3rd Dept. 1998), lv denied 91 N.Y.2d 1013, 676 N.Y.S.2d 141 (no error where court permitted impeachment with Utah conviction which had been expunged, since expungement was not dismissal on merits

and the fact remained that defendant had committed a criminal act). But see People v. Ellis, 184 A.D.2d 307, 584 N.Y.S.2d 569 (1st Dept. 1992), lv denied 80 N.Y.2d 929, 589 N.Y.S.2d 856 (prosecution witness properly denied existence of prior sealed arrests) .

iv. Pending Cases; Invocation Of Fifth Amendment – The respondent may obtain a pretrial ruling prohibiting the prosecution from conducting cross-examination concerning unrelated charges that are pending. See People v. Cantave, 21 N.Y.3d 374 (2013) (defendant with conviction pending appeal may not be cross-examined in another matter about underlying facts of conviction until pending appeal has been exhausted); People v. Bennett, 79 N.Y.2d 464, 583 N.Y.S.2d 825 (1992); People v. Betts, 70 N.Y.2d 289, 520 N.Y.S.2d 370 (1987); People v. Chambers, 184 A.D.2d 716, 585 N.Y.S.2d 84 (2d Dept. 1992) (defendant could not be questioned about kidnapping conviction pending on appeal and the facts underlying it); Matter of TM, 26 Misc.3d 823, 894 N.Y.S.2d 831 (Fam. Ct., Kings Co., 2009) (Presentment Agency precluded from cross-examining respondent about pending juvenile delinquency matter; forcing respondent to invoke Fifth Amendment is prejudicial because it allows Presentment Agency to spread facts underlying allegations in the form of questions). But see People v. Brady, 97 N.Y.2d 233, 739 N.Y.S.2d 86 (2002) (defendant could be questioned about underlying facts of crime concerning which he had pled guilty and was awaiting sentence); People v. Rivera, 70 A.D.3d 1177, 896 N.Y.S.2d 192 (3rd Dept. 2010), lv denied 15 N.Y.3d 855 (no error where court permitted People to cross-examine defendant about pending matter, but defense counsel indicated that defendant had entered into cooperation agreement and would not be prosecuted); People v. Hanson, 30 A.D.3d 537, 818 N.Y.S.2d 128 (2d Dept. 2006) (questioning regarding conviction pending on appeal may be appropriate where it is limited to fact of conviction and does not include circumstances underlying conviction); People v. Blakeney, 219 A.D.2d 10, 638 N.Y.S.2d 642 (1st Dept. 1996), aff'd 88 N.Y.2d 1011, 648 N.Y.S.2d 872 (defendant opened door to impeachment by testifying and making claim which could be rebutted with facts underlying pending case); People v. Michael, 210 A.D.2d 874, 620 N.Y.S.2d 637 (4th Dept. 1994), lv denied 84 N.Y.2d 1035, 623 N.Y.S.2d 191 (1995) (defendant could be questioned about homicide charge

where prosecutor was attempting to refute defendant's agency defense); People v. Martinez, 177 Misc.2d 67, 675 N.Y.S.2d 825 (Sup. Ct., Kings Co., 1998) (defendant could be questioned at suppression hearing about pending case since his testimony could not be used in subsequent proceedings).

A defendant may also prevent such questioning when testifying before the Grand Jury. People v. Smith, 87 N.Y.2d 715, 642 N.Y.S.2d 568 (1996).

This rule may extend to cross-examination about uncharged crimes. Cf. People v. Williams, 157 A.D.2d 760, 550 N.Y.S.2d 54 (2d Dept. 1990).

c. Use Of Aliases - In People v. Walker, 83 N.Y.2d 455, 611 N.Y.S.2d 118 (1994), the Court of Appeals refused to adopt a rule precluding the prosecution from cross-examining a defendant concerning the prior use of aliases or other false pedigree information. See also People v. Richardson, 17 A.D.3d 196, 795 N.Y.S.2d 181 (1st Dept. 2005), lv denied 5 N.Y.3d 793 (no error where court permitted inquiry into defendant's use of aliases even though subject was not addressed at Sandoval hearing).

d. Advance Notice Of Prosecutor's Intent To Impeach – When appropriate, the respondent should demand that the prosecution provide notification of all prior "uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the [respondent]." See CPL §240.43. Even when no request is made, the prosecutor should advise the court prior to asking about uncharged bad acts, so that prejudicial facts are not raised prior to an objection. See People v. Roth, supra, 157 A.D.2d 494.

e. Failure Of Respondent To Seek Pretrial Ruling - A failure to make a pretrial motion does not constitute a waiver that prevents the respondent from objecting at trial when a prior conviction or bad act is raised by the prosecutor. See People v. Ortero, 75 A.D.2d 168, 428 N.Y.S.2d 965 (2d Dept. 1980); People v. Alamo, 63 A.D.2d 6, 406 N.Y.S.2d 787 (1st Dept. 1978).

f. Finality Of Pretrial Ruling – Since the respondent has relied on it, a pretrial ruling may not be changed at trial. See People v. Perez, 40 A.D.3d 1131,

837 N.Y.S.2d 275 (2d Dept. 2007) (prejudice was patent whether or not defendant had taken stand before modification of ruling); People v. Powe, 146 A.D.2d 718, 537 N.Y.S.2d 208 (2d Dept. 1989). Of course, the prosecutor must strictly follow the ruling. See People v. Wright, 260 A.D.2d 935, 690 N.Y.S.2d 286 (3rd Dept. 1999) (reversible error where prosecutor mistakenly asked about murder conviction); People v. Perez, 127 A.D.2d 707, 511 N.Y.S.2d 687 (2d Dept. 1987).

However, the ruling can be changed if the respondent's testimony "opens the door." See, e.g., People v. Moore, 92 N.Y.2d 823, 677 N.Y.S.2d 56 (1998) (ambiguous comments about lack of knowledge about what takes place in Central Park could not be construed as assertions that defendant had not committed any robberies in Central Park; therefore, defendant did not open the door to questioning about prior crimes); People v. Fisher, 104 A.D.3d 868 (2d Dept. 2013) (after obtaining ruling that he could ask defendant if he was previously accused of having “inappropriate sexual relationship” with student without opening door to cross-examination concerning certain prior allegations, defense counsel did not open door by asking defendant whether he had “ever been accused of acting inappropriately in a sexual way towards a student”); People v. Snyder, 103 A.D.3d 1143 (4th Dept. 2013) (defendant’s testimony that he had been law-abiding citizen for past three years did not open door to questioning about sexual abuse committed approximately nine years earlier); People v. Marable, 33 A.D.3d 723, 826 N.Y.S.2d 273 (2d Dept. 2006), lv denied, 8 N.Y.3d 882 (defendant opened door to questioning on underlying facts when he testified that he pleaded guilty in prior case because he was, in fact, guilty, thereby implying that his present failure to plead guilty was proof of innocence).

g. Cross-Examination Of Respondent By Attorney For Co-Respondent - A pretrial Sandoval ruling does not prevent counsel for a co-respondent from impeaching the respondent. See People v. McGee, 68 N.Y.2d 328, 508 N.Y.S.2d 927 (1986); but see People v. Lawson, 37 Misc.3d 1227(A) (Sup. Ct., Queens Co., 2012) (Sandoval not applicable to cross-examination of defendant by co-defendant, but court has discretion to limit such cross-examination).

h. Preemptive Presentation Of Evidence By Accused –

Compare Ohler v. United States, 529 U.S. 753, 120 S.Ct.185 (2001) (defendant who elects to introduce prior crimes impeachment evidence waives right to object) with State v. Gary M.B., 676 N.W.2d 475 (Wis. 2004) (defendant did not waive objection by preemptively testifying) and State v. Thang, 41 P.3d 1159 (Wash. 2002) (court holds, under State Constitution, that no waiver results since lawyer who introduced other crimes evidence only after losing battle to exclude it was not introducing evidence voluntarily).

i. Prosecution Witnesses – The Sandoval rule does not apply to prosecution witnesses. See People v. Allen, 50 N.Y.2d 898, 430 N.Y.S.2d 588 (1980), aff'g 67 A.D.2d 558, 416 N.Y.S.2d 49 (2d Dept. 1979) (defendant's right of confrontation was violated); People v. Blanchard, 150 A.D.2d 705, 541 N.Y.S.2d 578 (2d Dept. 1989); People v. Memminger, supra, 126 A.D.2d 752.

6. Motive To Falsify

a. Use Of Extrinsic Evidence - Extrinsic evidence of a witness' motive to lie may be offered. In fact, there is no requirement that the examiner question the witness about the motive to falsify before extrinsically proving it. See People v. Mink, 267 A.D.2d 501, 699 N.Y.S.2d 742 (3rd Dept. 1999), lv denied 94 N.Y.2d 950, 710 N.Y.S.2d 7; Richardson, §§ 6-415, 417.

b. Bias And Hostility - Bias in favor of a party is typically established by way of evidence of a witness' family, business or social relationship to the party. Hostility can be shown through evidence of hostile acts or statements or a history of quarrels. Richardson, §6-415. See, e.g., People v. Spencer, 20 N.Y.3d 954 (2012) (court erred in precluding defendant from attempting to establish that complainant had motive to frame him because complainant and third party defendant claimed was the perpetrator were close friends, and that complainant permitted third party to deal drugs and complainant and third party drag raced cars together; provided counsel has good faith basis for eliciting evidence, extrinsic proof tending to establish reason to fabricate is never collateral and may not be excluded on that ground); People v. Halter, 19 N.Y.3d 1046 (2012) (judge gave defendant adequate leeway in portraying nature of material on daughter's MySpace account and conflict that arose between

them over postings, and permitted testimony regarding controversy over daughter's attire and defendant's negative reaction to clothing choices); Corby v. Artus, (2d Cir. 2012) (no Confrontation Clause violation when court barred cross-examination of witness as to whether she had accused petitioner of crimes only after being told that petitioner had accused her, since petitioner was able to show that witness had motive to lie to deflect attention from herself and retaliate against petitioner for his accusation); People v. Grant, 60 A.D.3d 865, 875 N.Y.S.2d 532 (2d Dept. 2009) (reversible error where trial court excluded evidence, including testimony as to statements complainant allegedly made threatening to "get" defendant, that went directly to credibility of complainant); United States v. Figueroa, 548 F.3d 222 (2d Cir. 2008) (preclusion of cross-examination about swastika tattoos violated Confrontation Clause since swastika is commonly associated with white supremacism and neo-Nazi groups harboring extreme forms of racial, religious and ethnic hatred and prejudice against minority groups, including that to which defendant belonged); Brinson v. Walker, 547 F.3d 387 (2d Cir. 2008) (in habeas proceeding challenging decisions in People v. Brinson, 265 A.D.2d 879, 697, Second Circuit concludes that trial court improperly prohibited defendant from cross-examining complainant regarding racial bias; given intensity and extremity of bias alleged, and likelihood that one possessing such bias might distort testimony against object of bias, trial court had no discretion to preclude cross-examination); People v. Brooks, 39 A.D.3d 428, 834 N.Y.S.2d 527 (1st Dept. 2007), lv denied 9 N.Y.3d 873 (People permitted to impeach defendant's wife regarding loyalty to defendant through his long incarceration on rape conviction); People v. Szwec, 271 A.D.2d 322, 707 N.Y.S.2d 157 (1st Dept. 2000) (trial court erred by not allowing defense to introduce specific facts concerning successful civil suit brought by defendant against arresting officers); People v. Green, 156 A.D.2d 465, 548 N.Y.S.2d 752 (2d Dept. 1989) (defendant improperly precluded from calling witness; People's witness did not indicate full extent of bias); Matter of Edward F., 154 A.D.2d 464, 546 N.Y.S.2d 630 (2d Dept. 1989) (evidence that police beat up respondent improperly excluded); People v. Jones, 148 A.D.2d 547, 538 N.Y.S.2d 876 (2d Dept. 1989) (evidence of defendant's injuries from altercation with complainant improperly excluded); State v. Riggs, 942

P.2d 1159 (Ariz. 1997) (witness' refusal to be interviewed may prove hostility). But see People v. Mestres, 41 A.D.3d 618, 838 N.Y.S.2d 164 (2d Dept. 2007), lv denied 9 N.Y.3d 924 (defendant's alleged rejection of complainant's offer to pay $7,000 to defendant in exchange for his marrying her so that she could obtain citizenship was too remote and speculative to establish motive to fabricate); People v. Bailey, 19 A.D.3d 302, 798 N.Y.S.2d 406 (1st Dept. 2005) (no error in exclusion of evidence of civilian complaint filed by defendant against arresting officers where defendant failed to show the character and seriousness of the complaint); People v. Williams, 19 A.D.3d 228, 798 N.Y.S.2d 3 (1st Dept. 2005), aff'd, 7 N.Y.3d 15 (2006) (defendant properly precluded from questioning his police witness regarding witness's suspected perjury in another case in order to establish testifying officers' motive to support their fellow officer's story; evidence was excessively remote and speculative).

The accused's interest in the result of the proceeding creates a motive to falsify. See also People v. Cuevas, 37 Misc.3d 126(A) (App. Term, 1st Dept., 2012), lv denied 21 N.Y.3d 911 (court properly permitted People to question defendant about his parole status); But see United States v. Gaines, 457 F.3d 238 (2d Cir. 2006) (courts directed not to charge juries that testifying defendant's interest in outcome of case creates motive to falsify, since such an instruction presumes that the defendant is guilty).

c. Financial Or Property Interest - See, e.g., People v. Antonik, 42 Misc.3d 139(A) (App. Term, 2d Dept., 2014) (no error in limitation on cross-examination as to whether police had financial incentive to testify falsely to earn overtime pay); People v. Belvett, 105 A.D.3d 1040 (1st Dept. 2013), lv denied 21 N.Y.3d 1040 (court erred in refusing to permit cross-examination of witnesses regarding possible loss of apartment due to drug-selling activity); People v. Coakley, 73 A.D.3d 565, 900 N.Y.S.2d 643 (1st Dept. 2010), lv denied 15 N.Y.3d 772 (prosecutor's reference in summation to compensation given to defense expert for testimony, a standard impeachment technique, did not unconstitutionally burden defendant's right to call witnesses); People v. Stein, 10 A.D.3d 406, 781 N.Y.S.2d 654 (2d Dept. 2004) (People improperly failed to disclose complainants' filing of notice of claim with defendant's employer); People v. Newsome, 303 A.D.2d 317, 757 N.Y.S.2d 274 (1st

Dept. 2003), lv denied 100 N.Y.2d 564, 763 N.Y.S.2d 822 (2003) (defendant properly denied opportunity to explore expert's conclusions in unrelated cases after People elicited fact that expert was testifying for fee); People v. Hoover, 298 A.D.2d 599, 750 N.Y.S.2d 304 (2d Dept. 2002), lv denied 99 N.Y.2d 615, 757 N.Y.S.2d 826 (2003) (no error where trial court precluded defendant from cross-examining detectives about unrelated civil suit against police department); People v. Mink, supra, 267 A.D.2d 501 (court erred in excluding evidence that sexual abuse complainant told boyfriend she was looking for financial compensation from defendant and wanted his help in getting the money); People v. Nyemchek, 143 A.D.2d 1057, 533 N.Y.S.2d 770 (2d Dept. 1988) (trial court erred by thwarting cross-examination of officer concerning defendant's civil suit against witness).

d. Witness' Fear Of Harm - See, e.g., People v. Henderson, 13 N.Y.3d 844, 892 N.Y.S.2d 292 (2009) (prosecutor's questions reasonably attacked inmate-victim's truthfulness and explored motives for testimony clearing defendant of participation in fight, including intimidation or fear of reprisal); Longus v. United States, 52 A.3d 836 (D.C. Ct. App. 2012) (right of confrontation violated when court allowed defendant to ask detective whether he was under investigation by the U.S. Attorney for coaching witness to provide untruthful information during homicide investigation, but barred defense counsel from questioning detective about, or introducing evidence of, facts underlying allegations; facts were relevant to detective's bias and motive to curry favor with government, and corrupt behavior could show willingness to thwart discovery of truth); People v. Garcia, 47 A.D.3d 830, 849 N.Y.S.2d 637 (2d Dept. 2008), lv denied, 10 N.Y.3d 863 (no error in preclusion of defense cross-examination of witnesses as to immigration status, which, defense counsel contended, gave them reason to cooperate with prosecution and fabricate testimony; proposed line of inquiry was too remote and speculative to suggest motive to fabricate); People v. Norcott, 6 N.Y.3d 231, 811 N.Y.S.2d 613 (2005) (no error in exclusion of testimony from People's primary witness that she implicated defendant and his cohorts only after she was told that defendant had implicated her in another murder; trial court gave defendant wide latitude in eliciting witness's bias and hostility and her fear-based motive to lie, and

defense was also permitted to cross-examine her about welfare fraud and her criminal conviction for possession of a weapon, as well as her familiarity with drug trade); People v. Anonymous, 275 A.D.2d 210, 712 N.Y.S.2d 482 (1st Dept. 2000) (prosecutor properly allowed to question defendant's alibi witness concerning fear of defendant); People v. Ashner, 190 A.D.2d 238, 597 N.Y.S.2d 975 (2d Dept. 1993) (court should have allowed counsel to question witness about his motive to commit theft); People v. Wade, 99 A.D.2d 474, 470 N.Y.S.2d 53 (2d Dept. 1984) (defendant improperly precluded from cross-examining rape complainant about boyfriend's temper).

e. Right Of Confrontation - See Olden v. Kentucky, 488 U.S. 227, 109 S.Ct. 480 (1988) (extreme limitation of examination may violate constitution); Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431 (1986); United States v. Figueroa, 548 F.3d 222; Henry v. Speckard, 22 F.3d 1209 (2d Cir. 1994).

f. Witness Cooperation Agreement - A witness' promise to testify in exchange for favorable treatment is exculpatory material, and must be disclosed by the prosecutor. See, e.g., United States v. Bagley, 473 U.S. 667, 105 S.Ct. 3375 (1985); People v. Novoa, 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987); People v. Conlan, 146 A.D.2d 319, 541 N.Y.S.2d 347 (1st Dept. 1989); see also People v. Rodney, 109 A.D.3d 439 (1st Dept. 2013) (witness's subjective belief as to reason for dismissal would be relevant); Childers v. Floyd, 642 F.3d 953 (11th Cir. 2011) (no habeas relief where defense counsel cross-examined witness regarding plea agreement and jury knew he pleaded in exchange for testimony and avoided possible sentence of 125 years, and jury learned of each inconsistent statement made by witness, but counsel was not permitted to question witness about acquittal of co-defendant at trial at which witness also testified, which allegedly created incentive to produce better result at defendant's trial, or about Notice of Revocation of Terms of Plea Agreement in which State alleged that witness made incomplete or untruthful statements; questioning about plea agreement exposed bias, and Notice of Revocation and acquittal were merely individual manifestations of that bias).

There is a difference of opinion as to whether the prosecution may offer into evidence the text of the agreement prior to a defense attack. Compare United States v.

Cosentino, 844 F.2d 30 (2d Cir. 1988) (not admissible) with People v. Rivera, 155 A.D.2d 941, 547 N.Y.S.2d 760 (4th Dept. 1989).

7. Prior Inconsistent Statements - A witness may be impeached with a prior inconsistent statement. The statement does not constitute proof of the truth of its contents. See FCA §343.5(2). But see People v. Bradley, 99 A.D.3d 934 (2d Dept. 2012) (when truth of matter asserted in inconsistent statement is relevant to core factual issue, relevancy is not restricted to issue of credibility and right to present defense may encompass right to place before trier of fact secondary forms of evidence, such as hearsay); Federal Rules, 801(d)(1)(A) (statement can be admitted as substantive evidence under certain circumstances). The usual rule is that if the witness admits making the statement, additional, extrinsic evidence of the statement is not admissible. See, e.g., People v. Person, 26 A.D.3d 292, 810 N.Y.S.2d 68 (1st Dept. 2006), lv granted 7 N.Y.3d 816 (court declines to make exception for videotaped statements).

The court has some discretion to exclude inconsistent statements if they pertain to a collateral issue. People v. Gomez, 79 A.D.3d 1065, 913 N.Y.S.2d 758 (2d Dept. 2010) (in sex crime prosecution, reversible error where court excluded testimony regarding child's statement that abuse never happened and there were "no problems" in Florida when she lived there with defendant).

a. Foundation

i. Oral Statements – Prior to the introduction of extrinsic evidence of a prior oral statement which is inconsistent with a witness' trial testimony, the witness must be asked whether he or she made the statement. The examiner should specify the name of the person to whom the statement was made, and the time, place and substance of the statement. People v. Carter, 227 A.D.2d 661, 641 N.Y.S.2d 908 (3rd Dept. 1996), lv denied 88 N.Y.2d 1067, 651 N.Y.S.2d 411; Richardson, §6-411(a). See People v. Duncan, 46 N.Y.2d 74, 412 N.Y.S.2d 833 (1978), cert denied 442 U.S. 910, 99 S.Ct. 2823; People v. Fiedorczyk, 159 A.D.2d 585, 552 N.Y.S.2d 443 (2d Dept. 1990); People v. Watford, 146 A.D.2d 590, 536 N.Y.S.2d 835 (2d Dept. 1989). But see People v. Bell, 45 A.D.2d 362, 357 N.Y.S.2d 539 (1st Dept.

1974), aff'd 38 N.Y.2d 116, 378 N.Y.S.2d 686 (1975) (foundation adequate where witness claimed that he did not know person to whom he had made prior statement).

In Mattox v. United States, 156 U.S. 237, 15 S.Ct. 337 (1895), where the defendant attempted to impeach statements contained in a witness's prior testimony, a Supreme Court majority held that the traditional foundation requirement applies even when the witness is unavailable and it is impossible to lay a foundation. See also People v. Whitley, 14 A.D.3d 403, 788 N.Y.S.2d 94 (1st Dept. 2005), lv denied 4 N.Y.3d 892. However, in Carver v. United States, 164 U.S. 694, 17 S.Ct. 228 (1897), the Supreme Court limited the holding in Mattox to cases involving the admission of prior testimony; that is, cases in which the defendant had an opportunity to cross-examine the witness. Accordingly, New York courts have held that in other types of cases, the usual foundation is not required before a non-appearing hearsay declarant may be impeached with his/her prior inconsistent statements. See People v. DelValle, 248 A.D.2d 126, 670 N.Y.S.2d 827 (1st Dept. 1998) People v. Canady, 186 A.D.2d 749, 589 N.Y.S.2d 184 (2d Dept. 1992), lv denied 81 N.Y.2d 786, 594 N.Y.S.2d 732 (1993); People v. Conde, 16 A.D.2d 327, 228 N.Y.S.2d 69 (3rd Dept. 1962), aff'd 13 N.Y.2d 939, 244 N.Y.S.2d 314 (1963); People v. Jackson, 2002 WL 1798837 (Sup. Ct., Kings Co.).

Under the so-called Bornholdt rule, a witness may be impeached with an omission of fact in a prior statement if, on the prior occasion, the witness' attention was called to the matter and he was specifically asked about the facts embraced in the question propounded at trial. People v. Bornholdt, 33 N.Y.2d 75, 350 N.Y.S.2d 369 (1973); see People v. Greene, 110 A.D.3d 827 (2d Dept. 2013) (omission of fact at prior time is insufficient for impeachment purposes unless, on prior occasion, witness' attention was called to matter and he was specifically asked about omitted fact; here, it was error to preclude defendant from questioning witness about previous omission of reference to defendant's "squinting," and "partly closed" left eye, which was significant factor in witness's identification); People v. Selman, 55 A.D.3d 638, 867 N.Y.S.2d 98 (2d Dept. 2008) (omission of fact at prior time may not be used for impeachment unless it is shown that, on previous occasion, witness' attention was called to matter and he

was specifically asked about facts embraced in question asked at trial); People v. Broadhead, 36 A.D.3d 423, 827 N.Y.S.2d 138 (1st Dept. 2007), lv denied 8 N.Y.3d 919 (defendant properly precluded from impeaching witness who failed to mention defendant's verbal threat when testifying in grand jury, since grand jury questioning did not call for information and omission was not unnatural); People v. Montalvo, 285 A.D.2d 384, 728 N.Y.S.2d 448 (1st Dept. 2001), lv denied 96 N.Y.2d 941, 733 N.Y.S.2d 381 (although person may normally omit details unless asked directly about a matter, that rationale has limited applicability to defendant's testimony before grand jury, where defendant is given opportunity to prevent indictment by presenting any exculpatory information); People v. Skinner, 277 A.D.2d 27, 715 N.Y.S.2d 412 (1st Dept. 2000), lv denied 96 N.Y.2d 907, 730 N.Y.S.2d 805 (2001) (defendant, who testified that he had been coerced into making inculpatory statements, was properly impeached with prior testimony in which he denied making the statements and never mentioned that he had been physically abused); People v. Ortiz, 250 A.D.2d 372, 672 N.Y.S.2d 327 (1st Dept. 1998), lv denied 92 N.Y.2d 881, 678 N.Y.S.2d 28 (defendant was properly precluded from impeaching witness where it was not established that witness' attention was called to the omitted facts on the prior occasion); People v. Medina, 249 A.D.2d 166, 672 N.Y.S.2d 53 (1st Dept. 1998), lv denied 92 N.Y.2d 901, 680 N.Y.S.2d 65 (rule requiring that witness' attention was called to specific facts omitted did not apply to buy report prepared by undercover whose credibility was being attacked); People v. Wise, 176 A.D.2d 595, 575 N.Y.S.2d 39 (1st Dept. 1991), lv denied 79 N.Y.2d 866, 580 N.Y.S.2d 738 (1992); People v. Hudson, 147 A.D.2d 710, 538 N.Y.S.2d 321 (2d Dept. 1989); People v. Jones, 136 A.D.2d 740, 524 N.Y.S.2d 79 (2d Dept. 1988).

But there is some authority for permitting impeachment by omission where, in the previous statement, it would been natural for the witness to have mentioned the omitted facts. See People v. Tinkler, 105 A.D.3d 1140 (3d Dept. 2013), lv denied 21 N.Y.3d 1020 (impeachment permissible where defendant gave detailed statement to police regarding events surrounding victim's death, but did not include account of victim purportedly falling on stairs while coming to eat lunch; it would be reasonable to expect defendant to mention all potential injuries sustained by victim while in his care that day);

People v. Bishop, 206 A.D.2d 884, 615 N.Y.S.2d 163 (4th Dept. 1994), lv denied 84 N.Y.2d 933, 621 N.Y.S.2d 530 (while citing People v. Savage, 50 N.Y.2d 673, which permits impeachment when circumstances made it most unnatural for witness to omit certain information from prior statement, Fourth Department notes that court should admit statement even if degree of inconsistency is arguable); People v. Dismel, 16 Misc.3d 1120(A), 847 N.Y.S.2d 898 (Sup. Ct., Kings Co., 2007) (under Savage, failure of complainant to mention some of the alleged sex offenses during grand jury testimony constitutes prior inconsistent statement; even under more restrictive Bornholdt standard, complainant's failure constitutes prior inconsistent statement since she was asked three open-ended questions regarding whether defendant did "anything else" during relevant time period).

If the witness admits having made the statement, the impeachment is complete. People v. Wynn, 67 A.D.3d 423, 888 N.Y.S.2d 38 (1st Dept. 2009), lv denied 15 N.Y.3d 811 (no error where judge precluded defendant from introducing document reflecting prior inconsistent statement after witness had admitted making statement).

If the witness denies or does not recall making the statement, the witness to whom the statement was made may be called to prove that the statement was made. People v. Carter, supra, 227 A.D.2d 661; see also United States v. Iglesias, 535 F.3d 150 (3rd Cir. 2008) (where witness who had testified frankly under oath two days earlier at suppression hearing stated at trial that he "can't answer the question" and was otherwise evasive and vague, suppression hearing testimony was admissible under prior inconsistent statements rule, since inconsistency is not limited to diametrically opposed answers, and, when witness demonstrates reluctance to testify and forgets certain facts at trial, testimony can be found to be inconsistent).

ii. Written Statements - When impeaching with a written statement, the examiner should ask the witness whether he or she made the writing, and then ask whether the witness made the inconsistent entry. The adversary is entitled to obtain the statement after it is used for impeachment. People v. Hill, 285 A.D.2d 474, 727 N.Y.S.2d 892 (2d Dept. 2001). If the witness denies or does not recall the entry, the writing may be admitted after it is shown to the witness and he or she admits having

written it. Irrelevant material in the writing must be redacted. Richardson, §6-411(b). See also Federal Rules, 613 (statement need not be shown nor its contents disclosed to witness, but it must be disclosed upon request by opposing counsel).

iii. Prior Testimony - When the inconsistent statement appears in a transcript, the witness should be asked whether or not he or she recalls both the inconsistent testimony, and the question(s) which preceded it. But see People v. Dachille, 14 A.D.2d 554, 218 N.Y.S.2d 156 (2d Dept. 1961) (foundation was adequate despite failure to ask witness whether he had been asked specific questions and given specific answers, since witness was aware that prior testimony would be used to impeach him). The examiner should read from the transcript and refer opposing counsel to the page(s) on which the testimony appears. If the witness denies or does not recall giving the testimony, the appropriate portion of the transcript should be offered into evidence.

b. Introduction Of Police Reports And Other Records - Unless opposing counsel stipulates to its admissibility, a police report, or some other record which contains what appears to be a witness' inconsistent statement, will sometimes not be usable as impeachment material in the absence of testimony by the person who heard and recorded the statement, since it may not be clear that the record contains the witness' actual statement, as opposed to the recorder's characterization. See People v. Ortiz, 85 A.D.3d 588 (1st Dept. 2011) (reversible error where, although court concluded that prosecutor’s testimony concerning statements made by defendant during jailhouse interview could not be impeached with statements in People’s case summary and VDF, inference that witness prepared documents was a reasonable one since prosecutor testified that either she or another prosecutor had prepared documents, that other prosecutor was not present during jailhouse interview, that it was "very possible" she had prepared case summary, and that VDF bore her typewritten name; even assuming she did not personally prepare each document, it is entirely unreasonable to think that she, the lead prosecutor in a serious homicide case, did not know what each document said about a matter of great import); People v. Bernardez, 85 A.D.3d 936 (2d Dept. 2011) (absent proof that complainant signed, prepared, or verified accuracy of police

report or portion of it, statements in report attributed to complainant were not admissible as her prior inconsistent statements); People v. White, 272 A.D.2d 239, 707 N.Y.S.2d 456 (1st Dept. 2000), lv denied 95 N.Y.2d 940; United States v. Almonte, 956 F.2d 27 (2d Cir. 1992); People v. Henson, 113 A.D.2d 954, 493 N.Y.S.2d 851 (2d Dept. 1985); People v. Adams, 72 A.D.2d 156, 423 N.Y.S.2d 936 (1st Dept. 1980), aff'd 53 N.Y.2d 1, 439 N.Y.S.2d 877 (1981), cert denied 454 U.S. 854, 102 S.Ct. 301. See also People v. Jones, 190 A.D.2d 31, 596 N.Y.S.2d 811 (1st Dept. 1993) (defense counsel's affirmation improperly used to impeach defendant where several sources were identified). Obviously, if the recorder has an independent recollection of the statement that was transcribed, he or she could provide testimony with respect to the statement and the record need not be offered. On the other hand, if the recorder has no recollection of the statement, the document could be offered as a past recollection recorded or a business record. If the hearsay informant had a business duty to report to the recorder, the inconsistent statement could be admitted to prove the truth of its contents. See Johnson v. Lutz, 253 N.Y. 124 (1930).

c. Pretrial Silence Of Accused – The respondent's failure to make an exculpatory statement at the time of arrest may not be used to impeach the respondent at trial. See People v. DeGeorge, 73 N.Y.2d 614, 543 N.Y.S.2d 11 (1989); People v. Conyers, 52 N.Y.2d 454, 438 N.Y.S.2d 741 (1981). See also People v. Tucker, 87 A.D.3d 1077 (2d Dept. 2011) (evidence improperly admitted where defendant merely denied role in the incident in general manner, and “maintained an effective silence”); People v. Patterelli, 68 A.D.3d 1151, 889 N.Y.S.2d 748 (3rd Dept. 2009) (rule applies where defendant responds to questioning but declines to answer certain questions or desires to halt questioning); People v. Mejia, 256 A.D.2d 422, 683 N.Y.S.2d 541 (2d Dept. 1998) (after defendant testified that she had attempted to explain her side to the police, prosecutor was improperly permitted to ask her whether she had reiterated her story after she was arrested). However, if the respondent did make a statement, the cross-examiner may ask about omitted facts to which the respondent testifies at trial. See People v. Savage, 50 N.Y.2d 673, 431 N.Y.S.2d 382 (1980); People v. Spinelli, 214 A.D.2d 135, 631 N.Y.S.2d 863 (2d Dept. 1995) (since

defendant must have chance to explain on cross or re-direct, and court must advise jury that defendant is under no obligation to speak, prosecutor cannot attack defendant for the first time in summation); People v. Myrie, 137 A.D.2d 563, 524 N.Y.S.2d 303 (2d Dept. 1988); but see People v. Barber, 143 A.D.2d 450, 532 N.Y.S.2d 447 (3rd Dept. 1988) (although defendant withheld name of possible suspect when he spoke to police, he may have done so as a result of fear, loyalty, or advice of counsel).

d. Admission Of "Consistent" Facts - The party who called the witness may introduce portions of a prior statement which explain or clarify the inconsistent portion that was used to impeach the witness. See People v. Keeling, 141 A.D.2d 668, 529 N.Y.S.2d 560 (2d Dept. 1988).

e. Statements Made To Defense Counsel – See, e.g., People v. Johnson, 46 A.D.3d 276, 847 N.Y.S.2d 74 (1st Dept. 2007), lv denied, 10 N.Y.3d 865 (no error in impeachment of defendant with statements her attorney made at bail application since there was reasonable inference that statements were attributable to defendant).

8. Prior Sexual Conduct Or False Allegations Of Victim In Sex Offense Case - Evidence of a victim's prior sexual conduct is admissible if it: 1) was with the accused; 2) resulted in a conviction for prostitution within 3 years prior to the offense charged; 3) rebuts prosecution evidence of the victim's abstinence from sex; 4) rebuts evidence of the accused's connection to the victim's pregnancy or disease, or to semen that was recovered; or 5) is determined to be relevant and admissible in the interests of justice after an offer of proof or a hearing. FCA §344.4. See, e.g., People v. Halter, 19 N.Y.3d 1046 (2012) (evidence regarding sexual nature of daughter's relationship with older teenage boy fell within Rape Shield Law); People v. Scott, 16 N.Y.3d 589 (2011) (no error in exclusion of evidence regarding complainant's sexual conduct at party on night defendant allegedly raped her, but, had People introduced evidence of bruising caused by sexual contact and attributed such evidence to defendant, excluded evidence would have been relevant); People v. Williams, 81 N.Y.2d 303, 598 N.Y.S.2d 167 (1993) (requirement that accused make threshold showing of relevance is not unconstitutional); State v. Bishop, 291 P.3d 538 (Mont.

2012) (conversations of sexual nature between defendant and complainant in days leading up to sexual assault were not “sexual conduct” under exception in rape shield law); State v. J.A.C., 44 A.3d 1085 (N.J. 2012) ("sexual conduct" includes child complainant's sexually explicit instant message correspondence with adult men; sexual conduct that is matter of fantasy rather than fact can be protected under statute); Mayo v. Commonwealth, 322 S.W.3d 41 (Ky. 2010) (rape shield law applicable to evidence of sexual relations between victim and spouse); State v. Alberts, 722 N.W.2d 402 (Iowa 2006) (skinny-dipping incident that was likely precursor to sexual activity was covered by rape shield law); People v. Tohom, 109 A.D.3d 253 (2d Dept. 2013) (no error in exclusion of evidence purportedly showing that another man had impregnated victim where offer of proof consisted of fact that man had lived next door to victim, possibly at time of conception, that victim had been seen texting people, and that, at uncertain time, victim had made drawing with picture of heart, baby, and other man’s name); People v. Fisher, 104 A.D.3d 868 (2d Dept. 2013) (interests of justice exception applied where inquiries about complainant having sex with defendant’s brother were relevant to defense claim that certain phone calls and text messages were made by defendant’s brother using defendant’s phone); People v. Garrison, 103 A.D.3d 751 (2d Dept. 2013), lv denied 21 N.Y.3d 943 (interests of justice exception not applicable where complainant’s 2009 arrest for prostitution about 16 months after charged 2007 assault was not relevant to defendant’s allegation that complainant had engaged in prostitution in 2007); Gagne v. Booker, 680 F.3d 493 (6th Cir. 2012) (exclusion of evidence of victim's past willingness to engage in consensual group sex was not objectively unreasonable application of Supreme Court precedent); People v. Simonetta, 94 A.D.3d 1242 (3d Dept. 2012) (interests of justice exception not applied to evidence of victim’s sexual behavior towards defendant’s friend while at defendant’s apartment; person’s willingness to engage in sexual conduct with one person around the time of incident in question is not indicative of concomitant desire to consent to such behavior with another); United States v. Ellerbrock, 70 M.J. 314 (Ct. App., U.S. Armed Forces 2011) (court erred by preventing defendant from introducing evidence of complainant's first marital affair to show motive to lie about consensual nature of sex with defendant to

protect marriage); Barbe v. McBride, 521 F.3d 443 (4th Cir. 2008) (state court unreasonably applied clearly established federal law by determining that West Virginia's rape shield law was per se exclusionary rule; state court must make case-by-case assessment of whether exclusionary rule is arbitrary or disproportionate to State's legitimate interests); People v. Lane, 47 A.D.3d 1125, 849 N.Y.S.2d 719 (3rd Dept. 2008), lv denied, 10 N.Y.3d 866 (no error in the preclusion of evidence of prosecution witness's sexual misconduct with victim, which was offered by defendant to impeach witness's credibility); People v. Taylor, 40 A.D.3d 782, 835 N.Y.S.2d 442 (3rd Dept. 2007), lv denied 9 N.Y.3d 927 (certain evidence of victim's HIV status was covered by statute); People v. Curry, 11 A.D.3d 150, 782 N.Y.S.2d 66 (1st Dept. 2004) (defendant properly precluded from exploring complainant's alleged statement that injuries were inflicted by one of her "tricks" where defendant was attributing injuries to known assailant); People v. Loja, 305 A.D.2d 189, 761 N.Y.S.2d 7 (1st Dept. 2003), lv denied 100 N.Y.2d 584, 764 N.Y.S.2d 394 (2003) (court erred in excluding testimony regarding complainant's prior intimate behavior with defendant); People v. Jovanovic, 263 A.D.2d 182, 700 N.Y.S.2d 156 (1st Dept. 1999), appeal dism'd 95 N.Y.2d 846, 713 N.Y.S.2d 519 (e-mail sent to defendant by complainant, exhibiting interest in sadomasochism, not subject to Rape Shield Law; even if it was covered by law, it fell within exception for prior sexual conduct with accused, exception for evidence indicating that someone else was responsible for complainant's injuries, and interests of justice exception); People v. Halbert, 175 A.D.2d 88, 572 N.Y.S.2d 331 (1st Dept. 1991), aff'd 80 N.Y.2d 865, 587 N.Y.S.2d 891 (1992) (evidence properly excluded where defendant claimed victim left home not to escape, but to continue sexual relationship with boyfriend); People v. Halmond, 190 Misc.2d 175, 737 N.Y.S.2d 787 (Sup. Ct., Monroe Co., 2001) (under interests of justice exception, court admits complainant's admission that she had engaged in sexual relations with male other than defendant the day before alleged rape; admits complainant's admission that she had engaged in prior sexual relations with 2 men she refused to identify; admits complainant's statement that she had been raped on 2 prior occasions but was too intoxicated to recall the details; refused to admit the complainant's implied admission that she had previously engaged in sexual

relations for alcohol and drugs; and refused to admit the complainant's admission that she had contracted gonorrhea, chlamydia and herpes). See also CPL §60.43 (admissibility of evidence of victim's sexual conduct in non-sex offense cases).

The admission of evidence of prior false or suspiciously similar complaints of sex crimes is not precluded by this rule. See People v. Diaz, 20 N.Y.3d 569 (2013) (reversible error where court excluded testimony by father of complainant's younger brother regarding allegations of sexual abuse made against him by complainant approximately two years before allegations were made against defendant; evidence was relevant to defense claim that complainant had history of making false allegations of sexual abuse by family members and was inconsistent with complainant's testimony that she never made prior allegation and her mother's testimony that she was unaware of allegation); People v. Hunter, 11 N.Y.3d 1, 862 N.Y.S.2d 301 (2008) (Brady violated where People withheld evidence regarding man who had been indicted for raping complainant some ten months after charged incident and who admitted having sex with complainant but said she consented, and other man's guilty plea was irrelevant to Brady obligation at relevant time; court would have had discretion to admit information about other case and man's claim that complainant willingly had sex with him and then lied about it); Perry v. Commonwealth, 390 S.W.3d 122 (Ky. 2012) (sheer number and variety of allegations created sufficient probability they were false); Pantoja v. State, 59 So.3d 1092 (Fla. 2011) (no error where defendant was not permitted to question complainant about accusation against uncle regarding one-time "over-the-clothes" groping, and accusation against defendant involved "under-the-clothes" sexual acts on multiple occasions and complainant had not recanted accusation against uncle); Dennis v. Commonwealth, 306 S.W.3d 466 (Ky. 2010) (trial court must first determine whether allegations have been shown by defendant to be demonstrably false, and, if so, consider probativeness of evidence; then, if evidence is probative of complainant's credibility, court must determine whether probative value is substantially outweighed by danger of undue prejudice, confusion of issues and other considerations identified in governing evidence rule); Hammer v. State, 296 S.W.3d 555 (Tex. Ct. Crim. App. 2009) (trial court erred in excluding evidence that complainant had previously made false rape

accusation where evidence was relevant to her animus toward defendant and her desire to get out of his house); State v. A.O., 965 A.2d 152 (NJ, 2009) (false allegations made after allegations in present case may be relevant); People v. Shannon, 42 Misc.3d 127(A) (App. Term, 2d Dept., 2013) (no error where court barred defense from introducing evidence to show that complainant had previously made false accusations of domestic violence with respect to other men in her life); People v. McCray, 102 A.D.3d 1000 (3d Dept. 2013) (court did not err in failing to disclose possible false allegation by complainant that her father sexually abused her when she was 13; remote claim of sexual abuse by alcoholic, physically abusive father, when compared to complainant's assertion that she was date-raped by defendant, did not suggest pattern casting substantial doubt on complainant's allegations); United States v. Frederick, 683 F.3d 913 (8th Cir. 2012) (defendant failed to support claim that previous allegations were false); People v. Sanabria, 72 A.D.3d 552, 898 N.Y.S.2d 842 (1st Dept. 2010), lv denied 15 N.Y.3d 756 (reversible error where trial court precluded defense from investigating complainant's prior claims of molestation by doctors); People v. Lackey, 48 A.D.3d 982, 853 N.Y.S.2d 668 (3rd Dept. 2008) (conviction vacated where defendant presented evidence of victim's false report of sexual assault several months after conviction and victim's mental health problems); People v. Gibson, 2 A.D.3d 969, 768 N.Y.S.2d 511 (3rd Dept. 2003), lv denied 1 N.Y.3d 627 (2004) (defendant failed to establish falsity of complaint or that complaint suggested pattern that cast doubt on validity of or bore significant relation to instant charges); People v. Badine, 301 A.D.2d 178, 752 N.Y.S.2d 679 (2d Dept. 2002), appeal withdrawn 99 N.Y.2d 612, 757 N.Y.S.2d 822 (2003); People v. Harris, 151 A.D.2d 981, 541 N.Y.S.2d 660 (4th Dept. 1989); People v. Foulkes, 30 Misc.3d 1222(A) (Sullivan County Ct., 2011) (court denies People's motion to preclude defendant, the 14-year-old complainant's "quasi or de facto brother-in-law," from cross examining her about or making reference to similar allegation against her brother-in-law, the husband of her other sister); see also Holley v. Yarborough, 568 F.3d 1091 (9th Cir. 2009) (trial court improperly precluded cross-examination of child sex crime complainant regarding prior claims of her own sexual appeal; prosecution needed to characterize her as child who could be relied on to tell

truth and not exaggerate or fantasize about sexual issues, and that characterization might have been put into question by evidence that she had highly active sexual imagination or familiarity with sexual activities); United States v. No Neck, 472 F.3d 1048 (8th Cir. 2007) (defendant improperly precluded from questioning victims' mother as to whether she had previously made false allegations against her brother); Fowler v. Sacramento County Sheriff's Department, 421 F.3d 1027 (9th Cir. 2005) (right of confrontation violated where petitioner was denied opportunity to examine complainant and offer evidence regarding 2 prior molestation charges made by complainant in effort to show complainant had tendency to be "supersensitive" to physical contact near sensitive area); Kittelson v. Dretke, 426 F.3d 306 (5th Cir. 2005) (petitioner was entitled to examine complainant about previous allegations of sexual abuse in effort to show motive to make up allegation to gain attention and sympathy); Redmond v. Kingston, 240 F.3d 590 (7th Cir. 2001); State v. Miller, 921 A.2d 942 (N.H. 2007) (defendant did not have to show allegations were demonstrably false if they were probative of credibility and otherwise admissible); Abbott v. State, 138 P.3d 462 (Nev. 2006) (defendant established by preponderance of evidence that prior allegations were false); but see People v. Frary, 29 A.D.3d 1223, 815 N.Y.S.2d 334 (3rd Dept. 2006), lv denied 7 N.Y.3d 788 (impeachment precluded where allegedly false claim did not involve sex crime); People v. Petty, 17 A.D.3d 220, 795 N.Y.S.2d 1 (1st Dept. 2005), lv denied 5 N.Y.3d 793 (no error in preclusion of cross-examination of victim regarding complaint of physical abuse she filed against prior boyfriend, which resulted in adjournment in contemplation of dismissal; prior complaint did not bear significant probative relation to instant charges, and ACD is not an adjudication on the merits); Cookson v. Schwartz, 556 F.3d 647 (7th Cir. 2009) (conclusion by child protective authorities that allegation is "unfounded" does not establish it is false, only that investigator did not locate credible evidence establishing allegation's veracity prior to completion of investigation); but see Nevada v. Jackson, 133 S.Ct. 1990 (2013) (state court did not unreasonably apply federal law when it ruled that petitioner was not denied right to present a complete defense when evidence of complainant's prior accusations of sexual assault was precluded as sanction for failure to provide advance notice required by state law).

The rape shield law does not bar the prosecution from offering sexual history evidence. See People v. Wigfall, 253 A.D.2d 80, 690 N.Y.S.2d 2 (1st Dept. 1999), lv denied 93 N.Y.2d 981, 695 N.Y.S.2d 67 (People introduced testimony by complainant that she had not had sexual relations with anyone other than her common-law husband to explain why she did not inform her husband of the rape immediately and was relevant to defendant's consent defense).

9. Reputation For Truthfulness And Veracity - A person who has knowledge of a witness' bad reputation in the community for truthfulness and veracity may be called to testify. See People v. Fernandez, 17 N.Y.3d 70 (2011) (if proper foundation laid, family and family friends may constitute relevant community; in this case, one witness had known complainant since her birth, had overheard discussions concerning complainant among extended family of approximately 25 to 30 people, and was aware of reputation for truthfulness in family, and other witness explained that all family members and family friends often discussed complainant, and she was present during those conversations and was aware of reputation); People v. Hanley, 5 N.Y.3d 108, 800 N.Y.S.2d 105 (2005) (trial court erred in refusing to admit evidence of witnesses' reputation among co-workers; admission of evidence is required, not discretionary, where defendant lays proper foundation); People v. McGhee, 82 A.D.3d 1264, 920 N.Y.S.2d 164 (2d Dept. 2011) (no error where court permitted defendant to impeach prosecution witness with testimony by witness's father as to son's "exceedingly bad" reputation in community for truth and veracity, but did not allow father, who taught at high school son attended and continued to live in community where he had raised son, to testify that he had discussed reputation with son's "teachers, neighbors, friends, people of that sort"); People v. Hopkins, 56 A.D.3d 820, 866 N.Y.S.2d 819 (3rd Dept. 2008) (in refusing to allow reputation evidence, trial court erred by relying on fact that witness was not employed at facility where victim resided when she first disclosed intimate nature of relationship with defendant; reputation testimony also was admissible to establish victim's reputation at time she testified); People v. Streitferdt, 169 A.D.2d 171, 572 N.Y.S.2d 893 (1st Dept. 1991), lv denied 78 N.Y.2d 1015, 575 N.Y.S.2d 823 (improper exclusion of evidence of complainant's reputation).

The person must reside, work, circulate, etc. in the same community, and have a factual basis for describing the witness' reputation. Although the impeaching witness may not provide an opinion, the examiner may ask the witness whether, given the witness' knowledge of the other witness' reputation, he or she would believe the other witness. Richardson, §6-402. See People v. Pavao, 59 N.Y.2d 282, 464 N.Y.S.2d 458 (1983). But see Federal Rules, 608(a) (opinion permitted).

The reputation witness may not testify regarding specific instances of untruthfulness. People v. Arroyo, 37 A.D.3d 301, 831 N.Y.S.2d 126 (1st Dept. 2007), lv denied 9 N.Y.3d 839.

10. Opportunity To Tailor Testimony - Compare People v. Rosa, 108 A.D.2d 531, 489 N.Y.S.2d 722 (1st Dept. 1985) (prosecutor improperly remarked in summation that defendant testified after other witnesses) and State v. Daniels, 861 A.2d 808 (NJ 2004) (prosecutor may not make generic accusation that defendant tailored testimony to evidence, but may comment on specific evidence going beyond fact that defendant was present and heard testimony) with Portuondo v. Agard, 529 U.S. 61, 120 S.Ct. 1119 (2000) (no Fifth or Sixth Amendment violation where prosecutor was permitted to state on summation that defendant had opportunity to hear witnesses and tailor testimony); People v. King, 293 A.D.2d 815, 740 N.Y.S.2d 500 (3rd Dept. 2002), lv denied 98 N.Y.2d 698, 747 N.Y.S.2d 417 (2002) (court properly permitted questioning by prosecutor suggesting that defendant tailored testimony to conform to People's proof; since, under Portuondo, such remarks made during summation are permissible, innuendo arising during cross-examination is permissible); People v. Swift, 272 A.D.2d 126, 708 N.Y.S.2d 611 (1st Dept. 2000), lv denied 95 N.Y.2d 871, 715 N.Y.S.2d 226 (court follows Portuondo as matter of State constitutional law); People v. Galloza, 270 A.D.2d 69, 705 N.Y.S.2d 35 (1st Dept. 2000), lv denied 95 N.Y.2d 852, 714 N.Y.S.2d 3 (People properly permitted to prove on cross extent to which defendants conferred with each other about their testimony) and People v. Wirts, 178 A.D.2d 165, N.Y.S.2d (1st Dept. 1991) (defense counsel, by arguing that defendant had opportunity to tailor testimony but did not, opened door to prosecutor’s argument on summation that defendant crafted story after hearing People’s witnesses). See also

People v. Montoya, 63 A.D.3d 961, 882 N.Y.S.2d 429 (2d Dept. 2009) (court erred in not permitting defense counsel's cross-examination of complainant and her mother as to whether they spoke to each other about incidents); People v. Hartman, 4 A.D.3d 22, 772 N.Y.S.2d 396 (3rd Dept. 2004) (defense counsel should have been permitted to comment on fact that 3 People's witnesses met with prosecutor at same time).

11. Collateral Issues - Extrinsic impeachment evidence that merely contradicts a witness on a collateral point is not admissible. Compare People v. Stewart, 153 A.D.2d 706, 544 N.Y.S.2d 875 (2d Dept. 1989) (defendant's employment status, his receipt of welfare, and the location where he lived were collateral issues); People v. Johnson, 144 A.D.2d 490, 534 N.Y.S.2d 207 (2d Dept. 1988) (whether defendant ever carried guns was collateral); People v. Gonzalez, 100 A.D.2d 852, 474 N.Y.S.2d 97 (2d Dept. 1984) (defendant's physical appearance 2 weeks after crime was collateral); People v. Rivers, 96 A.D.2d 874, 465 N.Y.S.2d 740 (2d Dept. 1983) (date of defendant's job interview was collateral) with People v. Ortiz, 133 A.D.2d 853, 520 N.Y.S.2d 215 (2d Dept. 1987) (rape defendant and witness testified that alleged victim had been to defendant's apartment 3 times and spent the night once; it was permissible for victim's mother to testify that there had been more visits).

12. Impeachment Of Own Witness - The traditional rule is that a party may not impeach his or her own witness by offering evidence showing the witness to be unworthy of belief. Richardson, §6-419. But see Federal Rules, 607. However, under FCA §343.5 [see also CPL §60.35(1)], a party may impeach the witness with his or her signed statement or previous testimony under oath when the witness' present testimony upon a material issue is contradictory and "tends to disprove the position of such party." The damaging testimony must have been elicited during direct examination. People v. Rodwell, 246 A.D.2d 916, 667 N.Y.S.2d 839 (3rd Dept. 1998); but see People v. Mitchell, 57 A.D.3d 1308, 871 N.Y.S.2d 445 (3rd Dept. 2008) (People improperly permitted to impeach own witness with prior inconsistent statement where People, who had notified court that witness had unequivocally stated that he would recant prior testimony if forced to take stand, made no attempt to elicit testimony relevant to material issue other than identity of shooter, and thus primary purpose served by calling

witness was to place otherwise inadmissible prior inconsistent statement before jury). Generally speaking, a witness' failure to recall the events in question is not sufficient. See, e.g., People v. Saez, 69 N.Y.2d 802, 513 N.Y.S.2d 380 (1987) (since People only had to prove that defendant displayed what appeared to be a gun during robbery, complainant's testimony that he did not see what defendant stuck in his side did not tend to disprove an essential element); People v. Moore, 54 A.D.3d 878, 864 N.Y.S.2d 110 (2d Dept. 2008) (no error where the prosecution impeached witness who, prosecution learned just before he was to testify regarding defendant's shooting of decedent, also intended to testify that about seven hours before shooting, decedent had put gun to defendant's head); People v. Bellamy, 26 A.D.3d 638, 809 N.Y.S.2d 287 (3rd Dept. 2006) (impeachment improper where witness told grand jury that defendant was at site of shooting, but placed him a block away later in the evening during testimony at trial); People v. Rodwell, supra, 246 A.D.2d 916 (although witness was not entirely forthright, People were not entitled to impeach her with Grand Jury testimony concerning defendant's possession of a gun after she testified that she could not recall seeing anything in defendant's hand); People v. Hickman, 148 A.D.2d 937, 539 N.Y.S.2d 176 (4th Dept. 1989), aff'd 75 N.Y.2d 891, 554 N.Y.S.2d 474 (1990) (witnesses' denial that defendant had made admissions to them did not affirmatively damage People's case); People v. Comer, 146 A.D.2d 794, 537 N.Y.S.2d 272 (2d Dept. 1989) (witness' refusal to identify defendant as shooter did not affirmatively damage People's case); People v. Vega, 108 A.D.2d 766, 484 N.Y.S.2d 924 (2d Dept. 1985) (improper use of unsworn oral statements); People v. DeJesus, 101 A.D.2d 111, 475 N.Y.S.2d 19 (1st Dept. 1984), aff'd 64 N.Y.2d 1126, 490 N.Y.S.2d 188 (1985) (after witness testified that defendant was not the killer, prosecutor was properly allowed to use witness' Grand Jury testimony identifying defendant as the killer).

When the prior statement does not tend to disprove the position of the party, and, therefore, is not usable as impeachment material, the party may not attempt to refresh the recollection of the witness in a manner that discloses the contents of the prior statement to the court. FCA §343.5(3). See People v. Navarette, 131 A.D.2d 326, 516 N.Y.S.2d 460 (1st Dept. 1987) (prosecutor badgered witness and improperly made

jury aware of witness' previous testimony).

If the prosecutor was aware that the witness might exculpate the respondent, the witness may not be impeached in any event. People v. Vega, supra, 108 A.D.2d 766.

When the respondent is prevented from impeaching a witness under FCA §343.5, it could be argued that the respondent's right of confrontation has been violated. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 1047 (1973) ("The availability of the right to confront and to cross-examine those who give damaging testimony against the accused has never been held to depend on whether the witness was initially put on the stand by the accused or by the State"); People v. Oddone, _N.Y.3d_, 2013 WL 6499305 (2013) (citing Chambers, court notes that technical limitations on impeachment of witnesses must sometimes give way, in criminal case, to defendant's right to fair trial). But see People v. Coleman, 256 A.D.2d 631, 680 N.Y.S.2d 758 (3rd Dept. 1998), lv denied 92 N.Y.2d 1030, 684 N.Y.S.2d 495 (defendant was not entitled to lead and impeach confidential informant where witness merely failed to further defense theory and was not evasive, obstructionist or openly hostile). In addition, the respondent is entitled to testify on direct concerning his or her prior false or inconsistent statements in order to avoid the more damaging effect impeachment would have on cross-examination. See People v. Guy, 223 A.D.2d 723, 637 N.Y.S.2d 445 (2d Dept. 1996).

This rule is not violated when another witness' testimony, or other evidence offered by the party, contradicts the subject witness' testimony concerning a material fact. See Richardson, § 6-419; People v. Figueroa, 153 A.D.2d 576, 544 N.Y.S.2d 618 (2d Dept. 1989).

13. Prosecutorial Misconduct On Cross-Examination - A prosecutor may not cross-examine the respondent or any other witness in a manner that is mean-spirited or designed to ridicule the witness. See, e.g., People v. Hamilton, 121 A.D.2d 176, 502 N.Y.S.2d 747 (1st Dept. 1986); People v. Rodriguez, 103 A.D.2d 121, 479 N.Y.S.2d 25 (1st Dept. 1984). A prosecutor may not compel defense witnesses to characterize prosecution witnesses as liars. See, e.g., People v. Montgomery, 103 A.D.2d 622, 481 N.Y.S.2d 532 (4th Dept. 1984); People v. Bolden, 82 A.D.2d 757, 440

N.Y.S.2d 202 (1st Dept. 1981). But see People v. Overlee, 236 A.D.2d 133, 666 N.Y.S.2d 572 (1st Dept. 1997), lv denied 91 N.Y.2d 976, 672 N.Y.S.2d 855 (1998) (no error where prosecutor challenged defendant to characterize People's witnesses as liars only after defendant flatly denied charges and excluded possibility that People's witnesses were mistaken). Finally, a prosecutor may not become an unsworn witness by repeatedly asking leading questions which include facts that are inadmissible. See, e.g., People v. Sandy, 115 A.D.2d 27, 499 N.Y.S.2d 75 (1st Dept. 1986); People v. Perez, 90 A.D.2d 468, 455 N.Y.S.2d 89 (1st Dept. 1982). Cf. People v. Blake, 139 A.D.2d 110, 530 N.Y.S.2d 578 (1st Dept. 1988) (improper comments were made by prosecutor during defendant's videotaped confession).

F. Bolstering - Generally, a party may not bolster the testimony of a witness by showing that the witness has previously made statements consistent with his or her present testimony. Richardson, §6-503. However, there are exceptions to this rule.

1. Pretrial Identification Of Respondent

a. Proved By Testimony Of Identifying Witness - Pursuant to FCA §343.4, a witness who has identified the respondent at trial may testify that he or she made an identification before trial and subsequent to the time of the offense. See also People v. Jiminez, 22 A.D.3d 423, 805 N.Y.S.2d 2 (1st Dept. 2005) (photograph of lineup properly admitted to assist jury in assessing complainant's testimony, and there was no error in admission of detective's testimony regarding "objectivity" of lineup).

b. Proved By Testimony Of Police Officer Or Other Third Party - Generally, a witness may not testify that another person identified the respondent, see People v. Trowbridge, 305 N.Y. 471 (1953); People v. Felder, 108 A.D.2d 869, 485 N.Y.S.2d 576 (2d Dept. 1985), or create an inference that such an identification took place. See United States v. Reyes, 18 F.3d 65 (2d Cir. 1994) (reversible error where, although agent did not reveal what was said, his testimony regarding discussions with co-conspirators suggested to jury that they had admitted their role and implicated other defendants; although information possessed by agents can sometimes be admitted as "background" to explain the investigation or an agent's state of mind, the non-hearsay purpose must be relevant and the probative value of the evidence must outweigh the

danger of unfair prejudice); People v. Fields, 309 A.D.2d 945, 766 N.Y.S.2d 365 (2d Dept. 2003) (reversible error where detective testified that he arrested defendant after asking complainant whether she recognized anyone in lineup; violation of rule may not be overlooked unless evidence of identification is so strong that there is no serious question about identification); People v. Baldelli, 152 A.D.2d 741, 544 N.Y.S.2d 193 (2d Dept. 1989) (improper to admit testimony that defendant was arrested as a result of phone call by wife of complainant). See also People v. Rivera, 96 N.Y.2d 749, 725 N.Y.S.2d 264 (2001) (although introduction of such evidence may be improper in some circumstances (see United States v. Reyes, 18 F.3d 65), defendant opened door in this case); People v. Trott, 46 A.D.3d 713, 848 N.Y.S.2d 235 (2d Dept. 2007) (undercover officer's testimony that he was working on date of arrest, which permitted jury to infer that undercover identified defendant on date of arrest, was improper bolstering); People v. Samuels, 22 A.D.3d 507, 802 N.Y.S.2d 458 (2d Dept. 2005) (trial court improperly allowed detective to testify that he arrested defendant and co-defendant as a result of, inter alia, lineup identifications of co-defendant; court notes that witness's identification of co-defendant cannot be used as basis for evaluating accuracy of identification of defendant); People v. Roman, 273 A.D.2d 53, 710 N.Y.S.2d 823 (1st Dept. 2000) (rule against bolstering not applicable to arresting officer's testimony concerning undercover officer's description and confirmatory drive-by identification); People v. Robinson, 27 Misc.3d 1216(A), 910 N.Y.S.2d 764 (Dist. Ct., Nassau Co., 2010) (excited utterance identifying defendant admissible without violating Trowbridge rule).

However, pursuant to FCA 343.3, a third party may testify to such an identification when the identifying witness is unable because of a failure of memory to identify the respondent at trial, but does recall observing on a prior occasion a person whom he or she recognized as the same person who had been observed at the time of the crime or some other relevant occasion. See, e.g., People v. Quevas, 81 N.Y.2d 41, 595 N.Y.S.2d 721 (1993) (People failed to establish absence of present recollection where witness said "[n]ope" when asked whether he saw one of the perpetrators in the courtroom); People v. Jamerson, 68 N.Y.2d 984, 510 N.Y.S.2d 554, 555 (1986) (rule "may require an affirmative statement by an identification witness that he is currently

certain of the accuracy of a prior identification of defendant made on an occasion other than at the time and place of the offense"; however, defendant did not preserve issue, and absence of affirmative statement did not make identification legally insufficient to connect defendant to crime); People v. Bayron, 66 N.Y.2d 77, 495 N.Y.S.2d 24 (1985) (identification not admissible where present inability to identify is due to fear); People v. Roscher, _A.D.3d_, 2014 WL 553479 (2d Dept. 2014) (testimony admissible where complainant acknowledged he did not get good look at perpetrators and claimed that, although defendant looked “a little bit” like assailant, “I really don't remember”); People v. Thomas, 300 A.D.2d 2, 750 N.Y.S.2d 296 (1st Dept. 2002), lv denied 99 N.Y.2d 585, 755 N.Y.S.2d 721 (2003) (prior identification need not be based on defendant’s face); People v. Brown, 60 A.D.2d 890, 401 N.Y.S.2d 290 (2d Dept. 1978) (error where complainant testified that he was "sure" of prior identification; testimony that he was certain at trial that he had previously identified right man would have been proper). The Court of Appeals has held that §60.25 cannot be utilized where the identifying witness has died. People v. Patterson, 93 N.Y.2d 80, 688 N.Y.S.2d 101 (1999).

c. Photo Identifications - The rule in New York has been that photo identification evidence is not admissible. People v. Caserta, 19 N.Y.2d 18, 277 N.Y.S.2d 647 (1966); see also People v. Mosley, 296 A.D.2d 595, 744 N.Y.S.2d 577 (3rd Dept. 2002) (no “buy and bust” exception for confirmatory identifications); but see People v. Perkins, 15 N.Y.3d 200, 906 N.Y.S.2d 523 (2010) (by refusing to cooperate with lineup, defendant forfeited protection of rule; although victim eventually identified defendant in lineup, judge reasonably concluded that jurors might be more skeptical about reliability of identification made nine and one-half rather than three months after crime); People v. Stanislous, 40 Misc.3d 805 (Sup. Ct., Bronx Co., 2013) (court finds evidence admissible, concluding that there is no longer a per se rule barring admission; court noted that photographs were from high school yearbook, were of superior quality, and depicted students dressed in formal attire, and that trial was being held about five years after identification and juror asked how she could properly evaluate in-court identification given gap in time); People v. Solivera, 24 Misc.3d 1203, 889 N.Y.S.2d 883 (Sup. Ct., Kings Co., 2009) (identification of absent defendant admissible; defendant

should not be permitted to prevent People from proving identity in court by absconding, and, while arrest photos used to indicate that subject had been arrested, photos here had no indicia of criminality); People v. Woolcock, 7 Misc.3d 203, 792 N.Y.S.2d 804 (Sup. Ct., Kings Co., 2005) (given technological advances, evidence should be admissible).

A photo identification may be admissible if the respondent "opens the door." Compare People v. Francis, 123 A.D.2d 714, 507 N.Y.S.2d 78 (2d Dept. 1986) (door opened by attempt to create false impression that witness made no identification) with People v. Lindsay, 42 N.Y.2d 9, 396 N.Y.S.2d 610 (1977) (door not opened by testimony that other witness identified photo of someone other than defendant).

d. "Negative" Identification Evidence - The prosecution may attempt to bolster an identification by showing that before identifying the respondent, the witness did *not* identify anyone in a procedure which did not include the respondent. See People v. Wilder, 93 N.Y.2d 352, 690 N.Y.S.2d 483 (1999) (court properly admitted evidence that undercover stated that other suspect was not right person); People v. Bolden, 58 N.Y.2d 741, 459 N.Y.S.2d 22 (1982), aff'g 83 A.D.2d 921, 442 N.Y.S.2d 777 (1st Dept. 1981) (defense counsel opened door); People v. Linton, 55 A.D.3d 324, 864 N.Y.S.2d 431 (1st Dept. 2008) (no error in admission of evidence of victim's inability to identify anyone from numerous photographs). See also People v. Shaw, 150 A.D.2d 626, 541 N.Y.S.2d 495 (2d Dept. 1989) (error to admit evidence that undercover had told supervisor on other occasions that the person arrested was not the seller); People v. Rosario, 127 A.D.2d 209, 514 N.Y.S.2d 362 (1st Dept. 1987) (error to admit evidence that witness accurately identified another suspect at a lineup).

e. Description Testimony - A witness may testify to the details of a description he or she provided in order to demonstrate an ability to make observations, and to permit a comparison of the description with the respondent's appearance. In appropriate circumstances, a police officer may testify to the description. See People v. Smith, _N.Y.3d_, 2013 WL 6589555 (2013) (police officer's testimony regarding victim's description, where it does not tend to mislead jury, may be admissible; however, door is not open to presentation of redundant police testimony

that accomplishes no useful purpose); People v. Huertas, 75 N.Y.2d 487, 554 N.Y.S.2d 444 (1990); People v. Ragunauth, 24 A.D.3d 472, 805 N.Y.S.2d 654 (2d Dept. 2005), lv denied 6 N.Y.3d 779 (police officer permitted to repeat complainant's descriptions); People v. Smith, 278 A.D.2d 139, 718 N.Y.S.2d 55 (1st Dept. 2000), lv denied 96 N.Y.2d 868, 730 N.Y.S.2d 43 (2001) (hotel manager permitted to testify as to complainant's description and that defendant was only resident who fit description); see also People v. Castillo, 34 A.D.3d 221, 823 N.Y.S.2d 142 (1st Dept. 2006), lv denied, 8 N.Y.3d 879 (no error in admission of evidence that defendant was native of Mexico where Mexican origin was element of descriptions by victim and 911 caller); but see People v. Fluitt, 80 N.Y.2d 949, 590 N.Y.S.2d 870 (1992) (complainant properly permitted to provide details not gleaned from improper showup, but could not testify to description given after showup without a finding that description was untainted); People v. Moss, 80 N.Y.2d 857, 587 N.Y.S.2d 593 (1992) (witness improperly permitted to testify that person he saw being chased was involved in robbery in absence of evidence that he had made such a statement prior to potentially tainted photo identification); People v. Williams, 206 A.D.2d 917, 614 N.Y.S.2d 843 (4th Dept. 1994), lv denied 84 N.Y.2d 911, 621 N.Y.S.2d 529 (court erred in permitting officers to testify to victims' descriptions after victims testified to descriptions).

f. Witness' Sketch Of Respondent - See People v. Ross, 186 A.D.2d 1006, 588 N.Y.S.2d 463 (4th Dept. 1992), lv denied 81 N.Y.2d 766, 594 N.Y.S.2d 729 (court properly admitted witness' sketch of suspect to help jury evaluate whether identification of defendant at trial was product of out-of-court identification procedures).

g. Identification Of Accomplice - People v. Thomas, 17 N.Y.3d 923 (2011) (no error in admission of complainant's testimony regarding showup identification of co-defendant who was not on trial, since accuracy in identifying co-defendant was relevant to whether conditions at scene were conducive to observing other attacker and accurately identifying him at trial).

2. Prior Consistent Statements - The hearsay rule applies to out-of-court statements made by a witness who testifies at trial. People v Singer, 300 N.Y. 120

(1949). Thus, generally speaking, prior consistent statements may not be used to bolster testimony. However, such evidence may be admitted for purposes of rehabilitation when testimony is assailed as a recent fabrication. See People v. Rosario, 17 N.Y.3d 501 (2011) (defense counsel's reference in opening statement to "story" that began after police found complainant did not open door); People v. McClean, 69 N.Y.2d 426, 515 N.Y.S.2d 428 (1987); People v. Shaver, 86 A.D.3d 800 (3d Dept. 2011), lv denied 18 N.Y.3d 962 (no error in admission of a 911 tape as prior consistent statement where there was anticipated defense that victim was fabricating, and, when court offered to exclude tape if defendant stipulated that he was not going to make claim of recent fabrication, defendant would not stipulate); People v. Flowers, 83 A.D.3d 524 (1st Dept. 2011) (no requirement that statement predate all possible motives to falsify); People v. Williams, 139 A.D.2d 683, 527 N.Y.S.2d 436 (2d Dept. 1988); People v. Jimenez, 102 A.D.2d 439, 477 N.Y.S.2d 170 (1st Dept. 1984); Richardson, §6-503; Federal Rules, 801(d)(1)(B) (statements may be admitted to prove contents); see also People v. Ochoa, 14 N.Y.3d 180, 899 N.Y.S.2d 66 (2010) (majority holds that after prosecution witnesses were impeached with prior inconsistent statements, prosecutor was properly permitted to ask witnesses on re-direct about portions of prior statements that were correct; questions were addressed to matters raised by defense on cross-examination).

In addition, a prior consistent statement is admissible when it qualifies for admission under another hearsay exception. People v. Buie, 86 N.Y.2d 501, 634 N.Y.S.2d 415 (1995)

3. Good Character Of Witness - See, e.g., People v. Valdez, 53 A.D.3d 172, 861 N.Y.S.2d 288 (1st Dept. 2008), lv denied, 11 N.Y.3d 836 (unpreserved error where prosecutor elicited testimony that witness had, before joining police force, served as paratrooper in Army, had obtained Bachelor of Science degree in economics and international finance, had risen to level of police lieutenant and been awarded 47 commendations, including Medal of Valor he received for having been shot in line of duty, had been chosen twice as sole annual recipient of "Cop of The Year" award, and had nearly completed Master's degree in history; court notes that in general,

accreditation of witness in advance of impeachment is disallowed, that theory of defense was not that witness was lying, but rather that he was mistaken, and that “while education and experience may ‘affect’ a person’s powers of observation, it is not by any means clear what significance should reasonably attach to such factors” and “there appears no reason to suppose that an accumulation of advanced degrees will render one a more reliable observer or relator of street crime”).

G. Competency To Testify And Be Sworn

1. Generally - FCA §343.1(1) states that "[a]ny person may be a witness in a delinquency proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify reception of his evidence." See Matter of Brown, 36 N.Y.2d 183, 366 N.Y.S.2d 116 (1975); People v. Lowe, 289 A.D.2d 705, 733 N.Y.S.2d 555 (3rd Dept. 2001) (4-year-old properly permitted to give unsworn testimony); People v. Barksdale, 100 A.D.2d 852, 473 N.Y.S.2d 1006 (2d Dept. 1984) (despite history of mental illness and alcoholism, witness was properly permitted to testify); Walters v. McCormick, 108 F.3d 1165 (9th Cir. 1997) (court rejects defendant's argument that child vacillated so much and was so manipulable that "confrontation" could not be meaningful).

2. Oaths

a. Generally - FCA §343.1(2) provides that "[e]very witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath." See, e.g., People v. Parks, 41 N.Y.2d 36, 390 N.Y.S.2d 848 (1977); People v. Wisdom, 98 A.D.3d 241 (2d Dept. 2012), **lv granted** 19 N.Y.3d 1106 (indictment dismissed where prosecutor failed to administer oath to witness before videotaped examination; although witness was examined a second time, oath is intended to influence witness while witness is testifying and belated oath did not serve that purpose given failure to restate content of first examination); People v. Donato, 34 Misc.3d 66 (App. Term, 9th & 10th Jud. Dist., 2012) (reversible error where court failed to swear in officer); People v. Kwok Chan, 110 A.D.2d 158, 493 N.Y.S.2d 778 (2d Dept. 1985). The court may take unsworn testimony if the witness possesses sufficient intelligence and

capacity.

b. Infants - Under FCA §343.1(2), "[a] witness less than nine years old may not testify under oath unless the court is satisfied that he understands the nature of an oath." According to CPL §60.20(2), “[a] witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.” Compare In re Dandre H., 89 A.D.3d 553 (1st Dept. 2011) (five-year-old properly sworn where voir dire responses established that he understood difference between truth and falsity, that lying was wrong, and that lying could bring adverse consequences); Matter of Melvin L., 43 A.D.3d 924, 841 N.Y.S.2d 657 (2d Dept. 2007) (eight-year-old properly sworn where understood meaning of word "oath" and that making promise to judge was a bigger promise than an ordinary promise); People v. McIver, 15 A.D.3d 677, 791 N.Y.S.2d 587 (2d Dept. 2005), lv denied 4 N.Y.3d 888 (5-year-old properly sworn where voir dire established that she appreciated difference between truth and falsehood, necessity for telling truth, and fact that witness may be punished for telling lie in court); Matter of David S., 6 A.D.3d 539, 775 N.Y.S.2d 353 (2d Dept. 2004) (complainant properly allowed to testify as a sworn witness where he understood difference between truth and falsity, the legal and moral consequences of lying, and the importance of telling the truth at the proceeding); People v. Paramore, 288 A.D.2d 53, 732 N.Y.S.2d 410 (1st Dept. 2001) (6-year-old properly sworn where she knew difference between truth and lie and expected divine punishment if she lied); People v. Johnston, 273 A.D.2d 514, 709 N.Y.S.2d 230 (3rd Dept. 2000) (children under 6 years of age were properly sworn); Matter of James B., 262 A.D.2d 480, 692 N.Y.S.2d 417 (2d Dept. 1999) (6-year-old was properly sworn where, although he gave perfunctory answers to sometimes leading questions, his testimony demonstrated that he understood that he had a moral duty to tell the truth); People v. Cordero, 257 A.D.2d 372, 684 N.Y.S.2d 192 (1st Dept. 1999), lv denied 93 N.Y.2d 968, 695 N.Y.S.2d 54 (6-year-old should have been sworn where he indicated that telling the truth was a “good thing” and that it was “important” to tell the truth when he was “talking” in court); Matter of Jason FF., 224 A.D.2d 900, 638 N.Y.S.2d 226 (3rd Dept. 1996) (8-year-old properly

sworn where she indicated that she knew difference between truth and lie, understood that she had to promise not to tell lies in court, and recognized that she would get in "big trouble" if she failed to tell truth); Matter of Joseph C., 185 A.D.2d 883, 586 N.Y.S.2d 1009 (2d Dept. 1992) (7-year-old was properly sworn where she said "[t]hat's not true" when told an obvious lie and "[t]hat means to tell the truth and God will not punish you" when asked what it means for something to be true); People v. Hendy, 159 A.D.2d 250, 552 N.Y.S.2d 243 (1st Dept. 1990), lv denied 76 N.Y.2d 893, 561 N.Y.S.2d 556 (7-year-old properly sworn where he indicated that he understood difference between real and pretend and would get a "whipping" if he did not tell the truth); People v. Mercado, 157 A.D.2d 457, 549 N.Y.S.2d 383 (1st Dept. 1990), lv denied 75 N.Y.2d 922, 555 N.Y.S.2d 40 (10-year-old properly sworn where he attended church and had been taught about God, had sworn on the Bible previously and told the truth, understood the importance of telling the truth, and believed that the judge, his parents and God would punish him if he did not tell the truth); People v. Tyler, 154 A.D.2d 490, 546 N.Y.S.2d 113 (2d Dept. 1989), lv denied 75 N.Y.2d 925, 555 N.Y.S.2d 44 (1990) (8-year-old properly sworn where she indicated that she could get punished for telling a lie, and acknowledged that swearing means you cannot lie and that God does not want anyone to lie); People v. Hardie, 144 A.D.2d 484, 533 N.Y.S.2d 984 (2d Dept. 1988) (8-year-old properly sworn where she was not asked about criminal sanctions but understood that she would be "punished" for lying under oath, and attended church and had received religious training) and Matter of Noel O., 15 Misc.3d 1146(A), 841 N.Y.S.2d 821 (Fam. Ct., Queens Co., 2007) (five-year-old capable of testifying under oath where she knew she was in a courtroom and that there was a judge present whose function "is to listen to people"; when child was asked questions relating to clothing she and prosecutor were wearing, she correctly stated whether proposition was true or false; child stated that a lie is "something that didn't really happen," as opposed to the truth which is "what really happened," that "it is good to tell the truth" as opposed to telling a lie, and that it is "not good to tell a lie because her parents would be mad," and gave examples of what would constitute a lie; child stated that "make believe" was "playing" and that it was not real; that while child was never asked directly whether she

understood what term "oath" means, she understood she has obligation to testify truthfully in court; child expressed basic understanding of concept of God as powerful being who watches over people and would be "mad if you lied," and stated that if she told a lie, "God would be mad even if no one knew" and that she would "feel bad" if she told a lie or did something wrong; and child understood that promise meant someone would do what they say, and that if she promised to tell truth and did not, she "could get into trouble")

with People v. Castellanos, 65 A.D.3d 555, 884 N.Y.S.2d 126 (2d Dept. 2009), lv denied 13 N.Y.3d 858 (no error in determination that six-year-old complainant was competent to give unsworn testimony where child knew difference between telling truth and telling lie, promised to tell truth, and indicated that he would be punished by mother and by God if he lied); People v. Batista, 65 A.D.3d 554, 882 N.Y.S.2d 904 (2d Dept. 2009) (four-year-old complainant not competent to give sworn testimony because she did not appreciate nature of oath or consequences of failing to tell truthPeople v. Maldonado, 199 A.D.2d 563, 606 N.Y.S.2d 258 (2d Dept. 1994) (9-year-old improperly sworn where she gave "perfunctory, one-word or nonverbal responses to the mostly leading questions"); People v. Mudd, 184 A.D.2d 388, 585 N.Y.S.2d 364 (1st Dept. 1992) (7-year-old improperly sworn where she changed answers after "verbal coaxing" and inquiry was leading); People v. Ranum, 122 A.D.2d 959, 506 N.Y.S.2d 105 (2d Dept. 1986) (witnesses, one an 11-year-old, were improperly sworn where they paraphrased the judge or gave perfunctory answers in response to leading questions, and were never asked or told about the meaning of the word "oath"); People v. Smith, 104 A.D.2d 160, 481 N.Y.S.2d 879 (2d Dept. 1984) (trial court erred in allowing eight-year-old to give sworn testimony where record failed to show he understood and appreciated nature of oath); People v. Childress, 25 Misc.3d 1244(A), 906 N.Y.S.2d 781 (Crim. Ct., Kings Co., 2009) (seven-year-old complainant not competent to verify complaint where child said that he would get in trouble if he lied but never stated he would not lie; child demonstrated confusion as to birthday and other temporal matters; child, after stating that pinky swear was “like a secret,” indicated he might swear pinky to something that was not true if told to do so by adult; and child constantly put hand in

mouth despite being asked not to and repeatedly needed to be reminded to give verbal answers) and People v. Carrington, 18 Misc.3d 1147(A), 859 N.Y.S.2d 897 (County Ct., West. Co., 2008) (insufficient evidence that 7-year-old grand jury witness was capable of giving sworn testimony where he, inter alia, initially stated that it was "truth" that he was wearing skirt when in fact he was not; stated that he did not know what Bible was and that he did not know who God was or where he lived; refused to put hand on Bible, stating that "it's going to make a fire"; and stated "I promise to tell the truth," but avoided eye contact with prosecutor and put hands on top of head and slightly nodded "yes" and then laughed).

c. Voir Dire - To determine whether a child can properly be sworn, the court should examine the child before taking testimony. Although the court may question the child without the intervention of counsel, see People v. Byrnes, 33 N.Y.2d 343, 352 N.Y.S.2d 913 (1974), it is common for the court to permit counsel to question the child as well. See also People v. Morales, 80 N.Y.2d 450, 591 N.Y.S.2d 825 (1992) (defendant has no statutory or due process right to be present at witness competency hearing). Extrinsic evidence regarding the child's competency may be introduced. People v. Parks, 41 N.Y.2d 36, 46, 390 N.Y.S.2d 848 (1976) (court may properly consider testimony of physicians or other persons with information that would shed light on the capacity and intelligence of the witness).

3. Corroboration – FCA §343.1(3) provides that "[a] respondent may not be found to be delinquent solely upon the unsworn evidence given pursuant to [§343.1(2)]." See People v. Groff, 71 N.Y.2d 101, 524 N.Y.S.2d 13 (1987) (corroborative evidence is sufficient if it tends to establish the crime and that defendant committed it; court rejects rule requiring corroborative evidence extending to every material element of the crime).

H. Interpreters - Witnesses who do not speak English adequately may testify through an interpreter, who must be sworn to interpret fully and accurately. The judge may use an official court interpreter, or any other suitable and qualified interpreter. Richardson, §6-212. Compare People v. Lee, 21 N.Y.3d 176 (2013) (no error in court's refusal to replace state-employed court interpreter because he was acquainted with

complainants; court questioned interpreter as to whether he knew facts of case and would be uncomfortable translating and received negative response, and there was no evidence of bias and it could be presumed that interpreter, a state employee who had taken an oath to interpret, knew his ethical/professional obligations to translate testimony verbatim) and People v. Catron, 143 A.D.2d 468, 532 N.Y.S.2d 589 (3rd Dept. 1988) (determination of qualifications lies within sound discretion of court) with Matter of James L., 143 A.D.2d 533, 532 N.Y.S.2d 941 (4th Dept. 1988) (court improperly allowed complainant's son to interpret without evaluating his bias or his qualifications, or admonishing him to provide an exact translation).

A failure to appoint an interpreter for a witness who apparently requires one can lead to reversal. See, e.g., People v. Fogel, 97 A.D.2d 445, 467 N.Y.S.2d 411 (2d Dept. 1983). Moreover, a respondent who does not speak English is entitled to the assistance of an interpreter. See People v. Warcha, 17 A.D.3d 491, 792 N.Y.S.2d 627 (2d Dept. 2005), lv denied 5 N.Y.3d 771 (no error where court failed to appoint Quiche interpreter for defendant when defense counsel requested one 10 months after he began to represent defendant, and there was evidence that use of Spanish interpreters was adequate); People v. Pizzali, 159 A.D.2d 652, 552 N.Y.S.2d 961 (2d Dept. 1990).

In Matter of Yovanny L., 33 Misc.3d 894 (Fam. Ct., Bronx Co., 2011), the court held a hearing after the prosecutor alleged errors in a translation by a Mandarin interpreter and made a motion to strike the testimony of the complaining witness. The court noted that the limited case law suggests that interpretation should be word-for-word rather than summarized, and that there should be no conversation between the witness and the interpreter, no significant differences in the length of dialogue of the witness and the interpreter, and no bias or interest in the proceedings. The court cited the Office of Court Administration Court Interpreter Manual and Code of Ethics, which states that interpreters must faithfully and accurately interpret what is said without embellishment or omission, provide professional services only in areas where they can perform accurately, and inform the court when in doubt or where there has been an error, even if the error is perceived after the proceeding has concluded. The court also cited the OCA “benchcard” for judges working with interpreters advises judges to

assess as follows: 1. Are there significant differences in the length of interpretation as compared to the original testimony? 2. Does the individual needing the interpreter appear to be asking questions of the interpreter? 3. Is the interpreter leading the witness, or trying to influence answers through body language or facial expressions? 4. Is the interpreter acting in a professional manner? 5. Is the interpretation being done in the first person? 6. If the interpreter has a question, does he or she address the court in the third-person? The benchcard also suggests that judges swear in court interpreters, which the Court did not do in this case. After the hearing, the court, noting that the respondent, whose constitutional rights were implicated, did not want the testimony stricken, denied the prosecutor's motion. The court concluded that although the interpreter had violated the standards by not interpreting word for word on one or two occasions, engaging in conversations with the witness, and erring in her translation of one or two words, the errors were relatively minor and few and did not affect the main aspects of the witness's testimony.

I. Refreshing Recollection Of Witness - When a witness cannot recall a fact or event, the examiner may proffer a writing or an object, ask the witness to read or examine it, obtain an acknowledgment that the document or object refreshes the witness' memory, and then ask the witness to testify based upon his or her revived memory. A writing used to refresh a witness' recollection need not have been made at the time of the event, and need not have been made by the witness. The examiner may, for instance, use the witness' prior testimony. See Richardson, §6-214; Mauet, Trial Techniques, §5.6; see also People v. Oddone, _N.Y.3d_, 2013 WL 6499305 (2013) (reversible error where defense witness testified that duration of part of incident she observed "could have been a minute or so," and defense counsel was not allowed to refresh her recollection with prior statement that put same interval at "maybe 6 to 10 seconds"; although court ruled that witness had given no indication she needed memory refreshed, inference that recollection could benefit from being refreshed was compelling where witness, describing incident more than a year in the past, said that it "could have" lasted "a minute or so" and added "I don't know," and it was unfair to let jury hear testimony damaging to defense from defense witness while not allowing

defense to make use of earlier, more favorable statement); People v. Rosario, 275 A.D.2d 224, 712 N.Y.S.2d 499 (1st Dept. 2000) (court rejects defendant's argument that officer's testimony was incredible as a matter of law because of delay between arrest and testimony and lack of written notation regarding contents of radio transmission; court also notes that there is no rule that recollection can be refreshed only with notes detailing precisely what one is attempting to remember).

Although an adverse party may inspect the document or object, and use it while examining the witness, an objection to disclosure could be raised where, for instance, the document contains notes of a confidential attorney-client communication.

Finally, it should be remembered that the examiner may not surreptitiously "refresh" the witness' recollection by speaking to the witness during a break in the examination. Compare People v. Niver, 41 A.D.3d 961, 839 N.Y.S.2d 252 (3rd Dept. 2007), lv denied 9 N.Y.3d 924 (no prejudice where prosecutor consulted with witness over weekend break in cross-examination, but court precluded prosecution from eliciting information discussed) and People v. Robinson, 190 A.D.2d 697, 593 N.Y.S.2d 279 (2d Dept. 1993) with People v. Branch, 83 N.Y.2d 663, 612 N.Y.S.2d 365 (1994) (no error where court allowed prosecutor to speak to witness during recess because prosecutor was concerned that defendant's family had intimidated witness).

J. Exclusion Of Witness From Courtroom - The court may exclude a witness during the testimony of another witness in order to avoid the possibility that the witness will learn the precise points of difference and thereby gain an unfair advantage in shaping his testimony to his own advantage. Although exclusion should usually be granted, the denial of exclusion will not constitute reversible error unless it was an abuse of discretion. See, e.g., People v. Williams, 299 A.D.2d 568, 750 N.Y.S.2d 504 (2d Dept. 2002), lv denied 99 N.Y.2d 621, 757 N.Y.S.2d 832 (2003) (defendant's alibi witnesses, one of whom was his mother, properly excluded during defendant's testimony since they were subject to recall); People v. Mitchell, 224 A.D.2d 551, 638 N.Y.S.2d 172 (2d Dept. 1996) (court properly excluded defendant's mother, who was listed as possible prosecution witness and had testified at prior hearings); People v. Felder, 39 A.D.2d 373, 334 N.Y.S.2d 992 (2d Dept. 1972) (defendant not prejudiced by

presence of detective in court before his testimony, but court notes that practice of exclusion is strongly recommended); United States v. Olofson, 563 F.3d 652 (7th Cir., 2009) (no error in exclusion of defense firearms expert during testimony of government's firearms expert; expert's presence might have been helpful or desirable, but defendant did not establish it was essential); Jerry Parks Equipment Company v. Southeast Equipment Company, 817 F.2d 340 (5th Cir. 1987) (court properly precluded testimony due to violation of sequestration order). See also Federal Rules, 615(3).

When an exclusion order is violated, a preclusion sanction may be imposed only in extraordinary circumstances. See People v. Cervera, 40 Misc.3d 89 (App. Term, 2d Dept., 2013) (court erred in precluding testimony of defense witness who was present throughout proceedings prior to being called to testify; in these circumstances, witness's testimony is not rendered incompetent and appropriate remedy is matter generally left to court's discretion, and, in this case, there was no record of instruction by court or request by state trooper that defendant's witnesses be excluded, and ruling also violated defendant's constitutional right to present witnesses); People v. Brown, 274 A.D.2d 609, 710 N.Y.S.2d 194 (3rd Dept. 2000) (preclusion of defense alibi witness' testimony was error; the drastic sanction of preclusion would be appropriate only in the most egregious circumstances - e.g., when defense counsel and the witness have collaborated to gain some tactical advantage such as an opportunity to tailor the evidence).

A judge may allow a vulnerable witness to testify in the company of a supportive individual he or she knows as long as the person is not a witness, or with a "comfort dog." See State v. Rochelle, 298 P.3d 293 (Kan. 2013), cert denied 134 S.Ct. 270 (when determining whether "comfort person" may accompany witness, court should consider: age of witness; whether defendant has had chance to offer alternatives; choice of comfort person and whether it is someone related to child, which may lessen appearance of prejudice; where in courtroom support person is seated and whether presence is obvious; availability of alternative methods of making child more comfortable, such as child-size witness chair; issuance of instruction telling jury to disregard comfort person and not allow person's presence to influence credibility

determinations; and instruction directing comfort person not to speak, gesture, or otherwise indicate approval or disapproval of child's testimony); People v. Tohom, 109 A.D.3d 253 (2d Dept. 2013) (courts should permit presence of therapeutic "comfort dog" pursuant to Executive Law § 642-a when court determines that animal may provide emotional support for child crime victim under age of 16).

V. Privileged Communications

A. Attorney-Client

1. Generally - "Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication ...." CPLR §4503(a).

New York State Rules of Professional Conduct, Rule 1.6, states as follows:

> (a) A lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person, unless:
> (1) the client gives informed consent, as defined in Rule 1.0(j);
> (2) the disclosure is impliedly authorized to advance the best interests of the client and is either reasonable under the circumstances or customary in the professional community; or
> (3) the disclosure is permitted by paragraph (b).
> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential. "Confidential information" does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates.
> (b) A lawyer may reveal or use confidential information to the extent that the lawyer reasonably believes necessary:
> (1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime;
(3) to withdraw a written or oral opinion or representation previously given by the lawyer and reasonably believed by the lawyer still to be relied upon by a third person, where the lawyer has discovered that the opinion or representation was based on materially inaccurate information or is being used to further a crime or fraud;
(4) to secure legal advice about compliance with these Rules or other law by the lawyer, another lawyer associated with the lawyer's firm or the law firm;
(5) (i) to defend the lawyer or the lawyer's employees and associates against an accusation of wrongful conduct; or
(ii) to establish or collect a fee; or
(6) when permitted or required under these Rules or to comply with other law.

See also Rule 1.14(c) (information relating to representation of client with diminished capacity is protected by Rule 1.6, although when taking protective action for client with diminished capacity who cannot adequately act in his own interests and is at risk of substantial physical, financial or other harm, lawyer is impliedly authorized under Rule 1.6(a) to reveal information about client, but only to extent reasonably necessary to protect client's interests); Rule 1.0(j) ("Informed consent" denotes agreement by person to proposed course of conduct after lawyer has communicated information adequate for person to make informed decision, and after lawyer has adequately explained material risks of proposed course of conduct and reasonably available alternatives); Commentary to Rules of Professional Conduct, Rule 1.6 ("Information that is generally known in the local community or in the trade, field or profession to which the information relates is also not protected, unless the client and the lawyer have otherwise agreed. Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process. . . . In some situations. . . a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter. Implied disclosures are permissible when they (i) advance the best interest of the client and (ii) are either reasonable under the circumstances or customary in the professional community. In addition, lawyers in a

firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers. Lawyers are also impliedly authorized to reveal information about a client with diminished capacity when necessary to take protective action to safeguard the client's interests. . . . A tribunal or governmental entity claiming authority pursuant to other law to compel disclosure may order a lawyer to reveal confidential information. Absent informed consent of the client to comply with the order, the lawyer should assert on behalf of the client nonfrivolous arguments that the order is not authorized by law, the information sought is protected against disclosure by an applicable privilege or other law, or the order is invalid or defective for some other reason. In the event of an adverse ruling, the lawyer must consult with the client to the extent required by Rule 1.4 about the possibility of an appeal or further challenge, unless such consultation would be prohibited by other law. If such review is not sought or is unsuccessful, paragraph (b)(6) permits the lawyer to comply with the order").

Although the client's name is not, in and of itself, privileged, disclosure might be improper when the client would be exposed to liability in connection with the matter discussed with the attorney. See Matter of D'Alessio v. Gilberg, 205 A.D.2d 8, 617 N.Y.S.2d 484 (2d Dept. 1994). Moreover, a client's location may be privileged information. Compare Matter of Grand Jury of Suffolk County, 117 Misc.2d 197, 456 N.Y.S.2d 312 (County Ct., Suffolk Co., 1982) (disclosure ordered) with Matter of Grand Jury Investigation, 175 Misc.2d 398, 669 N.Y.S.2d 179 (County Ct., Onondaga Co., 1998) and New York County Lawyers' Ethics Opinion 702, 1994 WL 906735.

The attorney-client privilege covers an attorney's advice to the client. See, e.g., Smith v. State, 905 A.2d 315 (Md., 2006) (counsel's expressed opinion that there was no valid basis for invocation of Fifth Amendment privilege was privileged).

2. Existence Of Relationship – "A person who discusses with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a 'prospective client.'" Rules of Professional Conduct, Rule 1.18(a). "Even when no client-lawyer relationship ensues, a lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would

permit with respect to information of a former client." Rules of Professional Conduct, Rule 1.18(b). See also People v. Belge, 59 A.D.2d 307, 399 N.Y.S.2d 539 (4th Dept. 1977) (privilege may apply when asserted holder of privilege is or sought to become client); Mixon v. Texas, 224 S.W.3d 206 (Tex. Ct. Crim. App., 2007) (privilege covered statements made during consultation with view to obtaining legal services even though attorney declined to accept case); In re Investigating Grand Jury (Stretton), 887 A.2d 257 (PA Super. Ct., 2005), appeal denied 902 A.2d 1241 (statements from prison protected even though attorney had been relieved a few months earlier; even after formal representation ended, attorney retained professional relationship with defendant).

A "common interest privilege" protects statements made at joint meetings by multiple parties represented by one attorney, or by parties represented by different attorneys when a joint defense effort has been undertaken. See People v. Shrier, 190 Cal.App.4th 400 (Cal. Ct. App., 2d Dist., 2010) (because of joint defense agreement, statements made by defendants to attorneys were representing other defendants were privileged); People v. Pennachio, 167 Misc.2d 114, 637 N.Y.S.2d 633 (Sup. Ct., Kings Co. 1995).

It has been held that the privilege survives the death of the client. See, e.g., People v. Vespucci, 192 Misc.2d 685, 745 N.Y.S.2d 391 (County Ct., Nassau Co., 2002) (court discusses various approaches, including "absolute privilege" rule under which attorney can never release information, and use of balancing test which weighs, inter alia, need for disclosure). The right to waive the privilege also survives and may be exercised by the decedent's personal representative. Mayorga v. Tate, 302 A.D.2d 11, 752 N.Y.S.2d 353 (2d Dept. 2002).

3. Employees Of Attorney - Statements made to an attorney's employees or agents are privileged. See, e.g., Elijah W. v. The Superior Court of Los Angeles County, 216 Cal.App.4th 140 (Cal. Ct. App., 2d Dist., 2013) (defense psychologist not required to report child abuse disclosed by juvenile; psychologist also had no duty to warn potential victim of juvenile's threatened violent behavior, and, even if such a duty existed, reasonable care requirement could be achieved by notifying

defense counsel and triggering counsel's obligation to consider whether to reveal confidential information to prevent criminal act likely to result in death or great bodily harm); People v. George, 104 Misc.2d 630, 428 N.Y.S.2d 825 (Sup. Ct. Bronx Co., 1980) (statements to polygraphist are privileged; given need to hire experts, privilege covers independent contractors, not just regular employees). But see People v. Edney, 39 N.Y.2d 620, 385 N.Y.S.2d 23 (1976) (defense psychiatrist allowed to testify for People on rebuttal concerning defendant's sanity); State v. Jones, 681 S.E.2d 580 (S.C., 2009) (when neither work product doctrine nor attorney-client privilege is implicated, general rule is that in order to compel defense-retained expert to testify, State must prove it has substantial need for expert and that inability to present the testimony will present undue hardship; although court was persuaded by decisions from other jurisdictions finding right to counsel violation in similar circumstances, court concludes that this is rare case in which State's actions were permissible); People v. Greene, 153 A.D.2d 439, 552 N.Y.S.2d 640 (2d Dept. 1990), lv denied 76 N.Y.2d 735, 558 N.Y.S.2d 897 (no error where prosecution called defense expert as witness, since opinion was not based on information from defendant); Pawlyk v. Wood, 237 F.3d 1054 (9th Cir. 2001) (no error where prosecution obtained report of first court-appointed expert who evaluated defendant's mental status, and would not be testifying).

4. Communications Within Privilege

a. Crime-Fraud Exception - See Commentary to Rules of Professional Conduct, Rule 1.6 ("The lawyer's exercise of discretion … requires consideration of a wide range of factors and should therefore be given great weight. In exercising such discretion under these paragraphs, the lawyer should consider such factors as: (i) the seriousness of the potential injury to others if the prospective harm or crime occurs, (ii) the likelihood that it will occur and its imminence, (iii) the apparent absence of any other feasible way to prevent the potential injury, (iv) the extent to which the client may be using the lawyer's services in bringing about the harm or crime, (v) the circumstances under which the lawyer acquired the information of the client's intent or prospective course of action, and (vi) any other aggravating or extenuating circumstances. In any case, disclosure adverse to the client's interest should be no

greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime. When a lawyer learns that a client intends to pursue or is pursuing a course of conduct that would permit disclosure. . . the lawyer's initial duty, where practicable, is to remonstrate with the client. In the rare situation in which the client is reluctant to accept the lawyer's advice, the lawyer's threat of disclosure is a measure of last resort that may persuade the client…. A lawyer's permissible disclosure … does not waive the client's attorney-client privilege; neither the lawyer nor the client may be forced to testify about communications protected by the privilege, unless a tribunal or body with authority to compel testimony makes a determination that the crime-fraud exception to the privilege, or some other exception, has been satisfied by a party to the proceeding…. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat…. The lawyer whose services were involved in the criminal acts that constitute a continuing crime may reveal the client's refusal to bring an end to a continuing crime, even though that disclosure may also reveal the client's past wrongful acts, because refusal to end a continuing crime is equivalent to an intention to commit a new crime. Disclosure is not permitted under paragraph (b)(2), however, when a person who may have committed a crime employs a new lawyer for investigation or defense. Such a lawyer does not have discretion under paragraph (b)(2) to use or disclose the client's past acts that may have continuing criminal consequences. Disclosure is permitted, however, if the client uses the new lawyer's services to commit a further crime, such as obstruction of justice or perjury"); United States v. Zolin, 491 U.S. 554, 109 S.Ct. 2619 (1989) (court may review documents to determine whether exception applies if party seeking disclosure shows review is appropriate); Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1988) (no impropriety where lawyer threatened to inform court and withdraw if defendant perjured himself); In re Grand Jury Investigation, 902 N.E.2d 929 (Mass., 2009) (statement of intention to commit crime is protected if it does not come within

exception); In re Grand Jury Proceedings, 417 F.3d 18 (1st Cir. 2005) (exception applies when there is reasonable basis to believe lawyer's services were used to foster crime or fraud); McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003) (although consent not valid because attorney did not advise defendant of all possible adverse consequences, attorney could reveal location of bodies where he reasonably believed they might be alive); People v. Kahn, 26 Misc.3d 1211(A), 906 N.Y.S.2d 782 (Sup. Ct., Queens Co., 2010) (defense counsel did not breach ethical duties by revealing that defendant told him he would make sure no witnesses would testify against him at trial); State Bar Ethics Opinion 681, 1996 WL 421808 (lawyer requesting disqualification must preserve confidentiality; lawyer has duty to follow order to disclose but may be obligated to seek appeal); State Bar Opinion No. 562, 1984 WL 50017; ABA Standards For Criminal Justice, The Defense Function, 4-3.7(d) (lawyer may reveal information lawyer reasonably believes is necessary to prevent client from committing crime that lawyer believes is likely to result in imminent death or substantial bodily harm).

b. Documents - Documents revealed by the client are protected if they were prepared for purposes of litigation or seeking legal advice. See Bekins Record Storage Co. v. Morgenthau, 62 N.Y.2d 324, 476 N.Y.S.2d 806 (1984).

c. Address Of Client - See, e.g., Matter of Jacqueline F., 47 N.Y.2d 215, 417 N.Y.S.2d 884 (1979) (lawyer was properly directed to reveal whereabouts of client who had left the jurisdiction with an infant); R.L.R. v. State, 116 So.3d 570 (Fla. Ct. App., 3d Dist., 2013) (court erred in ordering minor's Attorneys Ad Litem to disclose client's whereabouts after minor requested that information not be disclosed; court's concern that minor might be in danger did not fit within exception to attorney-client privilege recognized by the Florida Bar Rule).

d. Stolen Property - See, e.g., City Bar Ethics Opinion 2002-1, 2002 WL 1040180 (client's possession of stolen property not a continuing crime that authorizes disclosure by attorney without consent); California State Bar Ethics Opinion 1986-89, 1986 WL 69069 (lawyer may not take possession of and secrete contraband); State Bar Ethics Opinion 530, 1981 WL 27591 (if lawyer has legal obligation to turn over evidence received from client, lawyer must comply with method of returning

property that is provided by law, but if law does not so provide, lawyer should turn over evidence in manner least prejudicial to client); ABA Standard for the Defense Function, Standard 4-4.6 (provides, inter alia, that counsel should return non-contraband item to source from whom counsel received it, and advise source of legal consequences pertaining to possession or destruction of the item; that counsel may receive item for reasonable period of time during which counsel intends to return it to owner, reasonably fears that return to source will result in destruction, reasonably fears that return to source will result in physical harm to anyone, intends to test, examine, inspect, or use item as part of representation of client, or cannot return it to source; if item received is contraband, counsel may suggest that client destroy it where there is no pending case or investigation relating to the evidence and destruction is clearly not in violation of criminal statute; that if destruction is not permitted by law or counsel concludes that he/she cannot retain item in way that does not pose unreasonable risk of physical harm to anyone, counsel should disclose location of or deliver item to law enforcement authorities; and that if counsel discloses location of or delivers item to law enforcement authorities, or to a third party, he/she should do so in way best designed to protect client's interests).

5. Waiver

a. Presence Of Third Parties - Statements knowingly made with third parties present are generally not privileged. See People v. Osorio, 75 N.Y.2d 80, 550 N.Y.S.2d 612 (1989) (privilege ordinarily applies when hired interpreter is present, but not where defendant interpreted for co-defendant; court cites 96 A.L.R.2d 125, §13, which states that "[i]t is well recognized that an interpreter necessarily present during attorney-client communications is precluded by the attorney-client privilege from testifying to matters disclosed to him so that he could interpret the communications between attorney and client"); People v. Mitchell, 58 N.Y.2d 368, 461 N.Y.S.2d 267 (1983) (although statement was made to attorney's secretary, other attorneys' secretaries were present); People v. Harris, 57 N.Y.2d 335, 456 N.Y.S.2d 694 (1982); Prink v. Prink, 48 N.Y.2d 309, 422 N.Y.S.2d 911 (1979) (common-law rule permitting eavesdropper to testify concerning otherwise privileged communication has been

modified by CPLR §4503); United States v. Rodriguez, 655 F.3d 126 (2d Cir. 2011) (privilege did not protect recorded phone calls made by defendant from prison where defendant was aware conversation was being recorded by prison authorities; however, existence of third party along line of communication does not destroy privilege if purpose of third party's participation is to improve comprehension of communications); Richardson, §§ 5-204.

b. In-Court Disclosure - Except when elicited on cross-examination, the client's testimony concerning communications waives the privilege. Richardson, §5-209. But see People v. Lynch, 23 N.Y.2d 262, 296 N.Y.S.2d 327 (1968) (no waiver where defendant testifies about events discussed with attorney but does not refer to confidential communications); Blanks v. State, 959 A.2d 1180 (Md., 2008) (defendant's testimony that he told his lawyer "all about it" did not waive privilege).

c. Extrajudicial Disclosure - See Richardson, §5-209; In re Von Bulow v. Von Bulow, 828 F.2d 94 (2d Cir. 1987) (consent by client to disclosure of privileged communications in book written by attorney waived privilege; however, although a client's in-court disclosure of communications with the attorney waives the privilege entirely and precludes the selective disclosure of information in a misleading way, extrajudicial disclosure does not waive the privilege as to undisclosed portion of communications); United States v. Nunez, _F.Supp.2d_, 2013 WL 4407069 (SDNY 2013) (where Government, pursuant to warrant served on Google, seized emails and online chat records containing communications between defendant and his lawyer, court precluded disclosure of communications protected by attorney-client privilege); Galison v. Greenberg, 5 Misc.3d 1025(A), 799 N.Y.S.2d 160 (Sup. Ct., N.Y. Co., 2004) (no waiver where counsel inadvertently attached protected e-mail to motion papers); People v. Terry, 1 Misc.3d 475, 764 N.Y.S.2d 592 (County Ct., Monroe Co., 2003) (privilege not waived where defendant inadvertently sent to ADA a letter meant for defense counsel). Regarding the issue of selective waiver - e.g., in a confidentiality agreement with the Government - see In re Columbia/HCA Healthcare Corporation Billing Practices Litigation, 293 F.3d 289 (6th Cir. 2002).

Revealing the subject, but not the content, of communications does not

constitute a waiver. Matter of Vanderbilt, 57 N.Y.2d 66, 453 N.Y.S.2d 662 (1982). And, under certain conditions, inadvertent disclosure does not constitute a waiver. See New York Times v. Lehrer McGovern Bovis, Inc., 300 A.D.2d 169, 752 N.Y.S.2d 642 (1st Dept. 2002); Long Island Lighting Co. v. Allianz Underwriters Insurance Co., 301 A.D.2d 23, 749 N.Y.S.2d 488 (1st Dept. 2002).

6. Sanction For Violation Of Privilege - See State v. Lenarz, 22 A.3d 536 (Conn. 2011) (dismissal only appropriate remedy where prosecutor improperly acquired privileged attorney-client communications).

B. Clergyman-Penitent - See CPLR §4505; People v. Carmona, 82 N.Y.2d 603, 606 N.Y.S.2d 879 (1993); State v. Mark R., 17 A.3d 1 (Conn. 2011) (statements made by defendant when he met with pastor, wife and step-daughter to discuss allegations of sexual abuse not protected by privilege; although presence of third parties does not necessarily result in abrogation of privilege when such presence is required to achieve purpose of communications, the circumstances here did not suggest confidentiality); State v. J.G., 990 A.2d 1122 (N.J. 2010) (cleric-penitent privilege applies where, under totality of the circumstances, objectively reasonable person would believe communication was made in confidence to cleric acting as spiritual adviser; rule protects not only confidences relayed in confessional, but also confidences relayed during group or family counseling, and is not anchored to religious rules or doctrine); Cox v. Miller, 296 F.3d 89 (2d Cir. 2002) (assuming, arguendo, that Alcoholics Anonymous is a "religion," statements made by defendant to fellow AA members were not made in confidence for purpose of seeking spiritual guidance); People v. Drelich, 123 A.D.2d 441, 506 N.Y.S.2d 746 (2d Dept. 1986) (statements to rabbi were made not for purpose of spiritual assistance, but for purpose of getting help in retaining legal counsel); People v. Harris, 34 Misc.3d 281 (Sup. Ct., Kings Co., 2011) (statements to detective not protected by privilege where third parties were present, and, although detective had title of Deacon, his position in church was not akin to that of minister or clergyman, and it appeared that defendant intended to ask sympathetic member of law enforcement for practical counsel). See also Lightman v. Flaum, 97 N.Y.2d 128, 736 N.Y.S.2d 300 (2001) (CPLR 4505 does not impose a fiduciary duty

and create a private cause of action for improper disclosure).

C. Spousal - See CPLR §4502(b); People v. Mills, 1 N.Y.3d 269, 772 N.Y.S.2d 228 (2003) (marital privilege did not apply where defendant made statement while he was choking and threatening wife); People v. Fediuk, 66 N.Y.2d 881, 498 N.Y.S.2d 763 (1985) (communications privileged even though spouses not living together); People v. Parker, 49 A.D.3d 974, 854 N.Y.S.2d 233 (3rd Dept. 2008), lv denied, 10 N.Y.3d 868 (testimony of wife did not violate marital privilege where defendant's statements concerning plans and activities on evening of murders were nothing more than daily and ordinary exchanges unprotected by privilege, and defendant's conduct in pulling out gun and simultaneously directing wife "to get down" when she wanted to open door to police were threats, and thus unprotected by privilege); People v. Powers, 42 A.D.3d 816, 839 N.Y.S.2d 865 (3rd Dept. 2007) (privilege not applicable to communication arising out of abuse of spouse's child); People v. Thomas, 288 A.D.2d 405, 733 N.Y.S.2d 231 (2d Dept. 2001), lv denied 97 N.Y.2d 709, 739 N.Y.S.2d 110 (2002) (defendant's letter to wife not covered by privilege where he composed it in presence of step-daughter and left it in plain view on table); People v. Gomez, 112 A.D.2d 445, 492 N.Y.S.2d 415 (2d Dept. 1985) (confession to rape of stepdaughter was not made in reliance on the marital relationship, and privilege not applicable in child abuse prosecutions); United States v. Breton, 740 F.3d 1 (1st Cir. 2014) ("offense against spouse" exception includes offense against child of either spouse); Winstead v. Commonwealth, 327 S.W.3d 386 (Ky. 2010) (request to spouse to communicate false alibi to police covered by spousal privilege where request communicated privately and not intended for disclosure); State v. Rollins, 675 S.E.2d 334 (NC, 2009) (privilege does not protect conversations in public visiting areas of state correctional facilities). It has been held that the privilege may, in some instances, apply to a common-law marriage. People v. Suarez, 148 Misc.2d 95, 560 N.Y.S.2d 68 (Sup. Ct. N.Y. Co., 1990). See also State v. Serrano, 210 P.3d 892 (Oregon 2009) (communicating spouse's intent governs confidentiality, since that spouse usually initiates communication and is in position to assess nature of communication and control circumstances under which communication is made);

United States v. Premises Known As 281 Syosset Woodbury Rd., 71 F.3d 1067 (2d Cir. 1995) (privilege, which is designed to ensure that spouses will not be forced to bear witness against each other, did not bar wife from revealing communications in civil forfeiture proceeding involving her property, not husband's).

D. Parent-Child - See, e.g., People v. Johnson, 84 N.Y.2d 956, 620 N.Y.S.2d 822 (1994) (privilege did not apply); People v. Harrell, 87 A.D.2d 21, 450 N.Y.S.2d 501 (2d Dept. 1982) (privilege applies where minor under arrest seeks assistance from parent); Matter of Mark G., 65 A.D.2d 917, 410 N.Y.S.2d 464 (4th Dept. 1978) (privilege not applicable where it did not appear that statement was made in confidence or that father wished to remain silent); Matter of A&M, 61 A.D.2d 426, 403 N.Y.S.2d 375 (4th Dept. 1978) (communications privileged under constitutional right of privacy); People v. Hilligas, 175 Misc.2d 842, 670 N.Y.S.2d 744 (Sup. Ct., Erie Co., 1998) (privilege not applicable to 28-year-old defendant's statements to parents). But see People v. Tesh, 124 A.D.2d 843, 508 N.Y.S.2d 560 (2d Dept. 1986) (privilege inapplicable where third parties were present).

E. Physician (and other health care professional)-Patient

1. Generally - See CPLR §4504 (physician, dentist or nurse may not disclose in absence of patient's waiver "any information which he acquired in attending a patient in a professional capacity, and which was necessary to enable him to act in that capacity"); Matter of the Grand Jury Investigation in New York County, 98 N.Y.2d 525, 749 N.Y.S.2d 462 (2002) (subpoena for records of "any male Caucasian patient" aged 30-45 who was treated or sought treatment for a stab wound during a 2-day period is quashed, since subpoena requires medical determinations, and not mere observations of what would be plainly visible to a lay person); Matter of Grand Jury Investigation Of Onondaga County, 59 N.Y.2d 130, 463 N.Y.S.2d 758 (1983) (since victim may have stabbed assailant, DA subpoenaed all hospital records regarding stab wounds treated since date of crime; finding no public interest exception to rule, court holds that even names and addresses are covered by the privilege); Matter of Camperlango, 56 N.Y.2d 251, 451 N.Y.S.2d 697 (1982); People v. Elysee, 49 A.D.3d 33, 847 N.Y.S.2d 654 (2d Dept. 2007) (blood specimen taken from patient by medical

professional is not "information" protected by physician-patient privilege), aff'd 12 N.Y.3d 100, 876 N.Y.S.2d 677 (2009) (privilege overcome when police officers executed court order); People v. Bowen, 229 A.D.2d 954, 645 N.Y.S.2d 381 (4th Dept. 1996), lv denied 88 N.Y.2d 1019, 651 N.Y.S.2d 18 (defendant's statements that his blood alcohol content was "way up there," that he had consumed six beers, and that he was "polluted" were made spontaneously, and there was no evidence that statements were necessary for treatment; thus, defendant failed to establish that statements were protected by privilege); People v. Norbert, 30 Misc.3d 1211(A) (Sup. Ct., Kings Co., 2011) (statements to doctor in emergency room admissible where conversation took place in bustling emergency room in manner that rendered it unlikely that defendant expected it to be confidential); People v. Brito, 26 Misc.3d 1097, 892 N.Y.S.2d 752 (Sup. Ct., Bronx Co., 2010) (physician-patient privilege applies to statements made to emergency medical technician when technician acts as agent of physician); People v. Rawley, 16 Misc.3d 1103(A), 2007 WL 1775517 (Sup. Ct., Bronx Co., 2007) (while statute prevents physician or other medical professional from testifying, it does not prevent another person from testifying about statement he or she overheard); People v. Muscarnera, 16 Misc.3d 622, 842 N.Y.S.2d 241 (Dist. Ct., Nassau Co., 2007) (defendant's consent to taking of blood during treatment following automobile accident did not permit hospital to test blood for non-medical reasons); People v. Bashkatov, 13 Misc.3d 1101, 827 N.Y.S.2d 594 (Crim. Ct., Richmond Co., 2006) (evidence of defendant's blood samples and chemical tests of samples barred by privilege); People v. Mirque, 195 Misc.2d 375, 758 N.Y.S.2d 471 (Crim. Ct., Bronx Co., 2003) (defendant's statement to Emergency Medical Technician covered by privilege); People v. Doe, 170 Misc.2d 454, 649 N.Y.S.2d 326 (Sup. Ct., Monroe Co., 1996) (privilege did not cover prisoner's request for examinations for Chlamydia); People v. Ackerson, 149 Misc.2d 882, 566 N.Y.S.2d 833 (County Ct. Monroe Co., 1991) (statement to EMT not covered by privilege); People v. Toure, 137 Misc.2d 1066, 523 N.Y.S.2d 746 (Sup. Ct., Richmond Co., 1988), aff'd 180 A.D.2d 1013, 579 N.Y.S.2d 809 (2d Dept. 1992), lv denied 79 N.Y.2d 1008 (generalized screening of prisoners upon entry into prison is not procedure related to treatment that gives rise to privilege); People v. McHugh, 124

Misc.2d 823, 478 N.Y.S.2d 754 (Sup. Ct., Bronx Co., 1984) (defendant has burden to establish privilege).

Facts which would have been obvious to a layperson are not privileged. People v. Greene, 36 A.D.3d 219, 824 N.Y.S.2d 48 (1st Dept. 2006), aff'd 9 N.Y.3d 277, 849 N.Y.S.2d 461 (2007); People v. Hedges, 98 A.D.2d 950, 470 N.Y.S.2d 61 (4th Dept. 1983) (physician allowed to testify that defendant had strong odor of alcohol on his breath, that his speech was slurred and disjointed, and that he was intoxicated). See also People v. Capra, 17 N.Y.2d 670, 269 N.Y.S.2d 451 (1966) (privilege not applicable where heroin fell out of defendant's sock).

2. Exceptions

a. Public Health Law §3373 – Under Article 33 of the Public Health Law, a practitioner has a duty to make a report concerning a person under treatment who is an addict or habitual narcotics user. Although PHL §3373 creates an exception to confidentiality, it does so only "[f]or purposes of duties arising out of this article ...." See People v. Sinski, 88 N.Y.2d 487, 646 N.Y.S.2d 651 (1996) (§3373 does not generally abrogate the privilege for purposes of a criminal prosecution, but merely permits practitioners to submit required reports).

b. PL §265.25 - A report must be made of "[e]very case of a bullet wound, gunshot wound, powder burn or any other injury arising from or caused by the discharge of a gun or firearm, and every case of a wound which is likely to or may result in death and is actually or apparently inflicted by a knife, ice pick or other sharp instrument." See also PL §265.26 (requires that report be made of certain burn injuries and wounds).

c. Social Services Law §§413, 415 - It has been held that reporting requirements in the Social Services Law create an exception to the privilege in criminal and civil cases involving child abuse. See People v. Sergio, 21 Misc.3d 451, 864 N.Y.S.2d 264 (Sup. Ct., Kings Co., 2008) (§415 applicable even though child was deceased at time of Grand Jury presentation and there was no danger of future harm); People v. Rodriguez, 7 Misc.3d 1023(A), 801 N.Y.S.2d 240 (County Ct., Suffolk Co., 2005) (mandatory reporting sections would be meaningless if reporters were prevented

from testifying as to their observations and findings); see also State v. Mark R., 17 A.3d 1 (Conn. 2011) (professional counselor's mandated report abrogates privilege in subsequent criminal prosecution); but see People v. Bass, 140 Misc.2d 57, 529 N.Y.S.2d 961 (Sup. Ct. Bronx Co., 1988). However, FCA §1046(a)(vii), which suspends the privilege in child abuse and neglect proceedings, does not apply in a criminal proceeding. People v. Strawbridge, 299 A.D.2d 584, 751 N.Y.S.2d 606 (3rd Dept. 2002), lv denied 99 N.Y.2d 632, 760 N.Y.S.2d 114 (2003).

d. "Tarasoff" Warnings - See People v. Bierenbaum, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept. 2002), lv denied 99 N.Y.2d 626, 760 N.Y.S.2d 107 (2003), cert denied 540 U.S. 821, 124 S,Ct. 134 (2003) (letter from psychiatrist to victim was properly admitted where defendant had waived privilege by agreeing that warning could be communicated, and exception to confidentiality applied since psychiatrist was under duty to warn potential victim); People v. Sergio, 21 Misc.3d 451 ("Tarasoff exception" applied where no reasonable woman who had just given birth and whose baby was missing would expect her denial of those facts to people treating her to be kept confidential from public officials responsible for locating and protecting the baby).

3. Waiver - Generally, a waiver results when a litigant discloses information and/or places his or her physical condition at issue. See, e.g., Arons v. Jutkowitz, 9 N.Y.3d 393, 850 N.Y.S.2d 345 (2007) (in medical malpractice actions, Court of Appeals holds that attorney may interview adverse party's treating physician privately when adverse party has affirmatively placed his/her medical condition in controversy and thus waived physician-patient privilege; however, while HIPAA does not prevent informal discovery from going forward, it requires that attorney first obtain valid HIPAA authorization or court or administrative order, or issue subpoena, discovery request or other lawful process); People v. Edney, supra, 39 N.Y.2d 620 (raising of insanity defense); Koump v. Smith, 25 N.Y.2d 287, 303 N.Y.S.2d 858 (1969) (commencement of personal injury suit); People v. Berlin, 39 A.D.3d 351, 835 N.Y.S.2d 54 (1st Dept. 2007), lv denied 9 N.Y.3d 840 (disclosure to police); People v. Martinez, 22 A.D.3d 318, 804 N.Y.S.2d 293 (1st Dept. 2005), lv denied 6 N.Y.3d 756 (once

defendant waived privilege for particular purpose, privilege was destroyed for all purposes regardless of defendant's intent); Matter of Farrow v. Allen, 194 A.D.2d 40, 608 N.Y.S.2d 1 (1st Dept. 1993) (privilege waived where doctor released information with patient's consent, but disclosure outside context of litigation did not result in waiver as to all other communications related to same subject matter); People v. Feldmann, 110 A.D.2d 906, 488 N.Y.S.2d 455 (2d Dept. 1985) (privilege waived when defense counsel cross-examined police about defendant's treatment for injuries); People v. Awoshiley, 20 Misc.3d 1136(A), 867 N.Y.S.2d 377 (Crim. Ct., N.Y. Co., 2008) (defense counsel's assertions at arraignment regarding defendant's condition while in emergency room waived privilege as to medical records for that time period at very least); People v. Pagan, 190 Misc.2d 474, 738 N.Y.S.2d 825 (Sup. Ct., Kings Co., 2002) (assault complainant waived privilege by discussing medical condition during criminal investigation). But see Matter of Antonia E., 16 Misc.3d 637, 838 N.Y.S.2d 872 (Fam. Ct., Queens Co., 2007), (no HIPAA waiver where complainant was refusing to cooperate further in prosecution of his sister, and thus it was prosecution, not complainant, that was placing complainant's physical condition at issue); People v. McHugh, 124 Misc.2d 823, 478 N.Y.S.2d 754 (Sup. Ct. Bronx Co., 1984) (by offering hospital records at Huntley hearing to prove his condition, defendant did not waive privilege with respect to statements made to nurses and social workers).

It has been held that there is no waiver when a prisoner makes statements, in the presence of a police officer who is guarding him, to a doctor in order to secure necessary medical treatment). People v. Sanders, 169 Misc.2d 813, 646 N.Y.S.2d 955 (Sup. Ct., Bronx Co., 1996); see also People v. Jaffarian, 9 Misc.3d 455, 799 N.Y.S.2d 733 (Justice Ct., Monroe Co.) (no waiver where defendant made statements to nurse in front of officer who was required to stay with defendant).

4. Sanctions For Disclosure - In People v. Greene, 9 N.Y.3d 277, the Court of Appeals held that evidence obtained as a result of a violation of the physician-patient privilege need not be suppressed at a criminal trial, since the privilege is statutory and not based on the State or Federal Constitution and an exception has been made only when the principal purpose of a statute is to protect a constitutional right.

See also People v. Sergio, 21 Misc.3d 451 (no suppression required even if use of defendant's statements in search warrant application violated privilege); People v. Awoshiley, 20 Misc.3d 1136(A) (medical records obtained by People via subpoena in violation of defendant's physician-patient privilege not subject to suppression).

F. Psychologist-Client - See CPLR §4507 ("confidential relations and communications ... are placed on the same basis as those provided by law between attorney and client"); People v. Wilkins, 65 N.Y.2d 172, 490 N.Y.S.2d 759 (1985) (defendant who testifies with respect to justification defense does not waive privilege; although physician-patient privilege is waived when a defendant puts his or her condition at issue, psychologist-client privilege is equivalent in scope to the attorney-client privilege); People v. Jackson, 103 A.D.2d 849, 478 N.Y.S.2d 367 (2d Dept. 1984) (court did not abuse discretion by refusing to allow defendant to call complainant's school psychologist); see also State v. Mark R., 17 A.3d 1 (Conn. 2011) (professional counselor's mandated report abrogates privilege in subsequent criminal prosecution).

G. Social Worker-Client

1. Generally - See CPLR §4508(a) (certified social worker "shall not be required to disclose a communication made by his client to him, or his advice given thereon, in the course of his professional employment, nor shall any clerk, stenographer or other person working for the [social worker's] employer"); Matter of Shane"MM", 280 A.D.2d 699, 720 N.Y.S.2d 219 (3rd Dept. 2001) (no privilege where social worker not certified); Matter of Koretta W., 118 Misc.2d 660, 461 N.Y.S. 205 (Fam. Ct., N.Y. Co., 1983) (while ruling that there was compelling need for disclosure in arson prosecution sufficient to overcome any privilege, court questions whether juvenile had expectation of confidentiality as to communications with foster care agency personnel). Although communications to a rape crisis counselor are not covered by the social worker-client privilege [see People v. Bridges, 142 Misc.2d 789, 538 N.Y.S.2d 701 (County Ct. Monroe Co., 1989)], CPLR §4510 contains a confidential privilege protecting communications made to a certified rape crisis counselor.

2. Exceptions

a. CPLR §4508 (includes, inter alia, communications revealing

the contemplation of a crime, and statements by a child under 16 who has been the victim of a crime) - See People v. Bass, supra, 140 Misc.2d 57 (defendant's statements concerning sexual abuse of daughter did not reveal the contemplation of a crime, since defendant did not reveal an intent to continue his activity); People v. O'Gorman, 91 Misc.2d 539, 398 N.Y.S.2d 336 (Sup. Ct. Suffolk Co., 1977).

b. Reporting Cases Of Suspected Child Abuse Or Maltreatment – In the course of reporting suspicions concerning child abuse or maltreatment pursuant to SSL §413(1), social workers often will be revealing confidential communications. See State v. Mark R., 17 A.3d 1 (Conn. 2011) (professional counselor's mandated report abrogates privilege in subsequent criminal prosecution).

VI. Circumstantial Evidence

A. Uncharged Crimes Evidence

1. Generally - Evidence of uncharged crimes committed by the respondent may not be admitted unless the court determines that the probative value of such evidence outweighs its prejudicial tendency to demonstrate the respondent's criminal propensities. People v. Molineux, 168 N.Y. 264 (1901); People v. Drake, 94 A.D.3d 1506 (4th Dept. 2012) (reversible error where court refused to preclude uncharged crime evidence of defendant's alleged postmortem sexual assault on victim, which was not relevant to intent to kill; the uncharged crime was particularly heinous, and defendant was required to defend against equivocal evidence that uncharged crime was committed); People v. Westerling, 48 A.D.3d 965, 852 N.Y.S.2d 429 (3rd Dept. 2008) (court erred in permitting victim to testify to non-particularized acts of physical and verbal abuse that occurred over three-year period without weighing probative value against prejudice); People v. Wlasiuk, 32 A.D.3d 674, 821 N.Y.S.2d 285 (3rd Dept. 2006) (reversible error where trial court failed to weight probative value against potential for undue prejudice); People v. Wood, 35 Misc.3d 1219(A) (County Ct., Yates Co., 2012) (use of evidence that is proof in another pending case implicates defendant's Fifth Amendment rights in other case); see also People v. Cortez, _N.Y.3d_, 2014 WL 210890 (2014) (where entries from defendant's journals in which he ruminated over

being spurned by murder victim were properly admitted, court erred in admitting other entries concerning defendant's relationships with and rejections by two other women dating from three to six years before murder; Court of Appeals splits as to whether protective Molineux analysis should apply to prior bad thought evidence); People v. Arafet, 13 N.Y.3d 460, 892 N.Y.S.2d 812 (2009) (evidence relating to other man's fencing operation, which showed that business defendant called in hours immediately after theft was one where stolen goods could be disposed of, and thus supported inference that defendant needed fence's services, was not Molineux evidence since criminal transactions in which defendant was not involved could show nothing about his propensity; court also rejects People's argument that evidence of defendant's experience as trailer thief showed his unusual skills, knowledge and access to means of committing charged crime, since there is no justification for creating "specialized crime" exception to Molineux); People v. Dorm, 12 N.Y.3d 16, 874 N.Y.S.2d 866 (2009) (fact that court at first trial precluded evidence and trial resulted in acquittals and hung jury had no bearing on whether court at the second trial properly exercised discretion in admitting evidence). Often, the prejudicial effect of the evidence will outweigh its probative value when there is other substantial evidence of whatever it is the prosecution is attempting to prove through introduction of the uncharged crimes evidence. See, e.g., People v. Johnson, 280 A.D.2d 683, 721 N.Y.S.2d 108 (2d Dept. 2001), lv denied 97 N.Y.2d 683, 738 N.Y.S.2d 299 (there was other evidence of force element).

Whether or not uncharged crimes evidence fits squarely within one of the exceptions below, it may be admissible if it counters a claim made by the accused. See People v. Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470 (2001); but see People v. Allen, 36 Misc.3d 155(A) (App. Term, 1st Dept., 2012) (defendant's mere denial that he engaged in charged conduct did not open door).

In some circumstances, error in the admission of uncharged crimes evidence at a bench trial will be found harmless because it is presumed that the judge disregarded prejudicial aspects of the evidence. Compare Matter of Devon B., 1 A.D.3d 432, 766 N.Y.S.2d 692 (2d Dept. 2003) (error not harmless where case was "very close") with

People v. Torres, 1 A.D.3d 621, 767 N.Y.S.2d 640 (2d Dept. 2003), lv denied 1 N.Y.3d 602 (2004); People v. Khuu, 293 A.D.2d 424, 740 N.Y.S.2d 860 (1st Dept. 2002), lv denied 98 N.Y.2d 714, 749 N.Y.S.2d 11 (2002).

2. Exceptions To Molineux Rule - If it comes within an exception to the general rule, evidence of crimes committed before, or after (see People v. Ingram, 71 N.Y.2d 474, 527 N.Y.S.2d 363 [1988]) the crime charged may be admitted.

a. Amorous Design - In prosecutions involving consensual sex crimes, evidence of prior sexual acts between the 2 accused persons has been admitted to show mutual disposition; any broader use of the exception is ordinarily inappropriate. See, e.g., People v. Lewis, 69 N.Y.2d 321, 514 N.Y.S.2d 205 (1987); People v. Gautier, 148 A.D.2d 280, 544 N.Y.S.2d 821 (1st Dept. 1989).

b. Common Plan Or Scheme - When 2 or more crimes are so related that proof of one tends to establish the other(s), the uncharged crimes evidence may be admissible. See, e.g., People v. Leeson, 12 N.Y.3d 823, 880 N.Y.S.2d 895 (2009) (In sex crime prosecution, no error in admission of testimony regarding uncharged acts of sodomy and sexual abuse during trip defendant took with victim and her brother where uncharged crimes allegedly occurred during same time period as crimes defendant was accused of committing and testimony provided necessary background information regarding relationship between defendant and victim and placed charged conduct in context); People v. Buskey, 45 A.D.3d 1170, 846 N.Y.S.2d 701 (3rd Dept. 2007) (where defendant was charged with making sexual advances toward 13-year-old on three occasions, court erred in admitting evidence of sexual advances toward three other teenage girls; evidence established repetitive pattern, not common scheme or plan); People v. Athanasatos, 40 A.D.3d 1263, 836 N.Y.S.2d 343 (3rd Dept. 2007), lv denied 9 N.Y.3d 872 (in each incident, defendants stole items from Staples using 41-quart black wastebasket); People v. Pons, 159 A.D.2d 471, 552 N.Y.S.2d 344 (2d Dept. 1990), lv denied 76 N.Y.2d 741, 558 N.Y.S.2d 902 (evidence of other torchings and demolition jobs ordered by arson defendant in order to destroy gambling competitors' operations was properly admitted); People v. Johnson, 114 A.D.2d 210, 498 N.Y.S.2d 804 (1st Dept. 1986) (evidence of robbery defendant's 10

prior thefts from complainant improperly admitted; there was no evidence of common scheme or similarities linking the crimes); People v. Grant, 104 A.D.2d 674, 479 N.Y.S.2d 914 (3rd Dept. 1984) (evidence that defendant, charged with promoting prostitution, had previously forced witness to engage in prostitution was admissible). See also People v. Jones, 239 A.D.2d 602, 658 N.Y.S.2d 366 (2d Dept. 1997), lv denied 90 N.Y.2d 894, 662 N.Y.S.2d 437 (in 3-2 decision, court upholds exclusion of evidence offered by defendant, who attempted to support his claim that he meant to sell baking soda rather than cocaine by showing that he had previously been arrested for selling baking soda).

c. Defense Of Accident - Uncharged crimes evidence may be admitted to counter a claim that the alleged crime was merely an accident. See, e.g., People v. Henson, 33 N.Y.2d 63, 349 N.Y.S.2d 657 (1973) (evidence of child's previous injuries was properly admitted to counter parents' claim that alleged injuries had been incurred accidentally); People v. Polomaine, 89 A.D.3d 1215 (3d Dept. 2011), lv denied 18 N.Y.3d 927 (no error in admission of evidence that defendant's daughter previously had suffered skull fracture, and that victim in this case previously had suffered fractured tibia, since defendant disclaimed knowledge of what caused injuries and claimed they were accidental); People v. Barreto, 64 A.D.3d 1046, 882 N.Y.S.2d 594 (3rd Dept. 2009), lv denied 13 N.Y.3d 834 (where defendant testified that child hit her head when they both fell as defendant was removing child from bathtub and contended that his contrary statements to police had been coerced and inaccurately transcribed, no error in admission of evidence of two prior suspicious "accidental" injuries suffered by child while in defendant's care); People v. Sims, 110 A.D.2d 214, 494 N.Y.S.2d 114 (2d Dept. 1985); cf. People v. Riback, 57 A.D.3d 1209, 870 N.Y.S.2d 517 (3rd Dept. 2008) (no error in admission of testimony by expert who defined terms "pedophile" and "sexual fetish" where there was testimony regarding defendant's bizarre behavior and central, disputed question was whether defendant's acts were committed for purpose of sexual gratification or were instead "accidental" or benign); but see People v. Skinner, 298 A.D.2d 625, 747 N.Y.S.2d 857 (3rd Dept. 2002) (defendant's improper disciplining of 5-year-old stepdaughter one year prior to death of infant victim was not sufficiently

probative to justify admission); People v. Irby, 79 A.D.2d 713, 434 N.Y.S.2d 252 (2d Dept. 1980) (prior assault of another person did not bear on accident issue).

d. Defense Of Consent - See, e.g., People v. Cook, 93 N.Y.2d 840, 688 N.Y.S.2d 89 (1999) (evidence of rape defendant's prior acts of violence towards paramour were admissible to prove force element even though defendant claimed allegation was a lie, not that complainant consented); People v. Vargas, 88 N.Y.2d 856, 644 N.Y.S.2d 484 (1996) (where defendant raised consent defense in rape case, it was error to admit evidence of 4 prior sex crimes, and cause defendant to abandon consent defense, where case presented two "starkly contrasting scenarios"); People v. Reilly, 19 A.D.3d 736, 796 N.Y.S.2d 726 (3rd Dept. 2005) (where defendant charged with entering victim's home when she was asleep and sexually abusing her, evidence regarding incident where defendant was found peering into another woman's bedroom window a few houses away was improperly admitted; defendant claimed consent in main case, but not in the other case); People v. Velez, 159 A.D.2d 665, 553 N.Y.S.2d 429 (2d Dept. 1990), lv denied 76 N.Y.2d 744, 558 N.Y.S.2d 906 (evidence of prior attacks on ex-wife admissible where defendant claimed ex-wife consented to sex).

e. Identity

i. Unique Modus Operandi - When the prior crime(s) and the crime charged are similar in a distinctive way, and the respondent raises the issue of identification, the evidence may be admitted as probative of the respondent's identity as the perpetrator. See, e.g., People v. Agina, 18 N.Y.3d 600 (2012) (defendant's identity not "conclusively established," and thus uncharged crimes testimony by defendant's ex-wife about incident that occurred 15 months earlier might be admissible to prove identity, where only complainant's testimony pointed to defendant and jury might doubt her word, and defendant's testimony did not remove identity as issue since he admitted being present and did not suggest that anyone else inflicted injuries or had opportunity to do so but denied he did it and seemed to suggest that complainant might have deliberately harmed herself); People v. Gillyard, 13 N.Y.3d 351, 892 N.Y.S.2d 288 (2009) (where defendant, charged in two cases with impersonating police officer, allegedly brandished handcuffs and threatened to use

them in one case and possessed them in another, trial court erred in admitting testimony regarding defendant's possession of handcuff key while incarcerated several weeks after incidents to show identity and prove he had access to handcuffs; defendant's familiarity with using handcuff keys had little relevance); People v. Beam, 57 N.Y.2d 214, 455 N.Y.S.2d 562 (1982) (4 homosexual assault victims testified to same ruse to lure them to isolated area, and all, except one who fought off attacker, described same pattern of behavior); People v. Allweiss, 48 N.Y.2d 40, 421 N.Y.S.2d 341 (1979) (evidence of 6 rapes properly admitted where they involved odd behavior similar to charged homicide); People v. Littlejohn, 112 A.D.3d 67 (2d Dept. 2013) (sufficiently distinctive modus operandi shown where uncharged offense and charged crime featured attacks on young, unaccompanied women; defendant held himself out as member of law enforcement in apparent attempt to facilitate commission of crimes; hands of victims were bound behind their backs, and each was transported in vehicle; both were attacked during early hours of morning; there was evidence of sexual assault in multiple ways; and they had large amounts of tape wrapped around heads and over faces; however, it was error to admit other uncharged crimes evidence where several key components of charged offense - in particular the wrapping of tape around the head and face of the victim and the commission of a sexual assault against her - did not occur); People v. Agina, 103 A.D.3d 739 (2d Dept. 2013) (crimes sufficiently similar where charged assault against defendant's wife and prior assault against former wife involved, inter alia, accusation that victim was cheating on him, choking or suffocation, and tying up victim; however, evidence was improperly admitted since only credibility was in issue, and probative value of evidence regarding identity was relatively low in comparison to high risk that jury would infer that defendant had propensity to commit violent acts against women with whom he was intimate); People v. Saunders, 71 A.D.3d 1058, 898 N.Y.S.2d 168 (2d Dept. 2010), lv denied 15 N.Y.3d 757 (no error in admission of testimony regarding robbery committed approximately six months before charged murder where, in each case, victim was person who had been involved in real estate transaction with defendant, perpetrator was assisted by younger man or men armed with weapon. victim was directed to sit in chair brought from another room, and,

at gunpoint, to call financial institution to ascertain available balance in account, victims were compelled to write check payable to defendant in rounded amount slightly below available balance in account, and victim was restrained by use of duct tape); People v. Swinton, 87 A.D.3d 491 (1st Dept. 2011), lv denied 18 N.Y.3d 862 (evidence properly admitted where all three incidents occurred within fifteen days of each other and involved assailant who broke into premises through window at night, covered victim's face with pillow or cushion, demanded that victim blindfold herself with her own clothing or clothing found within premises, repeatedly told victim to "relax," demanded money, threatened to kill victim, forced victim to perform oral sex, and either forced or tried to force victim to engage in sexual intercourse); People v. Porco, 71 A.D.3d 791, 896 N.Y.S.2d 161 (2d Dept. 2010), aff'd 17 N.Y.3d 877 (no error in admission of evidence that defendant, who raised identification defense, had engaged in pattern of staging crimes at parents' home to make it appear there had been break-ins); People v. Medina, 66 A.D.3d 555, 887 N.Y.S.2d 527 (1st Dept. 2009), lv denied 13 N.Y.3d 908 (prosecutor properly permitted to argue that similarities among three charged crimes warranted inference they were committed by same person where defendant allegedly committed two robberies and attempted armed robbery within period of a few days and radius of a few blocks, and, in each case, robber talked into cell phone as he followed female victim into her building, apparently to give impression of innocuous behavior); People v. Alston, 62 A.D.3d 806, 880 N.Y.S.2d 649 (2d Dept. 2009), lv denied 13 N.Y.3d 741 (where defendant was charged with seven gunpoint robberies, four of which involved masked perpetrator who placed stolen money into black bag, no error in admission of evidence of incident in which defendant, unmasked, was caught at scene of one of the seven robberies attempting to shoplift by placing items in black bag); United States v. Carlton, 534 F.3d 97 (2d Cir. 2008) (evidence of bank robberies properly admitted where similarities between location, "takeover style," and use of getaway car established pattern); People v. Doyle, 48 A.D.3d 961, 852 N.Y.S.2d 433 (3rd Dept. 2008), lv denied, 10 N.Y.3d 862 (where murder victim was found in chest floating in canal with mouth gagged with bandana and duct-taped shut while hands and feet were bound with handcuffs and duct tape, no error in admission of evidence that

defendant pushed down and choked former girlfriend and duct-taped mouth of another girlfriend and choked and strangled her); People v. Clink, 32 A.D.3d 862, 821 N.Y.S.2d 613 (2d Dept. 2006) (no error in admission of evidence regarding other incident involving possession of black gun, and black Honda Civic with tinted windows); People v. Stevens, 26 A.D.3d 396, 811 N.Y.S.2d 84 (2d Dept. 2006), lv denied 6 N.Y.3d 853 (evidence admissible where defendant approached each victim and offered to make home repairs, asked for a drink of water, and pushed victim down the basement stairs); People v. Latimer, 24 A.D.3d 807, 804 N.Y.S.2d 493 (3rd Dept. 2005), lv denied 6 N.Y.3d 849 (evidence admissible to prove defendant's identity where each robbery occurred in late evening or early morning hours, when one clerk was present and there were no other customers; each time the robber displayed a .22 caliber pistol, the clerk was lured into opening the register before money was demanded and the robber shot the clerk in the legs despite the clerk having complied with all demands; the robberies occurred each month from late fall to early winter and within a 10-15-mile area; and 3 of the 4 clerks appeared to be of Middle Eastern or Indian descent); People v. Daily, 297 A.D.2d 562, 747 N.Y.S.2d 85 (1st Dept. 2002), lv denied 99 N.Y.2d 534, 752 N.Y.S.2d 595 (2002) (evidence properly admitted where defendant and accomplices robbed people in Manhattan's jewelry district during evening rush hour as they carried packages of jewelry for delivery); People v. Alexander, 294 A.D.2d 118, 740 N.Y.S.2d 873 (1st Dept. 2002), lv denied 98 N.Y.2d 694, 747 N.Y.S.2d 412 (2002) (evidence properly admitted where crimes were geographically linked and perpetrator had pattern of requesting that taxi driver stop to permit him to buy marijuana, which perpetrator invariably referred to as "weed"); People v. Toland, 284 A.D.2d 798, 728 N.Y.S.2d 538 (3rd Dept. 2001), lv denied 96 N.Y.2d 942, 733 N.Y.S.2d 383 (defendant had penchant for engaging in bondage with women in particular manner); People v. Balazs, 258 A.D.2d 658, 685 N.Y.S.2d 782 (2d Dept. 1999), lv denied 93 N.Y.2d 1014, 697 N.Y.S.2d 572 (evidence of prior robbery properly admitted where both crimes involved perpetrator who posed as pizza delivery man and used silver colored duct tape to immobilize victims); People v. Daniels, 216 A.D.2d 639, 627 N.Y.S.2d 483 (3rd Dept. 1995) (rapes which occurred on 3 consecutive days, in front seat of dark-colored car

with bucket seats on country road, were not sufficiently similar); People v. Sanchez, 154 A.D.2d 15, 551 N.Y.S.2d 206 (1st Dept. 1990) (error to admit evidence where defendant conceded identification issue, and crimes were not sufficiently similar); People v. DeMeo, 139 A.D.2d 758, 527 N.Y.S.2d 507 (2d Dept. 1988) (3 sexual assaults were sufficiently similar to be admitted at separate trial of each one); People v. Rojas, 121 A.D.2d 315, 503 N.Y.S.2d 783 (1st Dept. 1986) ("trademark" on bag of cocaine recovered from defendant was not so unique as to identify defendant as seller of heroin which was in bag with same trademark); People v. Sanza, 121 A.D.2d 89, 509 N.Y.S.2d 311 (1st Dept. 1986) (gunpoint threats and theft or attempted theft of jewelry were not "unique" or "uncommon").

ii. Prior Crime Committed In Presence Of Witness - Prior contacts may be admitted to help establish a witness' ability to identify the respondent, but, when possible, should be described in a neutral manner without reference to criminal behavior. Compare People v. Patterson, 137 A.D.2d 632, 524 N.Y.S.2d 515 (2d Dept. 1988) (complainant testified about prior robbery while referring to it as an "incident") and People v. Bines, 137 A.D.2d 431, 524 N.Y.S.2d 212 (1st Dept. 1988) (evidence of prior attempts to rob complainant improperly admitted, but court notes People's "prudent offer" to have witness merely state that he had seen defendant on previous occasions) with People v. Sheehan, 105 A.D.3d 873 (2d Dept. 2013), lv denied 21 N.Y.3d 1020 (no error where People permitted to elicit testimony from complainant that, on prior occasions when complainant saw defendant walking around neighborhood, defendant appeared to be intoxicated); People v. Cromwell, 71 A.D.3d 414, 897 N.Y.S.2d 35 (1st Dept. 2010), lv denied 15 N.Y.3d 803 (court properly permitted witness to testify that two pistols used in crime, which were recovered from apartment shared by defendant and co-defendant, were similar to weapons he saw in possession of defendant and co-defendant several times in weeks leading up to incident); People v. Walters, 103 A.D.3d 557 (1st Dept. 2013), lv denied 21 N.Y.3d 1011 (evidence that witness had observed defendant conducting hand-to-hand transactions in past was probative of ability to make reliable identification and explained why he focused on defendant); People v. Jameson, 66 A.D.3d 407, 895 N.Y.S.2d 330

(1st Dept. 2009), lv denied 13 N.Y.3d 939 (court properly permitted manager of store to testify that she recognized defendant because of prior shoplifting attempts, which led her to pay close attention to defendant immediately before robbery and to warn another employee to do likewise; value of evidence would have been unduly restricted had it been limited to testimony that manager had simply seen defendant on prior occasions); People v. Sosa, 267 A.D.2d 106, 700 N.Y.S.2d 133 (1st Dept. 1999), lv denied 94 N.Y.2d 953, 710 N.Y.S.2d 9 (2000) (testimony by store employee that he suspected defendant of prior thefts admitted to show why employee focused on defendant at time of robbery). See also People v. Torres, 19 A.D.3d 732, 797 N.Y.S.2d 149 (3rd Dept. 2005), appeal dism'd 5 N.Y.3d 810 (no error in admission of evidence of uncharged second drug sale made by defendant to partner of officer involved in main case).

iii. Other Crime Directly Related to Crime Charged - See People v. Gamble, 18 N.Y.3d 386 (2012) (witnesses' testimony that defendant assaulted and made threats against them and against victims established perpetrator's identity); People v. Myers, _N.Y.3d_, 2013 WL 6499287 (2013) (reversible error in admission of evidence to establish identity), rev'g 105 A.D.3d 1250 (3d Dept. 2013) (witness testified that he saw defendant wielding .25 caliber handgun about 2½ months before charged shooting); People v. Lleshi, 100 A.D.3d 780 (2d Dept. 2012), lv denied 20 N.Y.3d 1012 (facts underlying prior convictions relevant to defendant's motive to commit threatened crimes against judge and to why judge reasonably feared defendant would imminently carry out threat); People v. Winkfield, 98 A.D.3d 923 (1st Dept. 2012), lv denied 20 N.Y.3d 1066 (court properly permitted defendant's former girlfriend to testify that, in months before shooting, she repeatedly saw defendant in possession of pistol resembling the one used in charged crime); People v. Leggett, 76 A.D.3d 860, 908 N.Y.S.2d 172 (1st Dept. 2010) (no error in admission of evidence that co-defendant stole car at gunpoint close in time and distance to attempted carjacking with which defendant was charged; evidence undermined defense theory that defendant had no idea car was stolen); People v. Stephens, 63 A.D.3d 624, 882 N.Y.S.2d 82 (1st Dept. 2009), lv denied 13 N.Y.3d 800 (no error in admission of surveillance tapes depicting man who matched defendant's description using victim's credit card shortly after theft;

use of card was closely connected to theft and tapes provided circumstantial evidence of identity even though they did not clearly show defendant's face).

f. "Inextricably Interwoven" With Crime Charged (aka, "completing the narrative" or "background" evidence) - In a line of decisions that has generated substantial controversy, courts have held that, in some instances, the need for a fair narrative of events justifies references to other criminal activity. Compare People v. Resek, 3 N.Y.3d 385, 787 N.Y.S.2d 683 (2004) (in 4 to 3 decision, Court of Appeals holds that defendant was denied fair trial where trial court allowed prosecution to explain why defendant was arrested by presenting testimony by officers that they monitored the vehicle because of a report that it was stolen); People v. Crandall, 67 N.Y.2d 111, 500 N.Y.S.2d 635 (1986) (court improperly admitted portions of defendant's conversation with undercover which suggested other sales); People v. Ward, 62 N.Y.2d 816, 477 N.Y.S.2d 602 (1984) (portions of defendant's statements which referred to other crimes were inadmissible); People v. Maier, 77 A.D.3d 681, 908 N.Y.S.2d 711 (2d Dept. 2010) (in drug possession prosecution, evidence regarding the recovery of marijuana and crack pipe not admissible to complete narrative or explain officer's conduct since defendant did not place propriety of police action in issue or dispute that he possessed narcotics); United States v. Green, 617 F.3d 233 (3rd Cir. 2010), cert denied 131 S.Ct. 363 (court will no longer allow admission of other crimes evidence on ground that evidence is inextricably intertwined with crime charged; the inextricably intertwined test is vague, overbroad, and prone to abuse); Langham v. State, 305 S.W.3d 568 (Tex. Ct. Crim. App., 2010) (violation of right of confrontation where detective's testimony regarding informant's statements about defendant's involvement in criminal activities allegedly was offered as "background" information to establish why police decided to investigate, but testimony was more detailed than necessary since bare fact that detective had obtained unspecified information justifying search warrant would have sufficed); People v. Wilkinson, 71 A.D.3d 249, 892 N.Y.S.2d 535 (2d Dept. 2010) (reversible error where court admitted evidence that defendant, on trial for single sale of cocaine, sold drugs to same buyer on several prior occasions; where drug sale case rests on evidence of single observed sale by seller who is quickly

arrested, evidence that defendant had made additional drug sales on other occasions is rarely if ever admissible merely to complete narrative, and notion of completing narrative may not be expanded to encompass chapters far removed from charged crime); People v. Sealy, 34 A.D.3d 259, 823 N.Y.S.2d 149 (1st Dept. 2006), lv denied 8 N.Y.3d 884 (court erred in admitting evidence that, while questioning defendant in connection with disorderly conduct charge, police discovered outstanding warrant for his arrest; mention of warrant was not needed to establish propriety of police conduct); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant, since evidence explained why no one was told when complainant reported rape to babysitter), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless); People v. Park, 12 A.D.3d 942, 785 N.Y.S.2d 180 (3rd Dept. 2004) (evidence of assault committed by defendant after charged assault improperly admitted to explain that complainant reported assault only after learning that defendant had been charged with another assault); People v. Foster, 295 A.D.2d 110, 743 N.Y.S.2d 429 (1st Dept. 2002), lv denied 98 N.Y.2d 710, 749 N.Y.S.2d 7 (2002) (evidence that police saw defendant commit uncharged theft was improperly admitted where defense counsel represented that defendant would not challenge officers' credibility or the propriety of their conduct, evidence was neither inextricably interwoven with earlier, charged theft nor necessary to jury's understanding of prosecution's case, and evidence was unduly prejudicial since uncharged theft was similar to charged theft) and People v. Lunsford, 244 A.D.2d 507, 664 N.Y.S.2d 107 (2d Dept. 1997), lv denied 91 N.Y.2d 927, 670 N.Y.S.2d 409 (1998) (harmless error where court admitted audiotape of 911 call regarding shots fired from defendant's vehicle since defendant was only charged with possession of gun recovered after police stopped vehicle)

with People v. Morris, 21 N.Y.3d 588 (2013) (in 4-3 decision, court finds no error in admission of recording of 911 call reporting that person matching defendant's description committed uncharged gunpoint robbery, and police testimony describing radio run about 911 call, as background information to explain aggressive police action

toward defendant; although defendant admitted possessing gun and agreed not to challenge propriety of police stop, evidence allowed jury to put aggressive police conduct in proper context and resolve conflict between testimony by officers and defendant, and case law does not require that trial court suppress uncharged crime evidence every time defendant proposes a "less prejudicial" alternative); People v. Gamble, supra, 18 N.Y.3d 386 (witnesses' testimony that defendant assaulted and made threats against them and victims provided necessary background on nature of relationship between defendant and victims); People v. Dorm, 12 N.Y.3d 16, 874 N.Y.S.2d 866 (2009) (evidence of defendant's prior conduct toward domestic violence victim provided necessary background information on nature of relationship and placed charged conduct in context); People v. Tosca, 98 N.Y.2d 660, 746 N.Y.S.2d 276 (2002) (court properly admitted officers' testimony concerning unidentified cab driver's report of recent encounter with armed defendant as background information regarding how and why police pursued and confronted defendant); People v. Till, 87 N.Y.2d 835, 637 N.Y.S.2d 681 (1995) (no error where evidence of robbery was admitted to explain why police were chasing defendant before he fired at officer, and to show defendant's motive for firing); People v. Blond, 96 A.D.3d 1149 (3d Dept. 2012) (in sex crime prosecution, testimony by defendant's wife regarding domestic violence and abusive behavior provided background information regarding victim's fear of defendant and unwillingness to tell anyone about abuse until after defendant was in police custody after most recent violent altercation with wife); People v. Morris, 89 A.D.3d 1112 (2d Dept. 2011) (no error in introduction of 911 recording stating that person matching defendant's description committed uncharged robbery to show how and why police pursued and confronted defendant); People v. Devaughn, 84 A.D.3d 1394 (2d Dept. 2011), lv denied 18 N.Y.3d 993 (no error in admission of testimony from two men with whom defendant participated in string of similar robberies before charged robbery, who testified that defendant complained to them that they were unavailable to assist him during charged robbery and told them everything that happened during robbery; evidence helped jury understand why defendant would speak freely to witnesses); People v. Birch, 69 A.D.3d 425, 893 N.Y.S.2d 30 (1st Dept. 2010), lv denied 14 N.Y.3d

797 (no error in admission of evidence that, earlier in evening of charged drug sale, officer saw defendant make what appeared to be drug sale to unapprehended buyer); People v. Vails, 43 N.Y.2d 364, 401 N.Y.S.2d 479 (1977) (defendant's statements concerning bad bargain he had previously made in sale to same officer were admissible since they were part of bargaining); People v. Gilley, 4 A.D.3d 127, 770 N.Y.S.2d 868 (1st Dept. 2003), lv denied 2 N.Y.3d 799 (in sex crime prosecution, defendant's prior acts against victim, his daughter, completed her narrative and assisted jury in comprehending the circumstances and defendant's relationship with victim); People v. Lopez, 272 A.D.2d 109, 709 N.Y.S.2d 17 (1st Dept. 2000) (no error where testimony regarding uncharged drug transaction was offered to explain why defendant was under surveillance); People v. Coleman, 205 A.D.2d 795, 613 N.Y.S.2d 689 (2d Dept. 1994), lv denied 84 N.Y.2d 824, 617 N.Y.S.2d 144 (no error in admission of testimony that defendant exchanged something for money with several people before undercover approached); People v. Bowden, 157 A.D.2d 789, 550 N.Y.S.2d 388 (2d Dept. 1990), lv denied 75 N.Y.2d 964, 556 N.Y.S.2d 249 (bargaining with undercover prior to sale was properly admitted) and People v. Hernandez, 124 A.D.2d 821, 508 N.Y.S.2d 541 (2d Dept. 1986) (defendant's sexual overtures to complainant were properly admitted to show defendant's motive and intent when he shot at complainant).

g. Respondent's Mens Rea - See, e.g., People v. Bradley, 20 N.Y.3d 128 (2012) (evidence of defendant's anger at men and violent propensity had no probative value in connection with defendant's justification claim; anger, and fear for one's personal safety, are not mutually exclusive); People v. Cass, 18 N.Y.3d 553 (2012) (evidence of uncharged murder properly admitted during People's case on rebuttal to counter extreme emotional disturbance defense where evidence arguably showed premeditated intent to target gay men for violence); People v. Caban, 14 N.Y.3d 369, 901 N.Y.S.2d 566 (2010) (no error where, in criminally negligent homicide involving killing of pedestrian while defendant backed her car, court admitted evidence that defendant's license had been suspended after incident with noticeable similarities, but did not admit details of earlier incident; jury could find that suspension should, if it did not keep defendant off road, at least have prompted her to pay more attention to

safety while she was driving, and that in failing to do so she deviated grossly from what reasonable person would have done); People v. Giles, 11 N.Y.3d 495, 873 N.Y.S.2d 244 (2008) (where defendant was arrested during a burglary attempt, and also was found in possession of items stolen during 2 uncharged burglaries, jury could consider prior burglaries in connection with knowledge element of possession of stolen property counts, but court erred in permitting jury to consider prior burglaries in connection with attempted burglary and possession of burglar's tools counts); People v. Blair, 90 N.Y.2d 1003, 665 N.Y.S. 629 (1997) (drug possession 8 months earlier not admissible to refute claim that drugs had been placed in defendant's apartment without his knowledge); People v. Hernandez, 71 N.Y.2d 233, 525 N.Y.S.2d 7 (1987) (where defendant testified that drugs were for his own consumption, evidence of prior sales was probative of intent to sell); People v. Schwartzman, 24 N.Y.2d 241, 299 N.Y.S.2d 817 (1969); People v. Hernandez, 103 A.D.3d 433 (1st Dept. 2013) (People permitted to introduce evidence that shanks were recovered from defendant's cell in past incident and subsequent incident where evidence was not received not as proof of propensity to keep shanks in cell, but as evidence that defendant knew shank was in cell, which was contested issue); People v. Gardner, 98 A.D.3d 901 (1st Dept. 2012), lv denied 20 N.Y.3d 932 (no error where People permitted to introduce three trespass notices pertaining to prior shoplifting incidents to establish that defendant knew he was legally prohibited from entering Macy's stores); People v. Drake, 94 A.D.3d 1506 (4th Dept. 2012) (reversible error where court refused to preclude uncharged crime evidence of defendant's alleged postmortem sexual assault on victim, which was not relevant to intent to kill; the uncharged crime was particularly heinous, and defendant was required to defend against equivocal evidence that uncharged crime was committed); People v. Cox, 63 A.D.3d 626, 883 N.Y.S.2d 184 (1st Dept. 2009), lv denied 13 N.Y.3d 859 (seven trespass notices, six of which defendant had signed, properly admitted where defendant contended that notices were never read to him and that he never read them himself, and number of notices tended to reduce likelihood that defendant was unaware of ban); People v. Towndrow, 62 A.D.3d 1028, 879 N.Y.S.2d 223 (3rd Dept. 2009), lv denied 13 N.Y.3d 750 (defendant's involvement in two prior sales of stolen firearms

helped establish possession of the rifle found in defendant's residence and his knowledge it was stolen); People v. Heslop, 48 A.D.3d 190, 849 N.Y.S.2d 301 (3rd Dept. 2007), lv denied, 10 N.Y.3d 935 (evidence of his false statement on application for social services benefits countered defendant's claim of mental impairment by establishing ability to undertake act of deception to achieve desirable result); People v. Truesdale, 44 A.D.3d 971, 845 N.Y.S.2d 363 (2d Dept. 2007), lv denied, 9 N.Y.3d 1039 (where defendant allegedly used sweatshirt to cover hand while pickpocketing, evidence that he previously used sweatshirt to cover hand while pickpocketing was probative of intent) People v. Word, 43 A.D.3d 773, 842 N.Y.S.2d 426 (1st Dept. 2007) (in depraved indifference murder/manslaughter prosecution, evidence regarding defendant's daughter's hospitalization for malnourishment, instructions given to defendant for proper nourishment of daughter, and defendant's failure to comply with instructions; was properly admitted to prove element of recklessness); People v. Jackson, 29 A.D.3d 409, 814 N.Y.S.2d 627 (1st Dept. 2006) (no error in admission of statement made by rape defendant, during prior rape of complainant's babysitter, to effect that if babysitter were not there, it would have been complainant), aff'd 8 N.Y.3d 869, 832 N.Y.S.2d 477 (2007) (majority assumes, arguendo, there was error, but finds it harmless); People v. Crawford, 158 A.D.2d 353, 550 N.Y.S.2d 897 (1st Dept. 1990) (prior burglary not sufficiently probative of intent at burglary trial despite defendant's claim that he had permission to enter); People v. Carr, 157 A.D.2d 794, 550 N.Y.S.2d 394 (2d Dept. 1990), lv denied 76 N.Y.2d 732, 558 N.Y.S.2d 894 (prior violence towards murder victim improperly admitted to counter intoxication claim); People v. Ryklin, 150 A.D.2d 509, 541 N.Y.S.2d 103 (2d Dept. 1989) (evidence properly admitted to disprove insanity defense); People v. Richardson, 148 A.D.2d 476, 538 N.Y.S.2d 625 (2d Dept. 1989) (firing of gun at person's home was probative of intent to unlawfully use other gun defendant possessed near same home).

h. Acting In Concert Charge - When the respondent denies having acted in concert with the main actor(s), evidence of prior crimes committed by the respondent with the same person(s) may be admissible. See People v. Hall, 18 N.Y.3d 122 (2011) (door opened to testimony about previous assault defendants

committed together where defendant Freeman tried to minimize connection with defendant Hall); People v. Ingram, 71 N.Y.2d 474, 527 N.Y.S.2d 363 (1988); People v. Jackson, 39 N.Y.2d 64, 382 N.Y.S.2d 736 (1976); United States v. Townsend, 573 F.3d 138 (2d Cir. 2009), cert denied 130 S.Ct. 645 (no error in admission of evidence showing development of relationship between defendant and drug co-conspirator where defendant argued that some of alleged conduct might have been nothing more than innocent acts of friend and not knowing participation in conspiracy, and evidence of prior gun sales suggested that defendant was not innocent pawn taken by surprise by drug transaction); People v. Witherspoon, 156 A.D.2d 306, 549 N.Y.S.2d 6 1st Dept. 1990), aff'd 77 N.Y.2d 95, 564 N.Y.S.2d 992; People v. DeVecchio, 17 Misc.3d 990, 845 N.Y.S.2d 676 (Sup. Ct., Kings Co., 2007) (when People must prove existence of criminal agency relationship, they may demonstrate past and ongoing relationship between parties in order to establish course of dealing, and right to establish agency relationship is not forfeited when proof includes evidence of other crimes); see also People v. Gholam, 99 A.D.3d 441 (1st Dept. 2012), lv denied 20 N.Y.3d 1061 (evidence of defendant's activities with accomplices was relevant to gang assault charge since People were required to prove defendant was aided by two or more persons).

i. Motive Of Respondent - See, e.g., People v. Gamble, 18 N.Y.3d 386 (2012) (witnesses' testimony that defendant assaulted and made threats against them and victims established motive for murders); People v. Dorm, 12 N.Y.3d 16, 874 N.Y.S.2d 866 (2009) (evidence of defendant's prior conduct toward domestic violence victim was probative of defendant's motive and intent to assault victim); People v. Till, supra, 87 N.Y.2d 835 (no error in admission of evidence that, prior to firing at off-duty officer during attempted escape, defendant had been involved in uncharged armed robbery); People v. Pagan, 88 A.D.3d 37 (1st Dept. 2011), lv denied 17 N.Y.3d 954 (evidence of defendant's membership in Latin Kings gang improperly admitted where circumstances of crime manifested shooter's motive and intent); People v. Patten, 43 A.D.3d 964, 841 N.Y.S.2d 359 (2d Dept. 2007) (no error in admission of evidence that defendant had been convicted of criminal possession and sale of marijuana in area in which shooting occurred, that this area was location where he sold drugs, and that no

other individuals sold drugs in that location out of respect for him, since evidence was relevant to People's theory that shooting was motivated by defendant's desire to protect his "turf"); People v. Latimer, supra, 24 A.D.3d 807 (no error in the admission of evidence of 3 uncharged robberies where People were attempting to show defendant's reason for selecting a store clerk who appeared Indian or Middle Eastern); People v. Cain, 16 A.D.3d 288, 792 N.Y.S.2d 60 (1st Dept. 2005) (evidence regarding defendant's membership in Bloods gang and customs, hierarchies and violent practices of Bloods was relevant to defendant's motive and accessorial liability); People v. Manuel Vega, 3 A.D.3d 239, 771 N.Y.S.2d 30 (1st Dept. 2004), lv denied 2 N.Y.3d 766 (defendant's previous acts of domestic violence against victim admissible to show defendant's motive in case where there was no evidence of the perpetrator's identity or a motive for the murder, and defendant attempted to divert attention from himself by falsely stating that he had had sex with victim the evening of the murder and had ejaculated in her); United States v. LaFlam, 369 F.3d 153 (2d Cir. 2004) (evidence of drug use and drug debts was evidence of defendant's motive to pay off debts and purchase drugs with proceeds of robbery); People v. Ko, 304 A.D.2d 451, 757 N.Y.S.2d 561 (1st Dept. 2003) (where People's theory was that defendant murdered former girlfriend to placate and impress new girlfriend, court properly admitted evidence that defendant and new girlfriend participated in knife attack against another one of his former girlfriends); People v. Bierenbaum, 301 A.D.2d 119, 748 N.Y.S.2d 563 (1st Dept. 2002), lv denied 99 N.Y.2d 626, 760 N.Y.S.2d 107 (2003), cert denied 540 U.S. 821, 124 S,Ct. 134 (2003) (evidence of defendant's marital strife probative of his motive to kill wife); People v. Weir, 120 A.D.2d 554, 502 N.Y.S.2d 49 (2d Dept. 1986) (evidence that victim's brother had robbed cocaine from defendant was relevant to defendant's motive).

j. Motive Of Witness To Testify - See, e.g., People v. Adames, 52 A.D.3d 617, 859 N.Y.S.2d 725 (2d Dept. 2008) (trial court erred in allowing People to cross-examine defense witness regarding two remote domestic violence incidents involving defendant and present evidence of incidents on rebuttal where evidence did not permit non-speculative inference that witness was in fear of defendant and thus had motive to testify falsely); People v. Nurse, 5 A.D.3d 401, 771 N.Y.S.2d 906 (2d Dept.

2004), lv denied 2 N.Y.3d 803 (court properly admitted complainant's testimony that he initially lied to police about identity of assailant because he was aware of defendant's prior criminal history and membership in gang); People v. Anonymous, 275 A.D.2d 210, 712 N.Y.S.2d 482 (1st Dept. 2000) (prosecutor properly allowed to question alibi witness concerning fear of defendant); People v. Rodriguez, 143 A.D.2d 854, 533 N.Y.S.2d 331 (2d Dept. 1988), lv denied 73 N.Y.2d 859, 537 N.Y.S.2d 506 (evidence of threats and violence against witness was probative of motive to testify for defendant); People v. Beckles, 128 A.D.2d 435, 512 N.Y.S.2d 826 (1st Dept. 1987) (evidence improperly admitted to counter defense attempt to show that witness' motive for testifying was defendant's prior physical attacks on her).

k. Possession Of Weapon - Evidence of possession of a weapon connected to the crime may be admitted. See, e.g., People v. Brooks, 62 A.D.3d 511, 878 N.Y.S.2d 730 (1st Dept. 2009), lv denied 12 N.Y.3d 923 (evidence of four incidents involving possession of pistol resembling weapon used in crime linked defendant to crime, and neither number of incidents, nor level of detail elicited, was excessive) ; People v. McCarthy, 293 A.D.2d 490, 740 N.Y.S.2d 381 (2d Dept. 2002), lv denied 98 N.Y.2d 711, 749 N.Y.S.2d 9 (2002); People v. Mercado, 120 A.D.2d 619, 502 N.Y.S.2d 87 (2d Dept. 1986); People v. Dupree, 110 A.D.2d 777, 487 N.Y.S.2d 847 (2d Dept. 1985).

l. Drug Sales - Generally, evidence of other drug sales is inadmissible in a drug sale prosecution where the respondent denies any involvement in the sale. See People v. Crandall, supra, 67 N.Y.2d 111; People v. Rivera, 144 A.D.2d 258, 533 N.Y.S.2d 858 (1st Dept. 1988). However, such evidence may be admitted to counter an agency defense, see People v. Lam Lek Chong, 45 N.Y.2d 64, 407 N.Y.S.2d 674 (1978), or an entrapment defense, see People v. Mann, 31 N.Y.2d 253, 336 N.Y.S.2d 633 (1972), when possession with intent to sell is charged, see People v. Hernandez, supra, 71 N.Y.2d 233, or the other sales involved an alleged accomplice in the main case. People v. Witherspoon, supra, 156 A.D.2d 306.

3. Burden Of Proof Concerning Other Crimes - The respondent's identity as the perpetrator of the other crime(s) must be established by clear and

convincing evidence. See People v. Robinson, 68 N.Y.2d 541, 510 N.Y.S.2d 837 (1986) (prior crime not adequately proved where handwriting experts disagreed over whether defendant wrote both bank hold-up notes); People v. Wandoloski, 128 A.D.2d 568, 512 N.Y.S.2d 504 (2d Dept. 1987) (defendant's admission to People's witness not sufficient); People v. Vincek, 75 A.D.2d 412, 429 N.Y.S.2d 928 (4th Dept. 1980) (inadequate proof that defendant, charged with burning his insured residence, was responsible for previous fire in his home); People v. Harrell, 2012 WL 3020189 (Sup. Ct., Kings Co., 2012) (defendant's admission, standing alone, not sufficient); see also Dowling v. United States, 493 U.S. 342, 110 S.Ct. 668 (1990) (acquittal on prior charge does not bar admission when evidence offered under 404(b) of Federal Rules, jury need only "reasonably conclude" that defendant committed prior acts); Huddleston v. United States, 485 U.S. 681, 108 S.Ct. 1496 (1988) (court need not make preliminary finding that government has proved "other act" by preponderance of evidence before submitting it to jury); People v. Stenson, 68 A.D.3d 419, 890 N.Y.S.2d 40 (1st Dept. 2009), lv denied 14 N.Y.3d 893 (People could use evidence related to counts that had been dismissed by motion court, with leave to re-present, due to technical gaps in proof before grand jury); People v. MacLean, 18 Misc.3d 1145(A), 859 N.Y.S.2d 897 (County Ct., Sullivan Co., 2008) (evidence of uncharged crimes of which defendant was acquitted at previous trial not admissible).

4. "Inferential" Uncharged Crimes Evidence - Defense counsel must be alert to the attempted introduction of evidence which does not on its face include references to criminal activity, but which indirectly suggests that the respondent has a police record, has committed other crimes, or is a bad person. But see People v. Miles, 49 A.D.3d 446, 853 N.Y.S.2d 548 (1st Dept. 2008), lv denied, 10 N.Y.3d 867 (testimony that defendant was arrested while in possession of six ski caps and five scarves with tags on them did not constitute uncharged crimes evidence since there was no evidence that items were stolen, or used or intended to be used for purposes of disguise); People v. Desnoyer, 49 A.D.3d 297, 853 N.Y.S.2d 58 (1st Dept. 2008), lv denied, 10 N.Y.3d 870 (detective's testimony that he observed defendant going into and out of bars and restaurants on night before arrest for jostling, and several weeks

after events resulting in grand larceny charges, was not uncharged crimes or bad acts evidence regardless of whether it may have raised suspicion of casing-type behavior).

a. Membership In Gang - Compare People v. Turner, 46 A.D.3d 847, 848 N.Y.S.2d 275 (2d Dept. 2007), lv denied, 10 N.Y.3d 817 (harmless error found where court admitted evidence that defendant and accomplice were members of "Bloods") and People v. Boxill, 111 A.D.2d 399, 489 N.Y.S.2d 366 (2d Dept. 1985), aff'd 67 N.Y.2d 678, 499 N.Y.S.2d 684 (1986) (admission of evidence was harmless error) with People v. Edwards, 295 A.D.2d 270, 743 N.Y.S.2d 872 (1st Dept. 2002), lv denied 99 N.Y.2d 557, 754 N.Y.S.2d 209 (2002) (evidence that defendant's gang engaged in random ritual slashings to earn advancement within gang established motive for defendant's unprovoked attack on fellow prisoner).

b. Nickname - See People v. Hoffler, 41 A.D.3d 891, 837 N.Y.S.2d 750 (3rd Dept. 2007) (no error in use at trial of defendant's street name, "Murder," where it was probative in identifying defendant as perpetrator); People v. Santiago, 255 A.D.2d 63, 691 N.Y.S.2d 22 (1st Dept. 1999) (error in admission of testimony that defendant's nickname was "Mike Murder").

c. Police Fingerprint Card - See People v. Balone, 52 A.D.2d 216, 383 N.Y.S.2d 726 (4th Dept. 1976) (reversible error).

d. Possession Of Large Amount Of Money Or Drug-Related Items By Respondent Charged With Possessing or Selling Drugs - Evidence that the respondent had a large sum of money or drug-related items when he or she was arrested for drug possession is ordinarily inadmissible. Compare People v. Washington, 5 A.D.3d 703, 774 N.Y.S.2d 87 (2d Dept. 2004) (evidence that defendant possessed $1137 improperly admitted); People v. Wesley, 154 A.D.2d 880, 546 N.Y.S.2d 46 (4th Dept. 1989) (evidence of money, scales and plastic bags was improperly admitted); People v. Morales, 133 A.D.2d 90, 518 N.Y.S.2d 437 (2d Dept. 1987) (improper to admit evidence that defendant had "wad of money") with People v. Panchon, 93 A.D.3d 446 (1st Dept. 2012) (in observation drug sale case, no error where court permitted People to establish that police recovered from defendant $207, including 47 single dollar bills; evidence corroborated police testimony about how sales were transacted,

amount of money was not unduly prejudicial, and evidence that defendant could make change showed he had equipped himself with means of committing crime); People v. Cartagena, 9 A.D.3d 468, 780 N.Y.S.2d 288 (2d Dept. 2004) (no error in admission of evidence of defendant's possession of beeper and cell phone, and testimony by undercover that he previously used beeper or cell phone to contact drug dealers; evidence was probative of defendant's intent to sell drugs); People v. Valentine, 7 A.D.3d 275, 776 N.Y.S.2d 248 (1st Dept. 2004), lv denied 3 N.Y.3d 682 (evidence that defendant had calculator and $205, including $95 in one-dollar bills, admissible as relevant to issue of whether defendant participated in drug selling operation) and People v. Carpenter, 187 A.D.2d 519, 589 N.Y.S.2d 912 (2d Dept. 1992), lv denied 81 N.Y.2d 1012, 600 N.Y.S.2d 200 (evidence that defendant wore beeper was admissible where defense was that another person was the culprit).

Such evidence may be admissible when there is a charge of possession with intent to sell, but not where a single sale is charged. Compare People v. Ciccarelli, 161 A.D.2d 952, 557 N.Y.S.2d 525 (3rd Dept. 1990) (where single sale was involved, testimony that defendant had $700 was improperly admitted); People v. Valderama, 161 A.D.2d 820, 556 N.Y.S.2d 669 (2d Dept. 1990) (testimony concerning money was inadmissible where defendant was charged with single sale, not with conducting a narcotics business) and People v. Whitfield, 144 A.D.2d 915, 534 N.Y.S.2d 25 (4th Dept. 1988) (where a single sale was involved, it was improper to admit evidence that defendant had "wad" of money at time of alleged drug sale) with People v. Calada, 154 A.D.2d 700, 546 N.Y.S.2d 681 (2d Dept. 1989) (evidence that defendant had $281 and a beeper was probative of defendant's intent to sell the drugs that were found in his possession); People v. Milom, 75 A.D.2d 68, 428 N.Y.S.2d 678 (1st Dept. 1980) (where defendant was charged with engaging in separate transactions with several people, testimony regarding defendant's possession of $1,111 was relevant to defendant's intent to sell).

e. HIV Status - See People v. Felix-Torres, 281 A.D.2d 649, 721 N.Y.S.2d 415 (3rd Dept. 2001), appeal dism'd 97 N.Y.2d 681, 738 N.Y.S.2d 296 (People were improperly allowed to ask defendant whether he has a life-threatening

disease in order to show that he had nothing to lose by committing murder).

f. General Suggestion Of Criminality - See People v. Martinez, 95 A.D.3d 462 (1st Dept. 2012) (no error where court admitted testimony that police apprehended defendant on subway train after recognizing him from wanted poster); People v. Taylor, 46 A.D.3d 1213, 847 N.Y.S.2d 786 (3rd Dept. 2007), lv denied, 10 N.Y.3d 844 (letter defendant wrote to paramour in which he discussed desire to have her train their infant son to steal and for her to become "a deceitful criminal," and stated that "[t]his is a crime family" and "I'm in the crime lifestyle for life," referred to neither prior bad act nor uncharged crime, and was merely statement of defendant's general beliefs used to infer subjective intent).

5. Advance Ruling On Admissibility - To prevent the prosecutor from eliciting uncharged crimes evidence before the defendant can object, the court should rule on the admissibility of the evidence out of the hearing of the jury. See People v. Ventimiglia, 52 N.Y.2d 350, 438 N.Y.S.2d 261, 266 (1981) (prior to testimony, "prosecutor should ask for a ruling out of the presence of the jury at which the evidence to be produced can be detailed to the court"); People v. Powell, 152 A.D.2d 918, 543 N.Y.S.2d 818 (4th Dept. 1989). But see People v. Small, 12 N.Y.3d 732, 876 N.Y.S.2d 675 (2009) (defendant not entitled as a matter of law to pretrial notice or pretrial hearing; no error found where trial court granted People's mid-trial application to submit Molineux evidence in response to defendant's attempt to establish agency defense, since there is no requirement that court's inquiry or ruling occur before trial commences); People v. McLeod, 279 A.D.2d 372, 719 N.Y.S.2d 557 (1st Dept. 2001), lv denied 96 N.Y.2d 921, 732 N.Y.S.2d 638 (2001) (lack of advance ruling caused no prejudice); People v. Wilcox, 194 A.D.2d 820, 599 N.Y.S.2d 131 (3rd Dept. 1993) (defendant was aware of People's intention before trial). This includes cases in which the prosecutor believes that the defendant has "opened the door" to the admission of uncharged crimes evidence. People v. Coppolo, 30 A.D.3d 207, 817 N.Y.S.2d 242 (1st Dept. 2006).

Similarly, if the accused obtains a pretrial ruling barring the use of uncharged crimes evidence, but opens the door to such evidence during trial, the prosecutor

should ask for a sidebar conference and ask for an amended ruling rather than ask a question that creates risk that the evidence will be disclosed. People v. Rojas, 97 N.Y.2d 32, 735 N.Y.S.2d 470 (2001). However, the accused is not entitled to an advance ruling regarding what would open the door to uncharged crimes evidence, People v. Niver, 41 A.D.3d 961, 839 N.Y.S.2d 252 (3rd Dept. 2007), lv denied 9 N.Y.3d 924 (such a determination must be made on ad hoc basis during trial), or a ruling governing the scope of rebuttal if the accused takes the stand and testifies regarding the uncharged crimes. People v. Ardito, 231 A.D.2d 116, 662 N.Y.S.2d 103 (1st Dept. 1997).

In delinquency proceedings, the prosecution should announce before trial that it plans to offer uncharged crimes evidence. The respondent should then make a motion in limine before another judge seeking exclusion of the evidence. But see People v. Fernandez, 72 A.D.3d 303, 897 N.Y.S.2d 158 (2d Dept. 2010), aff'd 15 N.Y.3d 213 (it is presumed that judge at bench trial did not consider allegation of uncharged crime).

6. Concession Of Element By Defense - Arguably, uncharged crimes evidence should not be admitted when the defense offers to concede an element of the crime and thereby render the evidence unnecessary. See United States v. Scott, 677 F.3d 72 (2d Cir. 2012) (where defendant conceded he was at scene and argued that police had observed him engaging in innocent conduct, court finds reversible error in admission of testimony from detectives that they were familiar with defendant and had spoken to him on numerous occasions prior to arrest in this case; testimony was potentially prejudicial since it was unreasonable to think jury would not have assumed defendant's frequent contacts with police were related to bad character and criminal propensity); People v. Parker, 50 A.D.3d 330, 854 N.Y.S.2d 397 (1st Dept. 2008) (People failed to demonstrate that proffered concession would have failed to conclusively establish defendant's identity, but error was harmless); People v. Sanchez, supra, 154 A.D.2d 15 (error to admit evidence where defendant conceded the identification issue, and the crimes were not sufficiently similar); see also People v. Hunter, 32 A.D.3d 611, 819 N.Y.S.2d 620 (3rd Dept. 2006) (prior burglary conviction improperly admitted where defense was mistaken identification and perpetrator's intent

to commit crime in premises was clear); but see People v. Campbell, 7 A.D.3d 409, 777 N.Y.S.2d 435 (1st Dept. 2004), lv denied 3 N.Y.3d 672 (although defendant offered to concede as to certain issues, aspects of recovery of drugs from his apartment would still have been incomprehensible to jury in absence of testimony that defendant was a parolee); People v. Robinson, 251 A.D.2d 602, 674 N.Y.S.2d 767 (2d Dept. 1998), affirmed on other grounds 93 N.Y.2d 986, 695 N.Y.S.2d 49 (1999) (no error where court did not require prosecutor to accept defense concession regarding knowledge of weight of drugs).

7. Redaction Of Evidence To Avoid Prejudice - When particularly prejudicial facts can be redacted without undermining the value of the evidence, the court should grant a defense request for redaction. Compare People v. Hall, 18 N.Y.3d 122 (2011) (door opened to testimony about previous assault defendants committed together where defendant Freeman tried to minimize connection with defendant Hall; to be fair to Hall, who had not opened door, judge did not allow prosecutor to refer to conviction but did allow him to ask whether Freeman remembered "having a fight" along with Hall with another person, and, although Freeman testified that "we all [including Hall] got locked up for so-called assaulting this guy," there was no reason to believe prosecutor or judge saw that response coming, and Hall did not request that Freeman be instructed in advance not to volunteer that information); People v. Gaston, 262 A.D.2d 782, 690 N.Y.S.2d 327 (3rd Dept. 1999), lv denied 93 N.Y.2d 1002, 695 N.Y.S.2d 748 (court could have admitted evidence that defendant had refused to pay money owed to the victim without admitting evidence that drug trafficking was the reason for the loan) and United States v. Nelson, 725 F.3d 615 (6th Cir. 2013) (reversible error where court admitted anonymous 911 call containing description of perpetrator with pistol; to extent that jury needed to hear about what prompted police action, less detailed statement would have sufficed) with People v. De Los Angeles, 270 A.D.2d 196, 707 N.Y.S.2d 16 (1st Dept. 2000), lv denied 95 N.Y.2d 889, 715 N.Y.S.2d 381 (defense counsel opened door to stipulation regarding defendant's incarceration by repeatedly asking detectives whether they had seen defendant at the 2 crucial locations during a period of time when counsel knew defendant was in jail;

although court initially asked counsel to agree upon a stipulation which would not mention defendant's jail status, prosecutor was correct in arguing that any stipulation which omitted reference to defendant's jail status would leave the impression that defendant voluntarily withdrew from the conspiracy).

8. Preemptive Presentation Of Evidence By Accused – Compare Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851 (2001) (defendant who elects to introduce prior crimes impeachment evidence waives right to object) with Cure v. State, 26 A.3d 899 (Md. 2011) (court rejects holding in Ohler and finds no waiver) and State v. Thang, 41 P.3d 1159 (Wash. 2002) (court holds, under State Constitution, that no waiver results since lawyer who introduced other crimes evidence only after losing battle to exclude it was not introducing evidence voluntarily).

B. Character Evidence

1. Good Character Of Respondent

a. Generally - In order to show that it is unlikely that he or she committed the offense charged, the respondent may introduce evidence concerning his or her general reputation in the community with respect to a character trait relevant to the case. See Richardson, §4-403; People v. Barber, 74 N.Y.2d 653, 543 N.Y.S.2d 818 (1989). But see People v. Aharonowicz, 71 N.Y.2d 678, 529 N.Y.S.2d 736 (1988) (character evidence is not sufficient by itself to raise reasonable doubt; it must first be believed, and then, when considered with other evidence, it may be sufficient to raise a reasonable doubt); People v. Chisolm, 7 A.D.3d 728, 777 N.Y.S.2d 502 (2d Dept. 2004) (defendant's reputation for peacefulness in community was relevant to charge of gun possession); United States v. Pujana-Mena, 949 F.2d 24 (2d Cir. 1991).

b. Nature Of Good Character Evidence - The evidence must pertain to the respondent's character at a time sufficiently proximate to the time of the alleged offense. People v. Dinh Pham, 31 A.D.3d 962, 818 N.Y.S.2d 674 (3rd Dept. 2006) (evidence properly excluded where it covered the 4 years before trial but the alleged offense took place 6 years before trial). The respondent may offer testimony concerning his or her general reputation in the community, but not the opinions of those who know the respondent personally. But see Federal Rules, 405(a) (opinion testimony

permitted). The "community" need not be the area where the respondent lives; it could be the respondent's workplace, school, church, etc. See, e.g., United States v. Parker, 447 F.2d 826 (7th Cir. 1971). The respondent must establish that the witness has a basis of knowledge by virtue of the witness' connection to the respondent, the "community," and the respondent's circle of acquaintances. See Richardson, §4-403; People v. Barber, supra, 74 N.Y.2d 653 (in dissenting opinion, Judge Titone argues that the traditional rule excluding opinion testimony is archaic); People v. Ayala, 118 A.D.2d 790, 500 N.Y.S.2d 298 (2d Dept. 1986) (testimony must involve reputation before charges were made, but may be based on discussions the witness had with people after the charges were made). See also People v. Rosa, 153 A.D.2d 257, 550 N.Y.S.2d 886 (1st Dept. 1990), lv denied 75 N.Y.2d 969, 556 N.Y.S.2d 254 (defendant improperly precluded from testifying that he had never been convicted of a crime). The character evidence may consist of testimony establishing that the witness has heard nothing bad about the respondent's reputation. Richardson, §151. However, an individual's personal opinion of the accused is not admissible character evidence. See, e.g., People v. Jones, 278 A.D.2d 246, 717 N.Y.S.2d 270 (2d Dept. 2000), lv denied 96 N.Y.2d 831, 729 N.Y.S.2d 451 (2001) (by giving opinion in non-responsive answer, witness did not open door to impeachment).

c. Cross-Examination Of Character Witness - The prosecutor may not ask the witness if he or she has personal knowledge of the respondent's prior bad acts. See People v. Kennedy, 47 N.Y.2d 196, 417 N.Y.S.2d 452 (1979). But see Federal Rules, 405(a). However, the witness may be asked whether he or she has heard particular negative reports or rumors that are inconsistent with the reputation described by the witness; the negative information may include specific acts. Richardson, §4-406. See, e.g., People v. Cruz, 147 A.D.2d 584, 537 N.Y.S.2d 878 (2d Dept. 1989) (prosecutor properly allowed to ask witness if he had heard about defendant's possession of marijuana at time of arrest); People v. Wharton, 138 A.D.2d 429, 525 N.Y.S.2d 711 (2d Dept. 1988) (prosecutor properly allowed to ask witnesses whether they had heard about defendant's threats against his landlady's life). The witness may not be asked whether he or she is aware that the respondent is guilty, or

whether his or her testimony would change if it became clear that the respondent did, in fact, commit the crime charged. See People v. Lediard, 80 A.D.2d 237, 438 N.Y.S.2d 540 (lst Dept. 1981); People v. Lopez, 67 A.D.2d 624, 411 N.Y.S.2d 627 (1st Dept. 1979), cert denied 444 U.S. 827, 100 S.Ct. 51; United States v. Russo, 110 F.3d 948 (2d Cir. 1997). If the witness denies having heard the rumors, the prosecutor may not repeatedly question the witness in order to prove the truth of the rumors, but may test the witness' credibility with some additional questioning. See, e.g., People v. West, 271 A.D.2d 806, 708 N.Y.S.2d 478 (3rd Dept. 2000), lv denied 95 N.Y.2d 893, 715 N.Y.S.2d 386 (no error where prosecutor did not improperly seek to establish truth of report or contend that report came to People directly from source); People v. Bendell, 111 A.D.2d 87, 489 N.Y.S.2d 81 (1st Dept. 1985), rev'd 67 N.Y.2d 724, 499 N.Y.S.2d 939 (1986). The prosecutor must have a good faith basis for the inquiries, see People v. Lediard, supra, 80 A.D.2d 237 (no good faith basis where source of information was a crime witness who was a friend of the complainant and did not testify), and may only ask about character traits addressed by defense witnesses. See People v. Lediard, supra, 80 A.D.2d 237.

d. Prosecution Rebuttal Evidence – The prosecutor may present witnesses to testify to a contrary reputation. Richardson, §4-404. See, e.g., People v. Viloria, 160 A.D.2d 499, 554 N.Y.S.2d 163 (1st Dept. 1990) (error to admit testimony that sex crime defendant was "fresh, and...had wandering hands"). The prosecutor may prove any juvenile delinquency finding which tends to negate the character trait or quality attributed to the respondent. See FCA §344.1(2).

2. Character Of Victim Where Justification Defense Is Raised - In connection with a justification defense, the respondent may prove the victim's general reputation for violence, or specific acts against third persons, if the respondent was aware of the reputation or acts prior to the time of the offense charged. Such evidence can help establish the respondent's reasonable fear of being harmed. See People v. Robert S., 52 N.Y.2d 1046, 438 N.Y.S.2d 509 (1981) (Court of Appeals rejects the prevailing view that facts of which the defendant was unaware may be admitted to show that the victim was the aggressor); People v. Miller, 39 N.Y.2d 543, 384 N.Y.S.2d 741

(1976); People v. White, 73 A.D.2d 865, 423 N.Y.S.2d 670 (1st Dept. 1980); Richardson, §4-409. See also People v. Chevalier, 220 A.D.2d 114, 644 N.Y.S.2d 508 (1st Dept. 1996), aff'd 89 N.Y.2d 1050, 659 N.Y.S.2d 846 (1997) (defendant was entitled to introduce evidence that there was cocaine in the victim's body to help establish that defendant felt endangered by victim's "crazy" conduct); People v. Lopez, 200 A.D.2d 767, 607 N.Y.S.2d 368 (2d Dept. 1994) (evidence of deceased's nonviolent nature admissible only if defendant was aware of it). But see Federal Rules, 404(a)(2) (unlike rule in Robert S., permits evidence of relevant character trait of victim).

C. Consciousness Of Guilt - Although it is considered to be of low probative value, see People v. Moses, 63 N.Y.2d 299, 482 N.Y.S.2d 228 (1984), evidence of behavior reflecting a consciousness of guilt may be admitted.

1. Flight Or Evasive Conduct - See, e.g., People v. Yazum, 13 N.Y.2d 302, 246 N.Y.S.2d 626 (1963); Decker v. State, 971 A.2d 268 (Md. 2009) (evidence that on previously scheduled trial date, defendant left courthouse before trial commenced was not too ambiguous and equivocal to be admitted as evidence of consciousness of guilt); People v. Wells, 26 Misc.3d 143(A), 907 N.Y.S.2d 440 (App. Term, 1st Dept., 2010), lv denied 14 N.Y.3d 894 (defendant's conduct in allegedly refusing to accompany injured mother and her hired caregiver to hospital may have been unusual, but did not constitute kind of behavior traditionally associated with consciousness of guilt); People v. Jones, 276 A.D.2d 292, 714 N.Y.S.2d 24 (1st Dept. 2000), lv denied 95 N.Y.2d 965, 722 N.Y.S.2d 482 (court properly admitted testimony that defendant suddenly and without explanation stopped reporting to his parole officer immediately following crime); People v. Baldwin, 170 A.D.2d 687, 567 N.Y.S.2d 100 (2d Dept. 1991), lv denied 77 N.Y.2d 991, 571 N.Y.S.2d 917 (officer testified that he went to places defendant was known to frequent and was told that defendant was not there or had just left); People v. Hoc, 146 A.D.2d 545, 537 N.Y.S.2d 165 (1st Dept. 1989), appeal dism'd 76 N.Y.2d 740, 545 N.Y.S.2d 115; Gilmore v. Henderson, 825 F.2d 663 (2d Cir. 1987) (defendant entitled to present evidence explaining flight); but see State v. Ingram, 951 A.2d 1000 (NJ, 2008) (trial court erred in instructing jury that it could consider defendant's voluntary absence from trial as evidence of flight/consciousness of

guilt, since there was no indication defendant was attempting to avoid detection or apprehension, and an unexplained election to waive appearance is "riddled with fatal ambiguity"); United States v. Mundy, 539 F.3d 154 (2d Cir. 2008) (court notes that where party opposing inference of consciousness of guilt objects to jury charge, courts should "think carefully whether the charge serves a useful and proper purpose or whether it simply gives court imprimatur to one side's factual contention"; that inferences to be drawn from evidence are more appropriately communicated to jury by counsel in summation than by judge's instruction on law; that judges wield great influence over juries, and, by instructing jurors about one inference to be drawn from conduct without giving equal prominence to other possible inferences, "the judge risks unwittingly to take sides in the case and to influence the jury on the finding of the verdict"; and that "[e]specially in a criminal trial, in which the defendant often declines to present evidence, the court's marshaling of the evidence often amounts substantially to a repetition of the prosecutor's summation").

2. False Alibi Or Explanation - See, e.g., People v. Levine, 65 N.Y.2d 845, 493 N.Y.S.2d 290 (1985); People v. Marin, 65 N.Y.2d 741, 492 N.Y.S.2d 16 (1985); People v. Moses, supra, 63 N.Y.2d 299 (false alibi did not adequately corroborate accomplice testimony); People v. Jenkins, 27 A.D.3d 372, 811 N.Y.S.2d 69 (1st Dept. 2006), lv denied 7 N.Y.3d 757.

3. Bribes And Other Attempts To Influence Witness - See, e.g., People v. Christiani, 96 A.D.3d 870 (2d Dept. 2012) (jury could consider, as evidence of consciousness of guilt, evidence that defendant's mother and stepfather visited witness's home after visiting defendant in jail, and that defendant told them to "stop by" and they were "hoping that [the witness] wasn't testifying"); People v. Ya-ko Chi, 72 A.D.3d 709, 898 N.Y.S.2d 619 (2d Dept. 2010) (reversible error where court admitted testimony that relative of defendant gave the witness $5000 not to testify and offered him additional money without showing that defendant was involved, and, although judge in nonjury trial is presumed to have considered only competent evidence, presumption was rebutted when further testimony on subject was permitted and elicited by court); United States v. Jose Luis Perez, 387 F.3d 201 (2d Cir. 2004) (evidence of defendant's

attempt to get witness to make false statement to investigators was admissible); People v. Jean-Louis, 272 A.D.2d 626, 709 N.Y.S.2d 101 (2d Dept. 2000), lv denied 95 N.Y.2d 890, 715 N.Y.S.2d 382 (defendant's letters asking accomplice to take Fifth Amendment on stand were properly admitted); People v. Singleton, 121 A.D.2d 752, 504 N.Y.S.2d 167 (2d Dept. 1986); Gilmore v. Henderson, supra, 825 F.2d 663.

4. Threats Against Witness - See, e.g., People v. Rivera, 160 A.D.2d 267, 553 N.Y.S.2d 707 (1st Dept. 1990).

5. Behavior Of Respondent When Arrested - See, e.g., People v. Basora, 75 N.Y.2d 992, 557 N.Y.S.2d 263 (1990) (smiling was too ambiguous to constitute evidence that defendant believed he could beat charge); People v. Demagall, _A.D.3d_, 978 N.Y.S.2d 416 (3d Dept. 2014) (People improperly permitted to present testimony regarding defendant's post-arrest request for lawyer to rebut insanity claim); People v. Singleton, 102 A.D.3d 517 (1st Dept. 2013), lv denied 21 N.Y.3d 1020 (no error in admission of consciousness of guilt evidence that, when stopped in Maryland for possession of illegal knife several months after charged shooting, defendant gave false names, fled, and struggled with officer; jury could have reasonably found that defendant was primarily motivated by fear of prosecution for shooting rather than fear of prosecution for possessing knife); People v. Flores, 14 A.D.3d 351, 789 N.Y.S.2d 105 (1st Dept. 2005), lv denied 4 N.Y.3d 830 (charge properly given to jury where drug sale/possession defendant abandoned paper bag containing heroin at approach of police and struggled with police before being handcuffed); People v. Graziosa, 10 Misc.3d 128(A), 809 N.Y.S.2d 483 (App. Term, 1st Dept. 2005) (no error in admission of evidence that defendant was smiling and appeared "happy," at time of and after arrest, to contradict justification defense).

6. Refusal To Appear In Lineup - People v. Eberhart, 7 Misc.3d 1027(A), 801 N.Y.S.2d 239 (County Ct., Ulster Co.) (although defendant's refusal to appear in court-ordered lineup may be admitted, court denies People's application where identity was not in issue because defendant admitted presence at crime scene).

7. Apology For Offense - People v. McLaurin, 27 A.D.3d 399, 811 N.Y.S.2d 401 (1st Dept. 2006), lv denied 7 N.Y.3d 815.

8. Consultation With Attorney - State v. Angel T., 973 A.2d 1207 (Conn. 2009) (prosecutor violates federal due process clause by eliciting and arguing about evidence tending to suggest defendant's contact with attorney prior to arrest).

9. Conduct Of Others - See, e.g., People v. Council, 52 A.D.3d 222, 859 N.Y.S.2d 152 (1st Dept. 2008), lv denied, 11 N.Y.3d 735 (given defendant's relationship with co-defendants and overlap of evidence, no error in admission against defendant of evidence that witness was threatened only by co-defendants); People v. Almestica, 288 A.D.2d 483, 733 N.Y.S.2d 247 (2d Dept. 2001) (evidence that defendant's sisters harassed prosecution witness admitted); People v. Lessie, 11 Misc.3d 1088(A), 819 N.Y.S.2d 850 (Sup. Ct., Kings Co., 2006) (finding sufficient evidence connecting acts to defendant, court admits evidence that defendant's witnesses threatened police witness).

D. Consciousness Of Innocence - See United States v. Goffer, 721 F.3d 113 (2d Cir. 2013) (no error in exclusion of evidence of defendant's rejection of plea offer offered to show consciousness of innocence, since discussion at length of collateral consequences of conviction would cause complex trial to gain additional and unnecessary dimensions); People v. Ross, 56 A.D.3d 380, 868 N.Y.S.2d 185 (1st Dept. 2008) (trial court did not err in refusing to allow defendant to offer testimony that, after consultation with his attorney, he agreed to comply with the prosecutor's request for a DNA sample without requiring the prosecutor to make a discovery motion; defendant's consent to discovery authorized by law was devoid of probative value); People v. Torres, 289 A.D.2d 136, 734 N.Y.S.2d 174 (1st Dept. 2001) (trial court properly excluded evidence of defendant's cooperation with the police).

VII. Demonstrative Evidence

A. Relevance - Before an item of contraband or other physical evidence may be admitted, the circumstances surrounding the recovery of the evidence must establish a connection to the charges against the respondent. See, e.g., People v. Pauling, 57 A.D.3d 318, 869 N.Y.S.2d 438 (1st Dept. 2008) (in burglary prosecution in which defendant and two others were accused of impersonating police officers and displaying what appeared to be police shields, three purported police shields recovered

from car and apartment of separately tried co-defendant approximately six months after crime was properly admitted); People v. Thatch, 1 A.D.3d 213, 767 N.Y.S.2d 223 (1st Dept. 2003), lv denied 1 N.Y.3d 635 (2004) (pistols discovered day after crime in house where crime occurred were properly admitted where jury could readily draw inference that they were the pistols used in the crime); People v. Foss, 267 A.D.2d 505, 700 N.Y.S.2d 499 (3rd Dept. 1999), lv denied 94 N.Y.2d 947, 710 N.Y.S.2d 3 (2000) (court erred in admitting earring recovered from defendant where identifying witness testified that it "looked like" earring owned by victim); People v. Wyman, 136 A.D.2d 755, 524 N.Y.S.2d 90 (2d Dept. 1988) (where victim was acutely aware of denominations of stolen money, currency found on defendant and 2 accomplices was properly admitted); People v. Mooney, 135 A.D.2d 578, 521 N.Y.S.2d 797 (2d Dept. 1987) ($10 bill was properly admitted where robbery complainant was "pretty positive" that he had given defendant a $10 bill, and officer who witnessed crime testified that $10 was separated from the rest of defendant's money); People v. Williams, 124 A.D.2d 616, 507 N.Y.S.2d 760 (2d Dept. 1986) (shotgun thrown from van in which defendant was passenger, and recovered at location where it had been thrown, was properly admitted); People v. Cunningham, 116 A.D.2d 585, 497 N.Y.S.2d 442 (2d Dept. 1986) (gun was properly admitted where complainant testified that it "looks like" the one held by the robber, and, although the gun was found at the arrest scene the morning after defendant was apprehended, the police had seen defendant moving his arms and legs about prior to the arrest); People v. Brown, 115 A.D.2d 610, 496 N.Y.S.2d 272 (2d Dept. 1985) (court improperly admitted piece of rug upon which defendant had allegedly ejaculated in absence of evidence that it was, in fact, the rug involved in the crime); People v. Matias, 112 A.D.2d 897, 493 N.Y.S.2d 318 (1st Dept. 1985), aff'd 67 N.Y.2d 1032, 503 N.Y.S.2d 323 (1986) (knife case recovered from defendant's apartment properly admitted so jury could decide whether knife used in attack could have fit into case; the knife was described by a witness, and other knives found in the apartment did not fit). See also People v. Reid, 298 A.D.2d 191, 748 N.Y.S.2d 20 (1st Dept. 2002), lv denied 99 N.Y.2d 563, 754 N.Y.S.2d 216 (2002) (evidence that pistol used in crime had been purchased by person whose sister lived in building adjacent to defendant's residence

was properly admitted)

B. Chain Of Custody

1. Generally - It must be shown that the evidence is the same item that was involved in the crime and has not been materially altered. Fungible evidence such as drugs or money can be authenticated by way of evidence of a complete chain of custody. However, if there are reasonable assurances of the identity and unchanged condition of the evidence and no evidence of tampering, testimony by certain persons who handled the evidence, such as a property clerk, as well as proof of the day-to-day location of the evidence, may be excused. See People v. Julian, 41 N.Y.2d 340, 392 N.Y.S.2d 610 (1977); People v. Connelly, 35 N.Y.2d 171, 359 N.Y.S.2d 266 (1974); People v. Newman, 129 A.D.2d 742, 514 N.Y.S.2d 501 (2d Dept. 1987).

2. Drugs And Other Lab-Tested Evidence - See, e.g., People v. Julian, supra, 41 N.Y.2d 340 (since seals on container had not been altered, 3-year period during which the precise whereabouts of the evidence were not known did not ruin chain); People v. Malone, 14 N.Y.2d 8, 247 N.Y.S.2d 641 (1964) (chain adequate where State Trooper took blood sample home and kept it locked up before mailing it to lab the next day); People v. Alomar, 55 A.D.3d 617, 865 N.Y.S.2d 311 (2d Dept. 2008) (People's failure to call individual or individuals who transported evidence between laboratories was relevant to weight but not admissibility of evidence); People v. Carter, 31 A.D.3d 1056, 818 N.Y.S.2d 854 (3rd Dept. 2006) (no chain of custody problem arose from prosecutor's possession of drugs for 3 days prior to trial); People v. Buckery, 20 A.D.3d 821, 798 N.Y.S.2d 788 (3rd Dept. 2005) (chain of custody sufficient even though drugs recovered at scene were described as "chunky or colored" while drugs tested were described as "powder"); People v. Lanza, 299 A.D.2d 649, 749 N.Y.S.2d 618 (3rd Dept. 2002), lv denied 100 N.Y.2d 563, 763 N.Y.S.2d 820 (2003) (fact that report referred to crack as "powder," while crack is a hard chunky substance, went to weight rather than admissibility); People v. Pacheco, 274 A.D.2d 746, 711 N.Y.S.2d 566 (3rd Dept. 2000) (chain adequate where People failed to elicit testimony from informant regarding receipt of drugs from defendant and delivery of them to investigator); People v. Matos, 255 A.D.2d 156, 681 N.Y.S.2d 236 (1st Dept.), lv denied 93 N.Y.2d 974, 695

N.Y.S.2d 60 (1999) (chain sufficient despite absence of chemist who first analyzed drugs where officer who vouchered drugs and second chemist testified); People v. Flores-Ossa, 234 A.D.2d 315, 652 N.Y.S.2d 44 (2d Dept. 1996), lv denied 90 N.Y.2d 857, 661 N.Y.S.2d 184 (1997) (chain adequate despite absence of officer who drove evidence from site of seizure to office where it was examined); Matter of Shaheem F., 229 A.D.2d 436, 644 N.Y.S.2d 800 (2d Dept. 1996) (chain adequate despite lack of testimony by officer who recovered the evidence since another officer testified that he was told by the other officer which items were taken from respondent and which were taken from the accomplice, and that he kept the items separate); People v. Espino, 208 A.D.2d 556, 616 N.Y.S.2d 782 (2d Dept. 1994), lv denied 84 N.Y.2d 1031, 623 N.Y.S.2d 187 (1995) (chain inadequate where undercover bought white powdery substance, but brownish-white and hard substance was offered at trial); People v. Rivera, 184 A.D.2d 153, 592 N.Y.S.2d 697 (1st Dept. 1993) (chain inadequate where officer who received drugs from detective may have commingled envelopes before returning drugs to detective); People v. Miller, 174 A.D.2d 901, 571 N.Y.S.2d 597 (3rd Dept. 1991) (chain inadequate where drugs from separate sales may have been commingled in undercover's pocket, and a different officer sealed some of the drugs); People v. Brooks, 172 A.D.2d 549, 568 N.Y.S.2d 137 (2d Dept. 1991) (chain inadequate where neither the undercover who bought the drugs, nor the officer who took them to the precinct, identified the vials at trial); People v. Sarmiento, 168 A.D.2d 328, 565 N.Y.S.2d l (1st Dept. 1990), aff'd 77 N.Y.2d 976, 571 N.Y.S.2d 906 (1991) (although vials did not contain officer's initials, the writing could have been rubbed off in handling); People v. Steiner, 148 A.D.2d 980, 539 N.Y.S.2d 216 (4th Dept. 1989) (chain inadequate where condition of drugs as described by chemists was different from description of police witnesses, and first of 2 chemists who analyzed drugs did not initial bag and was not called as a witness); People v. Ramos, 147 A.D.2d 718, 538 N.Y.S.2d 327 (2d Dept. 1989) (pap smear slides were properly admitted where smear was identified prior to analysis with victim's name and number, and emergency room nurse's initials appeared on slides); People v. Mayas, 137 A.D.2d 836, 525 N.Y.S.2d 298 (2d Dept. 1988) (chain adequate where each officer who obtained drugs testified that he

placed drugs in a numbered envelope that was sealed, signed and delivered to the property clerk, and chemists testified that sealed and signed envelopes were received from clerk); People v. Piazza, 121 A.D.2d 573, 503 N.Y.S.2d 623 (2d Dept. 1986) (chain adequate where chemist and officer who vouchered property testified, but desk sergeant who took property from arresting officer did not); People v. Heiss, 113 A.D.2d 953, 493 N.Y.S.2d 850 (2d Dept. 1985) (chain inadequate where neither the testifying co-defendant who bought the drugs from defendant, nor the People's confidential informant, testified to the unaltered condition of the drugs); People v. Jiminez, 100 A.D.2d 629, 473 N.Y.S.2d 593 (2d Dept. 1984) (chain adequate where the undercover and the officer who took the drugs to the police lab testified, and, although the first chemist did not testify, the second chemist testified along with a lab supervisor who provided a chronology of dates from the lab records and described standard procedures for handling samples); People v. Maring, 54 A.D.2d 1129, 388 N.Y.S.2d 804 (4th Dept. 1976) (change in condition not fatal if People prove that test did not change chemistry of drugs); People v. Bennett, 47 A.D.2d 322, 366 N.Y.S.2d 639 (1st Dept. 1975) (chain broken where People did not call officer who drove defendant's car to precinct prior to the recovery of contraband from the car); Durham v. Melly, 14 A.D.2d 389, 221 N.Y.S.2d 366 (3rd Dept. 1961) (chain inadequate where officer failed to testify where, or with whom, he left blood sample at hospital lab); People v. Levy, 20 MIsc.3d 1145(A), 873 N.Y.S.2d 236 (Dist. Ct., Nassau Co., 2008) (People failed to establish chain of custody with respect to urine sample removed from urine container and tested where People failed to call witnesses to explain what happened with test tube samples after they were placed into refrigerator or testimony regarding testing of samples; People merely called witness who testified how urine tests are generally performed, but had no personal knowledge regarding how tests were actually performed).

3. Other Physical Evidence - See, e.g., People v. Ketteles, 62 A.D.3d 902, 879 N.Y.S.2d 208 (2d Dept. 2009), lv denied 13 N.Y.3d 746 (failure to voucher MetroCard did not prevent People from establishing that MetroCard purchased with complainant's debit card and MetroCard recovered from defendant were one and the

same where officer who seized wallet from defendant maintained possession of it until he turned it over to other officer, who recorded serial number of MetroCard and placed card in case folder); People v. Harris, 195 A.D.2d 479, 599 N.Y.S.2d 862 (2d Dept. 1993), lv denied 82 N.Y.2d 896, 610 N.Y.S.2d 163 (error to admit $1570 where serial numbers were not recorded and money was not in same envelope used for vouchering); People v. Scott, 124 A.D.2d 684, 508 N.Y.S.2d 59 (2d Dept. 1986) (defendant's wallet admissible where it was found, and then identified at trial, by victims; however, there was no testimony showing that certain items were in the wallet when it was recovered); People v. Capers, 105 A.D.2d 842, 482 N.Y.S.2d 37 (2d Dept. 1984) (despite gap in chain, gun was properly admitted where officer initialed it and testified that it was the same gun he recovered); People v. Walker, 64 A.D.2d 540, 406 N.Y.S.2d 811 (1st Dept. 1978) (chain inadequate where officer who seized knife was not called).

C. Photographs And Diagrams - Photographs are admissible when the physical appearance of a person, place or thing is at issue. Proper authentication may be provided by a witness who is familiar with the subject of the photograph, and testifies that the photograph is a fair and accurate representation of the person, place or thing at a time relevant to the case. The photographer need not be called to testify. Richardson, §4-212. See People v. Nevado, 22 A.D.3d 383, 802 N.Y.S.2d 171 (1st Dept. 2005) (although photos were taken under different lighting conditions and when there were fewer leaves on trees, differences went to weight rather than admissibility); People v. Whiten, 306 A.D.2d 105, 759 N.Y.S.2d 870 (1st Dept. 2003), lv denied 100 N.Y.2d 600, 766 N.Y.S.2d 176 (2003) (no error in admission of photographs taken with lens replicating degree of magnification provided by officer's binoculars, and taken from a slightly different position); People v. Lenihan, 30 Misc.3d 289, 911 N.Y.S.2d 588 (Sup. Ct., Queens Co., 2010) (given ability to "photo shop" on computer, defendant could not authenticate photographs his mother downloaded from "MySpace"; defendant did not know who took photographs or posted them on "Myspace"); see also People v. McCoy, 89 A.D.3d 1218 (3d Dept. 2011), lv denied 18 N.Y.3d 960 (photos retrieved from cell phone properly authenticated where evidence established how photos were retrieved

from phone and how data in phone could not have been altered after phone was recovered by police).

The admissibility of photographs is commonly placed at issue when particularly graphic and gruesome photographs are offered to show a victim's injuries, and the defense argues that the probative value of the photographs is outweighed by the risk of prejudice to the respondent. Richardson, §4-206. See, e.g., People v. Wood, 79 N.Y.2d 958, 582 N.Y.S.2d 992 (1992) (admission of 44 photos and color slides of murder victim upheld); People v. Bell, 63 N.Y.2d 796, 481 N.Y.S.2d 324 (1984) (no abuse of discretion where court admitted photos depicting victim's wounds and a knife embedded in her back). Obviously, such an argument carries more weight when made by the defendant in a jury trial.

Photographs of the respondent's injuries are sometimes offered to support a justification defense or an argument that a confession was involuntary, or to impeach a police officer or some other witness whose dislike for the respondent, or whose potential civil or criminal liability for the respondent's injuries, provides a motive to lie. See, e.g., Matter of Edward F., 154 A.D.2d 464, 546 N.Y.S.2d 630 (2d Dept. 1989) (photos improperly excluded where defendant claimed officer beat him up); People v. Jones, 148 A.D.2d 547, 538 N.Y.S.2d 876 (2d Dept. 1989) (where prosecution witness assaulted defendant as he fled from scene, defendant was improperly precluded from informing jury of the extent of his injuries).

Diagrams, apartment and street plans, maps and the like are also admissible when the description of a scene or object is relevant. Richardson, §4-211. A proper foundation can be established through testimony establishing: 1) that the witness is familiar with the scene depicted; 2) that the witness was familiar with the scene on the relevant date; and 3) that the diagram or other exhibit is reasonably accurate. It is also useful to establish that the exhibit will be useful in helping the witness explain his or her testimony. Thomas A. Mauet, Trial Techniques, §6.3(4).

D. Audio and Video Recordings - Tape recorded conversations and/or events are admissible when there is clear and convincing evidence establishing that the tape is genuine and a complete and accurate reproduction. This foundation may be

established through testimony by a participant or witness, or through testimony by such a person, combined with testimony by an expert, establishing that the tape is accurate and has not been altered. Proof of a chain of custody is not required, but can lay a foundation by itself if it includes testimony concerning the making of the tape and the identity of the speakers, and testimony by those who have handled the tape concerning its custody and unchanged condition. People v. Ely, 68 N.Y.2d 520, 510 N.Y.S.2d 532 (1986); Richardson, §4-213; see Grucci v. Grucci, 20 N.Y.3d 893 (2012) (no error in exclusion of tape recording where plaintiff's attorney offered only to have witness identify voices on tape and state "whether or not the tape recording [was] fair and accurate," and nearly nine years had elapsed since conversation allegedly took place; dissenting judges cite People v. Ely); People v. Vasser, 97 A.D.3d 767 (2d Dept. 2012), lv denied 19 N.Y.3d 1105 (People established foundation for admission of recordings of defendant's telephone conversations at Rikers Island through testimony of individual familiar with record-keeping practices of Department of Corrections); People v. Collins, 90 A.D.3d 1069 (2d Dept. 2011), lv denied 18 N.Y.3d 993 (recording of telephone call made by defendant while incarcerated properly admitted where senior program specialist for Department of Corrections testified that he was familiar with recording system, that prison routinely recorded inmates' calls, and that recordings were housed in computer system and identified by inmate's unique book and case number); People v. Ebron, 90 A.D.3d 1243 (3d Dept. 2011) (officer involved in surveillance and a participant in conversations identified voices on recording, verified it was accurate and explained that "dead air" on recording occurred when no communications among police officers were taking place); People v. Roberts, 66 A.D.3d 1135, 887 N.Y.S.2d 326 (3rd Dept. 2009) (videotape depicting sex crime defendant performing oral sex on victim, who appeared to be asleep or unconscious, improperly admitted where there was no testimony that videotape fairly and accurately represented events, and authenticity and accuracy of videotape was not established by chain of custody testimony that did not address making of videotape, or where it was kept or who had access to it during nearly three-year period from time of its making to discovery by defendant's housemate; because films are so easily altered, there is very real danger that deceptive tapes,

inadequately authenticated, could contaminate trial process); People v. Ramirez, 44 A.D.3d 442, 843 N.Y.S.2d 280 (1st Dept. 2007) (videotape offered to show time on clock was not self-authenticating as to accuracy of time depicted); People v. Wemette, 285 A.D.2d 729, 728 N.Y.S.2d 805 (3rd Dept. 2001), lv denied 97 N.Y.2d 689, 738 N.Y.S.2d 305 (testimony by "expert" regarding whether camera had been focused or videotape edited rejected where defendant failed to establish witness' training or experience in determining whether videotapes have been manipulated through focusing or editing); People v. Buchanon, 186 A.D.2d 864, 588 N.Y.S.2d 933 (3rd Dept. 1992), lv denied 81 N.Y.2d 882, 597 N.Y.S.2d 943 (defendant's voice identified by witness who had spoken to him on many occasions); see also People v. Taylor, 956 N.E.2d 431 (Ill. 2011) (factors to be used in determining admissibility of surveillance tape include device's capability for recording and general reliability; competency of operator; proper operation of device; manner in which recording was preserved (chain of custody); identification of persons, locale, or objects depicted; and explanation of any copying or duplication process; because VHS tape was made by copying data stored on hard drive of DVR, it was an "original, and State was not required to establish that no alterations were made in copying process because unimportant, irrelevant, prejudicial, privileged and/or confidential material should be removed); State v. Melendez, 970 A.2d 64 (Conn. 2009) (DVD to which original footage captured on eight millimeter videotape was transferred was not computer-generated evidence and was subject only to foundational requirement that it be fair and accurate representation). When called to help lay a foundation, the operator of the recording device should state his or her experience and qualifications and that the device had been tested and was in good working order, and, as appropriate, that after the recording was made, he or she replayed the tape and can say that the tape was an accurate recording, that the tape was labeled and sealed, placed in secure storage to guard against tampering and later removed for trial in the same condition, and that the device in court is in normal operating condition and capable of accurately reproducing the sounds or images on the tape. Mauet, Trial Techniques, §6.3(8).

In People v. Joyner, 240 A.D.2d 282, 660 N.Y.S.2d 398 (1st Dept. 1997), the

Court held that a tape recording had to be authenticated even though only individual statements were being offered to impeach the defendant. But see People v. Novak, 40 Misc.3d 1239(A) (County Ct., N.Y. Co., 2013) (when participant in tape-recorded conversation testifies that tape fairly and accurately represents portion of conversation, it need not be shown that conversation was entirely recorded if portion of conversation was not taken out of context); People v. Curcio, 169 Misc.2d 276, 645 N.Y.S.2d 750 (Sup. Ct., St. Lawrence Co., 1996) (court agrees to admit edited videotape). However, it has been held that where a tape is being offered because it is relevant to the crime charged, but not to prove the details of the transaction it records, there is no need to establish that the recording is an accurate portrayal of the events. People v. Velez, 190 Misc.2d 206, 737 N.Y.S.2d 819 (Sup. Ct., Queens Co., 2002).

To aid the court, an accurate transcript of a recording may be admitted. See, e.g., People v. Blanco, 162 A.D.2d 540, 556 N.Y.S.2d 735 (2d Dept. 1990), lv denied 76 N.Y.2d 1019, 565 N.Y.S.2d 769 (inadequate foundation where witness to conversation testified that transcriptions were fair and accurate, but did not state that they were true, accurate and complete); People v. Batista, 183 Misc.2d 203, 703 N.Y.S.2d 885 (Sup. Ct., N.Y. Co., 2000) (court admits transcripts of conversations in Spanish where, although court interpreters could not understand and translate tape, interpreter employed by Office of the Special Prosecutor was able to prepare transcript). However, any portion of a recording which is substantially inaudible, and the corresponding portion of a transcript, are inadmissible. See, e.g., People v. Carrasco, 125 A.D.2d 695, 509 N.Y.S.2d 879 (2d Dept. 1987) (tape should be sufficiently audible so that independent third party can listen to it and produce a transcript); People v. Brown, 104 A.D.2d 1044, 481 N.Y.S.2d 114 (2d Dept. 1984).

It should be noted that a tape recording may be excludable pursuant to CPLR §4506, which prohibits the admission of the products of unlawful eavesdropping and recordings made without the consent of a party. See, e.g., People v. Clark, 19 Misc.3d 6, 855 N.Y.S.2d 809 (App. Term, 2d & 11th Jud. Dist., 2008), lv denied, 10 N.Y.3d 861 (child's mother lawfully consented to recording on behalf of child where she demonstrated good faith, objectively reasonable basis to believe it was necessary for

welfare of child to make recording; decision should not be interpreted as holding that minor alone can never provide requisite consent to record conversation at which he or she is present or as permitting parents to tape any conversation involving their child); Locke v. Aston, 31 A.D.3d 33, 814 N.Y.S.2d 38 (1st Dept. 2006) (New York law governed surreptitious taping of phone conversation by California resident who called New York from California); People v. K.B., _Misc.3d_, 2014 WL 360574 (Sup. Ct., Kings Co., 2014) (14-year-old sex crime complainant who recorded conversation with defendant could give effective consent under §4506); Matter of I.K. v. M.K., 194 Misc.2d 608, 753 N.Y.S.2d 828 (Sup. Ct., N.Y. Co., 2003) (court excludes tape recordings father made of conversations between mother and children; father could not consent on behalf of children); People v. Heffner, 187 Misc.2d 617, 726 N.Y.S.2d 211 (County Ct., Renssalaer Co., 2001) (tape suppressed where victim's parents surreptitiously recorded defendant's conversations with victim); People v. Qike, 182 Misc.2d 737, 700 N.Y.S.2d 640 (Sup. Ct., Kings Co., 1999) (court excludes tape offered by defendant); see also People v. Ogburn, 46 A.D.3d 1018, 846 N.Y.S.2d 818 (3rd Dept. 2007), lv denied, 10 N.Y.3d 769 (recording of defendant's incriminating telephone conversation during call he placed from New York to Vermont raises procedural and evidentiary issues that are governed by laws of forum).

The court also has authority to admit a videotape of the crime scene if it will assist the fact-finder in considering the issues in the case. See, e.g., People v. Gil, 251 A.D.2d 121, 674 N.Y.S.2d 651 (1st Dept. 1998), lv denied 92 N.Y.2d 1049, 685 N.Y.S.2d 427 (1999) (tape admissible where court instructed jurors that a zoom lens had been used, that they should disregard the positions of persons and vehicles, and that the tape could not be considered a re-enactment of the crime). A lay witness may give an opinion that the accused is the person depicted in a surveillance tape or photograph if there is a basis for concluding that the witness is more likely to correctly identify the accused than is the fact-finder. People v. Ray, 100 A.D.3d 933 (2d Dept. 2012), lv denied 20 N.Y.3d 1103 (no error in admission of testimony by detective that person depicted in surveillance video was defendant where detective had encountered defendant on numerous occasions over more than 15 years and defendant had

changed appearance after commission of crime); People v. Sanchez, 95 A.D.3d 241 (1st Dept. 2012). Testimony regarding the contents of a lost surveillance videotape raises best evidence rule issues. Compare People v. Jimenez, 8 Misc.3d 803, 796 N.Y.S.2d 232 (Sup. Ct., Bronx Co., 2005) (People failed to establish that witness was able to testify with reasonable accuracy regarding all the contents of the tape) with Matter of Jayshawn B., 42 Misc.3d 492 (Fam. Ct., N.Y. Co., 2013) (no best evidence problem presented by testimony from store Asset Protection Investigator about alleged larceny based on observation of live feed from surveillance camera where tape of incident has been destroyed; just as witness can testify to what is observed while looking through binoculars, store employee should be permitted to testify about what was witnessed through live video feed).

E. Courtroom Demonstrations, Experiments And Displays

1. Display Of Injuries - When the extent of a person's injuries are at issue, the injured body parts may be exhibited to the court. An injured person may also give the court a practical demonstration of the effects of an injury. Richardson, §§ 4-209-210.

2. Display Of Respondent's Physical Characteristics - Since a display of physical characteristics is non-testimonial in nature, the Fifth Amendment privilege against self incrimination is not implicated when the respondent is forced at the request of the prosecutor to display an identifying physical characteristic to the court. See People v. Slavin, 1 N.Y.3d 392, 775 N.Y.S.2d 210 (2004) (no violation of defendant's self incrimination rights where prosecution was permitted to introduce photos of defendant's provocative tattoos in connection with hate crime charge).

Similarly, the privilege is not waived when the respondent decides to display a physical characteristic. See People v. Allen, 140 A.D.2d 229, 528 N.Y.S.2d 380 (1st Dept. 1988), lv denied 72 N.Y.2d 1043, 534 N.Y.S.2d 942 (defendant should have been permitted to exhibit his teeth without being cross-examined); United States v. Williams, 461 F.3d 441 (4th Cir. 2006), cert denied 549 U.S. 1047, 127 S.Ct. 616 (trial court erred in conditioning defendant's ability to perform demonstration as to the size of his waist on defendant's willingness to be cross-examined); United States v. Bay, 762 F.2d 1314

(9th Cir. 1985) (display of tattoos). The proper time for such a display is during the defense case. People v. Sims, 57 A.D.3d 1106, 868 N.Y.S.2d 832 (3rd Dept. 2008), lv denied 12 N.Y.3d 762 (defense counsel's request that defendant be allowed to stand before jury so they could gauge his height and weight was untimely where it came during cross-examination of People's first witness; defense never renewed request during its case).

If the respondent wants the court to take note of an obvious physical characteristic that a witness failed to observe, the respondent should be prepared to show that the characteristic existed at the time of the crime. See People v. Rodriguez, 64 N.Y.2d 738, 485 N.Y.S.2d 976 (1984) (tattoo).

It should also be noted that, when identification is at issue, the accused may be entitled to have a person who is alleged by the accused to be the perpetrator display a physical characteristic cited by a witness. See,e.g., Lyons v. Johnson, 99 F.3d 499 (2d Cir. 1996) (defendant was entitled to exhobit a similar-looking man who was also wearing gold "fronts" on his teeth).

3. Voice Exemplar - The respondent may also be compelled to speak at trial for identification purposes without implicating the privilege against self-incrimination. But see Taylor v. Sabourin, 269 F.Supp.2d 20 (E.D.N.Y., 2003) (Fifth Amendment could be found where defendant is compelled to read statement suggesting guilt). However, because it is so easy to feign, a voice exemplar offered by the respondent as exculpatory evidence is ordinarily excludable. See People v. Scarola, 71 N.Y.2d 769, 530 N.Y.S.2d 83 (1988) (court notes that foundation did not rule out possibility that defendants could feign speech defects at trial); People v. Webb, 215 A.D.2d 704, 628 N.Y.S.2d 302 (2d Dept. 1995) (no error where defendant was permitted to exhibit gold teeth which complainant had not noted, but was not permitted to speak the words spoken by the robber).

4. Re-enactment Of Crime - An experimental re- enactment may be presented if conditions are similar to those existing at the time of the incident. Slight variations affect weight, not admissibility. See Andrews v. State, 811 A.2d 282 (Md. 2002) (reversible error where court permitted demonstration of force necessary to

cause injury associated with Shaken Baby Syndrome, and expert testimony based on demonstration, but doll did not have same characteristics as victim); People v. Feuer, 11 A.D.3d 633, 782 N.Y.S.2d 858 (2d Dept. 2004) (court erred in asking defendant to re-enact altercation with victim); People v. Pierce, 270 A.D.2d 94, 705 N.Y.S.2d 333 (1st Dept. 2000), lv denied 95 N.Y.2d 837, 713 N.Y.S.2d 144 (trial court properly admitted testimony of detective who reconstructed incident by dropping weighted bag in order to demonstrate that location where victim was found was not consistent with defendant's claim that victim fell from window); People v. Isaac, 214 A.D.2d 749, 625 N.Y.S.2d 635 (2d Dept. 1995) (trial court properly denied defendant's request that his shorts be admitted so jury could evaluate officers' claim that they could see bulge, since defendant would not be wearing shorts during experiment); People v. Gregg, 203 A.D.2d 188, 611 N.Y.S.2d 151 (1st Dept. 1994), lv denied 83 N.Y.2d 911, 614 N.Y.S.2d 393 (no error where court refused to permit demonstration designed to challenge officer's claim that tin container hitting ground sounded like gun); People v. Mariner, 147 A.D.2d 659, 538 N.Y.S.2d 61 (2d Dept. 1989), lv denied 74 N.Y.2d 666, 543 N.Y.S.2d 409 (no error where court viewed exchange of glassine envelope-sized slips of paper from distance of 40 feet using officer's binoculars); see also State v. Fisher, 805 N.W.2d 571 (S.D. 2011) (in case involving death of 15-month-old child, allegedly due to violent shaking, no error in admission of portion of defendant's videotaped confession showing defendant shaking doll; because defendant was recreating events based on personal knowledge, any dissimilarity between motion defendant used and motion used to shake victim would have been slight, and insufficient to mislead jury or unfairly prejudice defendant); People v. Caldavado, 78 A.D.3d 962, 910 N.Y.S.2d 673 (2d Dept. 2010) (no error in ruling permitting PowerPoint presentation regarding injuries associated with Shaken Baby Syndrome and allowing expert to shake doll to demonstrate force necessary); People v. Mora, 57 A.D.3d 571, 868 N.Y.S.2d 722 (2d Dept. 2008) (similar to Caldavado).

The court may not conduct its own out-of-court re-enactment or other investigation without notice to the parties. People v. Allen, 90 A.D.3d 1082 (3d Dept. 2011) (suppression court erred when it independently tested tail light assembly to

determine deputy's credibility and legality of the stop without notice to and outside presence of parties after proof had been closed).

. F. Private Writings - See, e.g., People v. Pearce, 81 A.D.3d 856, 916 N.Y.S.2d 232 (2d Dept. 2011) (no error in admission of anonymous letter sent to complainant with return address listing defendant's jail and inmate number); People v. Jean-Louis, 272 A.D.2d 626, 709 N.Y.S.2d 101 (2d Dept. 2000), lv denied 95 N.Y.2d 890 (defendant's letters asking accomplice to take Fifth Amendment on stand were properly admitted; letters were properly authenticated since they also contained defendant's nickname, referred to another accomplice by his nickname, and were sent in response to letters mailed by the accomplice to defendant).

G. Computer-Generated Exhibits - See People v. Gregory Morency, 93 A.D.3d 736 (2d Dept. 2012) (no error in admission of computer-generated animation of shooting to illustrate expert testimony); Verizon Directories Corp. v. Yellow Book USA Inc., 331 F.Supp.2d 136 (EDNY, 2004) (while granting admission, court discusses developing use of various types of computer-generated exhibits).

VIII. Collateral Estoppel

A. Generally - "The doctrine of collateral estoppel, or issue preclusion, operates in a criminal prosecution to bar re-litigation of issues necessarily resolved in [the accused's] favor at an earlier trial [citations omitted]." People v. Acevedo, 69 N.Y.2d 478, 515 N.Y.S.2d 753, 758 (1987). In People v. Afrika, 189 Misc.2d 821, 738 N.Y.S.2d 159 (Sup. Ct., Monroe Co., 2001), the court, while noting that neither the United States Supreme Court nor the New York Court of Appeals has decided whether collateral estoppel can be applied against a criminal defendant, refused to apply collateral estoppel where another court had previously found probable cause for an order directing that defendant provide a blood sample. See also State v. Allen, 31 A.3d 476 (Md. 2011) (collateral estoppel may not be applied against criminal defendant to foreclose jury from finding for itself all ultimate facts that make out charged crime; "offensive" collateral estoppel at criminal trial is inimical to Sixth Amendment guarantee of jury trial).

In People v. Plevy, 52 N.Y.2d 58, 436 N.Y.S.2d 224 (1980), the Court of Appeals

stated: "The [collateral estoppel] doctrine, however, is not to be rigidly or mechanically applied and must on occasion, yield to more fundamental concerns [citation omitted]. It serves an important role in civil cases, where it originated and where society's primary concern is to provide a means of peaceful, swift and impartial resolution of private disputes [citation omitted]. It is less relevant in criminal cases where the pre-eminent concern is to reach a correct result and where other considerations peculiar to criminal prosecutions may outweigh the need to avoid repetitive litigation [citation omitted]. Thus, although it is frequently said that collateral estoppel applies to criminal cases [citation omitted], it cannot be applied in quite the same way as in civil cases [citation omitted]." 52 N.Y.2d at 64-65. In People v. Aguilera, 82 N.Y.2d 23, 603 N.Y.S.2d 392 (1993), the Court of Appeals noted that because liberty interests are at stake in criminal proceedings, the Court has "been generally less receptive to estoppel in criminal cases [citations omitted]." 82 NY2d at 30. See also People v. Hinton, 95 N.Y.2d 950, 952, 722 N.Y.S.2d 461 (2000) (quoting from People v. Fagan, 66 N.Y.2d 815, 498 N.Y.S.2d 335 (1985): "Strong policy considerations .militate against giving issues preclusive effect in a criminal case, and indeed we have never done so"); People v. Goodman, 69 N.Y.2d 32, 37, 511 N.Y.S.2d 565 (1986).

The doctrine can be applied against a convicted defendant who is involved in subsequent civil litigation, such as a damages action brought by a victim. See, e.g., Pahl v. Grenier, 279 A.D.2d 882, 719 N.Y.S.2d 370 (3rd Dept. 2001); Costello v. Lupinacci, 253 A.D.2d 478, 676 N.Y.S.2d 498 (2d Dept. 1998); but see Launders v. Steinberg, 9 N.Y.3d 930, 845 N.Y.S.2d 215 (2007) (no collateral estoppel in civil action where manslaughter conviction did not necessarily include determination as to whether deceased child was subjected to repeated physical abuse by defendant during months prior to acts resulting in her death). Even though it does not involve an actual admission of guilt, an Alford plea may have collateral estoppel effect in another proceeding. Merchants Mutual Insurance Company v. Arzillo, 98 A.D.2d 495, 472 N.Y.S.2d 97 (2d Dept. 1984); see also Kaplan v. Sachs, 224 A.D.2d 666, 639 N.Y.S.2d 69 (2d Dept. 1996), lv denied 88 N.Y.2d 952; Kuriansky v. Professional Care, Inc., 158 A.D.2d 897, 551 N.Y.S.2d 695 (3rd Dept. 1990).

While a delinquency adjudication may be used against a juvenile when he has brought suit, in other instances an adjudication is confidential pursuant to FCA § 381.2(1). Green v. Montgomery, 95 A.D.2d 693, 723 N.Y.S.2d 744 (2001) (protection of statute waived where juvenile brought §1983 action against officers charging them with use of excessive force).

Before collateral estoppel may be applied, it must be clear that the same parties have been involved in the proceedings, that the issues are the same, that the prior proceeding resulted in a final and valid judgment, and that the party opposing the estoppel had a "full and fair opportunity" to litigate the issues in the prior proceeding. See People v. Goodman, supra, 69 N.Y.2d 32. But see People v. Roselle, 84 N.Y.2d 350, 618 N.Y.S.2d 753 (1994) (issues in criminal proceeding were not the same as issues involved in family court abuse and neglect case). Collateral estoppel questions typically arise where a total or partial acquittal is followed by the prosecution of charges which arise from the same incident. See, e.g., People v. Suarez, 40 A.D.3d 143, 832 N.Y.S.2d 532 (1st Dept. 2007), lv denied 8 N.Y.3d 991 (jury's factual findings when it acquitted defendant of intentional murder lost preclusive effect when depraved indifference murder conviction was reversed on appeal, and intentional manslaughter charge on which People wish to proceed does not have depravity element found lacking when case was before Court of Appeals).

B. Double Jeopardy - When the prosecution seeks to re-litigate issues resolved in a prior prosecution arising from the same alleged criminal transaction, the constitutional guarantee against double jeopardy comes into play. When it appears that an acquittal reflected a decision adverse to the prosecution on a particular factual element, the prosecution may not present evidence relating to that element in any subsequent prosecution of the same person. Ashe v. Swenson, 397 U.S. 436, 90 S.Ct. 1189 (1970).

C. Evidence Excludable Under Doctrine - In Ashe v. Swenson, supra, 397 U.S. 436, the Supreme Court held that estoppel applies to "ultimate" facts. That is, estoppel bars evidence concerning "an issue which is the sine qua non of a conviction in the second trial." People v. Goodman, supra, 69 N.Y.2d at 38; see also People v. O'Toole,

96 A.D.3d 435 (1st Dept. 2012), aff'd _N.Y.3d_, 2013 WL 6410427 (First Department notes that collateral estoppel does not apply where statutory corroboration requirement governs).

When the respondent was acquitted of some charges and convicted of others at the first trial, a new trial might involve the re-presentation of evidence not for the purpose of proving an "ultimate" fact already decided against the prosecution in the prior proceeding, but to prove "evidentiary" facts establishing the elements of an offense of which the respondent was convicted at the first trial. However, in People v. Acevedo, supra, 69 N.Y.2d 478, the Court of Appeals expanded the collateral estoppel doctrine to include "evidentiary" facts. Thus, if it is clear that the judge in the first case necessarily decided a particular factual issue, evidence offered to prove those facts must be excluded in the second prosecution. It is the respondent's burden to show that the issue was decided. See People v. O'Toole, _N.Y.3d_, 2013 WL 6410427 (2013) (acquittal at first trial on charge of first degree robbery that was based on alleged display of firearm barred People from introducing, at retrial on charge of second degree robbery, evidence that firearm was displayed); People v. Ho Chin, 186 Misc.2d 454, 718 N.Y.S.2d 786 (Sup. Ct., Queens Co., 2000) (People precluded from introducing evidence of forcible compulsion in sex offense prosecution where acquittal in first trial must have resulted from jury's conclusion that defendant did not use force). Although "the precise factual issues encompassed by a general verdict and judgment of acquittal [in a criminal jury trial] are most often unknown" (see People v. Acevedo, supra, 69 N.Y.2d at 487), a judge's explicit fact-findings in a prior proceeding could be used to support the respondent's request for application of the collateral estoppel rule.

D. Identity Of Parties - The respondent may not use the acquittal of an alleged co-actor to bar his or her prosecution. See People v. Berkowitz, 50 N.Y.2d 333, 428 N.Y.S.2d 927 (1980); People v. Oleksowicz, 101 A.D.2d 119, 476 N.Y.S.2d 146 (2d Dept. 1984) (defendant could be prosecuted for criminal facilitation even though person allegedly facilitated had been acquitted). However, if resolution of the issues at the prior proceeding could not have been affected by the identity of the accused, collateral estoppel may be applicable. See People v. McGriff, 130 A.D.2d 141, 518 N.Y.S.2d 795

(1st Dept. 1987) (collateral estoppel effect given to prior decision finding no probable cause for a search warrant); but see Commonwealth v. Stephens, 885 N.E.2d 785 (Mass., 2008) (Commonwealth not collaterally estopped from re-litigating suppression issue after issue has been resolved against it in earlier proceeding against different defendant).

However, the accused is not estopped in such cases. See People v. Pettaway, 153 A.D.2d 647, 545 N.Y.S.2d 163 (2d Dept. 1989) (defendant entitled to challenge search warrant although co-defendant lost hearing).

Collateral estoppel may result even when different prosecutors are involved, if they are closely related. Compare People ex rel. Dowdy v. Smith, 48 N.Y.2d 477, 423 N.Y.S.2d 862 (1979) (People and Division of Parole sufficiently related); People v. McGriff, supra, 130 A.D.2d 141 (prosecutors in 2 New York City counties sufficiently related) with Taylor v. Sturgell, 553 U.S. 880, 128 S.Ct. 2161 (2008) (Supreme Court rejects theory of claim preclusion by "virtual representation" of party in previous proceeding); People v. Morgan, 111 A.D.2d 771, 490 N.Y.S.2d 30 (2d Dept. 1985) (not guilty determination at Housing Authority disciplinary hearing did not bar DA); Nelson v. Dufficy, 104 A.D.2d 234, 482 N.Y.S.2d 511 (2d Dept. 1984), lv denied 64 N.Y.2d 610, 490 N.Y.S.2d 1023 (1985) (dismissal in family court child abuse proceeding brought by Queens Society for the Prevention of Cruelty to Children and Corporation Counsel did not bind DA); People v. Batista, 158 Misc.2d 985, 602 N.Y.S.2d 774 (Sup. Ct. N.Y. Co., 1993) (People not estopped by suppression order issued in family court case prosecuted by Corporation Counsel).

E. Finality Of Prior Determination - See, e.g., People v. Sanders, 71 N.Y.2d 946, 528 N.Y.S.2d 819 (1988) (predicate felony determination improperly given collateral estoppel effect where sentence had not been imposed and People had not had opportunity to challenge ruling on appeal); Matter of McGrath v. Gold, 36 N.Y.2d 406, 369 N.Y.S.2d 62 (1975) (where search warrant was held invalid and indictment was dismissed, determination was not sufficiently final); People v. Howard, 152 A.D.2d 325, 548 N.Y.S.2d 785 (2d Dept. 1989), lv denied 75 N.Y.2d 814, 552 N.Y.S.2d 564 (1990) (where defendant was acquitted after suppression hearing, and, therefore, could

not appeal denial of suppression, determination was not sufficiently final).

F. Full And Fair Opportunity To Litigate Issues - See, e.g., People v. Hilton, 95 N.Y.2d 950, 722 N.Y.S.2d 461 (2000) (no collateral estoppel in felony sex abuse prosecution after violation of probation charge had been dismissed, since People did not have same incentive to litigate at violation hearing); Matter of Juan C., 89 N.Y.2d 659, 657 N.Y.S.2d 581 (1997) (Family Court suppression ruling not given collateral estoppel effect in school disciplinary hearing since Board of Education did not participate in Family Court); People v. Aguilera, 82 N.Y.2d 23, 603 N.Y.S.2d 392 (1993) (defendant not estopped at Manhattan Huntley hearing, since he did not testify at Bronx hearing); People v. Fagan, 66 N.Y.2d 815, 498 N.Y.S.2d 335 (1985) (DA not barred by dismissal at parole revocation hearing, since incentive in felony prosecution is stronger); People v. Plevy, 52 N.Y.2d 58, 436 N.Y.S.2d 224 (1980) (defendant not estopped at parole revocation hearing, since he did not testify at trial for legitimate reason); People v. Johnson, 14 A.D.3d 460, 788 N.Y.S.2d 379 (1st Dept. 2005) (where judge at first trial dismissed first degree gang assault charge because conviction on that charge was irreconcilable with acquittal on first degree manslaughter charge, People were precluded from prosecuting defendant on charge of second degree gang assault); People v. Rumph, 267 A.D.2d 1093, 701 N.Y.S.2d 218 (4th Dept. 1999), lv denied 94 N.Y.2d 925, 708 N.Y.S.2d 364 (2000) (defendant not estopped from litigating probable cause issue at suppression hearing after court determined that the arrest had a foundation and constituted violation of sentencing condition); People v. Williams, 263 A.D.2d 772, 695 N.Y.S.2d 150 (3rd Dept. 1999), lv denied 94 N.Y.2d 831, 702 N.Y.S.2d 602 (suppression order in burglary case did not have collateral estoppel effect in murder case, since People did not have same incentive in burglary case).

It has been held that there was no "full and fair opportunity to litigate" where the previous ruling was plainly wrong. See People v. Lathigee, 159 Misc.2d 1059, 607 N.Y.S.2d 846 (Sup. Ct. Monroe Co., 1993).

IX. Preservation Of Issues For Appellate Review

A. Generally - In the absence of a motion or timely objection citing grounds for the exclusion of evidence, an appellate court ordinarily is not obligated to consider a

claim of error. See, e.g., People v. Caban, 14 N.Y.3d 369, 901 N.Y.S.2d 566 (2010) (error preserved where attorneys lawyers never said “we object to this evidence,” but objection was clear from prosecutor’s summary of their position); Downs v. Lape, 657 F.3d 97 (2d Cir. 2011) (phrase “on the record" has not been accepted by New York courts signifying objection); People v. Alvarez, 51 A.D.3d 167, 854 N.Y.S.2d 70 (1st Dept. 2008), lv denied, 11 N.Y.3d 785 (prosecutor's agency defense-related request for submission of lesser included drug possession offense did not preserve issue on defendant's behalf); People v. Colon, 46 A.D.3d 260, 847 N.Y.S.2d 44 (1st Dept. 2007) (timely protest is sufficient if, in response to protest by party, court expressly decides question raised on appeal; here, court expressly decided question in response to jury's inquiry, and during charge conference in response to prosecutor's statement of People's position, but defendant did not object).

A general objection will probably not be sufficient unless the evidence was not admissible for any purpose. See People v. Ross, 21 N.Y.2d 258, 287 N.Y.S.2d 376 (1967). An intermediate appellate court may consider an unpreserved claim pursuant to the court's interest of justice jurisdiction. Cf. CPL §470.15(3)(c). Although an objection should be registered as soon as the grounds become apparent in the question or the witness' response, this rule need not be applied when, in a heated trial, an objection is registered a little late. See United States v. Pujana-Mena, 949 F.2d 24 (2d Cir. 1991).

An attorney "may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof." 22 NYCRR §604.1(d)(4)(ii); see also 22 NYCRR §700.4(d). See, e.g., United States v. Rodriguez, 627 F.3d 1372 (11th Cir. 2010), cert denied 131 S.Ct. 1840 (disagreeing with Second Circuit decisions in United States v. Kaba, 480 F.3d 152 and United States v. Leung, 40 F.3d 577 holding that defendant would be "understandably reluctant" to suggest that ambiguous remark made by judge reveals bias just as judge is about to select sentence, Eleventh Circuit finds no "vindictive judge or cowardly counsel" exception to contemporaneous objection

rule; “To suggest that judges, whose solemn duty it is to apply the law fairly and impartially to all parties before them, would vindictively respond to an attorney's objection by punishing the client is demeaning to the judiciary”); People v. Escobar, 79 A.D.3d 469, 912 N.Y.S.2d 202 (1st Dept. 2010), lv denied 16 N.Y.3d 797 (no preservation where court prohibited “speaking objections” and required unelaborated objections, but counsel made no effort to make record at any point even though court invited counsel to do so at first recess following objection and offered to reconsider rulings and take curative actions where appropriate); People v. Hancock, 46 A.D.3d 383, 847 N.Y.S.2d 576 (1st Dept. 2007), lv denied, 10 N.Y.3d 766 (defendant’s argument that court improperly admitted negative identification evidence unpreserved where court interrupted defendant's objection before he could articulate it but defendant then did nothing to alert court as to why he was objecting and conveyed impression that his only objection was that prosecutor was leading witness). However, "[n]o attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission." 22 NYCRR §604(d)(4)(i); see also 22 NYCRR §700.4(d).

Thus, judges have considerable discretion to cut off argument on evidentiary issues, particularly after they have ruled. So, when a lawyer has a legitimate argument supporting exclusion of important evidence, the proper course is to specify the grounds for an objection, and say all that can be said in support of the objection, right up front when first making the objection. If the lawyer waits until after the judge rules, he/she risks being cut off, and there is a possibility that the appellate court will conclude that the lawyer, and not the judge, was at fault. As a matter of strategy, it sometimes makes sense to lodge a general objection on the off chance that the judge will see an argument for exclusion stronger than anything the lawyer has come up with, but obviously the lawyer must be careful with that strategy,

While the lawyer should try to make a record, he/she should back off when the judge is expressly threatening to impose a contempt sanction. In such circumstances, the appellate court cannot penalize the respondent when it is obvious that the judge cut the lawyer off as he/she attempted to make a record, and where the context makes it

reasonably clear that appellate counsel is raising an issue the trial lawyer was trying to raise in a timely fashion. See Jordan v. Lefevre, 206 F.3d 196 (2d Cir. 2000).

B. Preservation Of Specific Issues

1. Bolstering Of Identification ("Trowbridge" error) - See, e.g., People v. Fleming, 70 N.Y.2d 947, 524 N.Y.S.2d 670 (1988) (claim unpreserved where, after court refused to rule prospectively on the issue, defendant raised only general objection when evidence was offered); People v. Love, 57 N.Y.2d 1023, 457 N.Y.S.2d 474 (1982) ("objection" was insufficient); People v. West, 56 N.Y.2d 662, 451 N.Y.S.2d 711 (1982) (same as Love); People v. Smith, 39 A.D.3d 1228, 833 N.Y.S.2d 796 (1st Dept. 2007), lv denied 9 N.Y.3d 881 (claim unpreserved where defendant failed to make specific objection or argue that evidence was precluded by pretrial ruling); People v. Fields, 122 A.D.2d 159, 504 N.Y.S.2d 704 (2d Dept. 1986) (where defense was aware of bolstering evidence because of prior suppression hearing, general objection and mistrial motion after witness testified failed to preserve claim).

2. Change In Theory Of Prosecution At Trial - See, e.g., People v. Mitchell, 10 N.Y.3d 819, 859 N.Y.S.2d 99 (2008) (no jurisdictional infirmity where prosecutor elicited evidence of two distinct burglaries, but each conformed with date, location and elements specified in indictment; thus, defendant was required to object); People v. Udzinski, 146 A.D.2d 245, 541 N.Y.S.2d 9 (2d Dept. 1989), lv denied 74 N.Y.2d 853, 546 N.Y.S.2d 1018 (defendant failed to object to jury charge which included change of theory; court rejects defendant's argument that the right to be tried only on theories stated in the indictment is so fundamental that it must be considered reviewable as a matter of law).

3. Judicial Interference In Trial - See, e.g., People v. Charleston, 56 N.Y.2d 886, 453 N.Y.S.2d 399 (1982) (claim unpreserved where, although defense counsel objected 3 times, the objections were directed to specific questions rather than to the court's general course of action).

4. Improper Ruling On Lesser Included Offense - See, e.g., People v. Ford, 62 N.Y.2d 275, 476 N.Y.S.2d 783 (1984) (by requesting or failing to object to consideration of lesser included offense, a defendant waives any error); People v.

Ryan, 55 A.D.3d 960, 865 N.Y.S.2d 146 (3rd Dept. 2008) (requests for submission of lesser included offenses should be made prior to summations, but request for submission of lesser included offense made before jury retires for deliberations cannot be rejected as untimely).

5. Improper Restriction Of Cross-Examination - See, e.g., People v. George, 67 N.Y.2d 817, 501 N.Y.S.2d 639 (1986) (claim unpreserved where defense counsel proceeded to another subject and failed to state purpose of question or dispute People's claim that it was irrelevant); People v. Radcliffe, 273 A.D.2d 483, 711 N.Y.S.2d 436 (2d Dept. 2000) (claim unpreserved where counsel was not allowed to ask witness about whether defendant's hair samples matched those found at the crime scene, and thereafter failed to inquire further or specifically ask about the forensic test results); People v. Trinidad, 177 A.D.2d 286, 576 N.Y.S.2d 18 (1st Dept. 1991), lv denied 79 N.Y.2d 865, 580 N.Y.S.2d 737 (1992) (defendant failed to explain relevancy of proposed lines of inquiry); People v. Dunbar, 145 A.D.2d 501, 535 N.Y.S.2d 438 (2d Dept. 1988) (constitutional claim unpreserved where defense counsel argued that questioning of witness concerning his parole status was relevant to credibility, but did not refer to defendant's right of confrontation).

6. Repugnant Verdict - See People v. Alfaro, 66 N.Y.2d 985, 499 N.Y.S.2d 378 (1985) (in bench trial, defendant must move to set aside or modify verdict to preserve claim).

7. Right To Counsel

a. State Constitutional Right To Counsel During Interrogation – As long as facts establishing the claim exist in the record, the claim may be raised for the first time on appeal. See, e.g., People v. McLean, 15 N.Y.3d 117, 905 N.Y.S.2d 536 (2010) (lack of adequate record bars review not only where vital evidence is absent, but whenever record falls short of establishing conclusively the merit of the claim); but see People v. Ramos, 99 N.Y.2d 27, 750 N.Y.S.2d 821 (2002) (delay in arraignment for purposes of eliciting statement does not trigger right to counsel, and, therefore, claim must be preserved).

b. Right To Consult With Counsel During Trial - See, e.g.,

People v. Narayan, 54 N.Y.2d 106, 444 N.Y.S.2d 604 (1981) (claim not preserved where counsel objected to denial of access to defendant after counsel had already failed to object to court's initial direction that he not talk to defendant and defendant had thereafter continued his direct testimony).

8. Failure To Serve Timely Notice Of Intent To Offer Evidence Under FCA §330.2 - See, e.g., People v. Hunter, 122 A.D.2d 166, 504 N.Y.S.2d 543 (2d Dept. 1986) (general objection not sufficient).

9. Miranda Violation - See, e.g., People v. Winship, 78 A.D.2d 514, 432 N.Y.S.2d 6 (1st Dept. 1980) (claim adequately preserved where defense counsel stated during closing argument at hearing that People had not proven that statements were completely voluntary beyond a reasonable doubt, and court said, "I have that. Go on to your next point").

10. Illegality Of Arrest - See, e.g., People v. Barksdale, 110 A.D.3d 498 (1st Dept. 2013) (defendant did not preserve claim that alleged refusal to provide information when confronted in building did not provide probable cause since People were not on notice of need to develop record as to whether defendant refused to give information, or was incredible when he indicated he was unable to identify host by name or apartment number); People v. Rodriguez, 188 A.D.2d 564, 591 N.Y.S.2d 460 (2d Dept. 1992), lv denied 81 N.Y.2d 892, 597 N.Y.S.2d 953 (1993) (defendant failed to preserve claim that identification was fruit of illegal arrest where he failed to raise the argument until he submitted a post-hearing memorandum).

11. Sandoval Ruling - See, e.g., People v. Moore, 156 A.D.2d 394, 548 N.Y.S.2d 344 (2d Dept. 1989) (defendant need not testify to preserve claim). But see Luce v. United States, 469 U.S. 38, 105 S.Ct. 460 (1984) (claim not preserved under Federal Rules unless defendant testifies). In Ohler v. United States, 529 U.S. 753, 120 S.Ct. 1851 (2001), the Supreme Court held that a defendant who elects to introduce prior crimes evidence waives the right to object. But see State v. Thang, 41 P.3d 1159 (Wash. 2002) (court holds, under the State Constitution, that no waiver results since lawyer who introduced other crimes evidence only after losing battle to exclude it was not introducing evidence voluntarily).

12. Discovery Violation - See, e.g., People v. Ramon Flores, 19 N.Y.3d 881 (2012) (claim that CPL §240.45 and People v Rosario obligated People to provide counsel with copy of videotape containing witness's prior statement unpreserved where counsel did not object to arrangements made by prosecutor for him to view videotape or request a copy of it); People v. Hall, 133 A.D.2d 845, 520 N.Y.S.2d 409 (2d Dept. 1987) (claim unpreserved where People offered defendant's statement to complainant's husband despite assertion in discovery materials that they did not intend to offer statements made to private individuals, but defendant failed to cite discovery violation when objecting).

13. Missing Witness Inference - See People v. Carr, 14 N.Y.3d 808, 899 N.Y.S.2d 746 (2010) (missing witness claim unpreserved where defendant knew at outset of trial that People did not intend to call three relatives of victim who were present at time of alleged crime, but made request for charge more than a week after People provided witness list and after People had rested case in chief); People v. Kass, 59 A.D.3d 77, 874 N.Y.S.2d 475 (2d Dept. 2008) (request made as defense case began was timely; defense was raising questions about the nature of informant's conduct, court had more than enough time to exercise discretion, there was no possibility that prosecutor was surprised by request since informant was at heart of case, and People had lost contact with informant after his release from prison but failed to establish his unavailability); People v. Arnold, 48 A.D.3d 239, 850 N.Y.S.2d 447 (1st Dept. 2008), lv denied, 10 N.Y.3d 859 (in drug sale prosecution, request for jury charge untimely since it could have been made at outset of trial given the information in defendant's possession); People v. Medina, 35 A.D.3d 163, 826 N.Y.S.2d 26 (1st Dept. 2006), lv denied 8 N.Y.3d 925 (request for charge as to arresting officers, which was made after defendant called three witnesses and both sides had rested, was untimely); People v. Jones, 23 A.D.3d 399, 808 N.Y.S.2d 84 (2d Dept. 2005), lv denied 6 N.Y.3d 754 (People cannot argue for first time on appeal that defendant's request was untimely, that defendant failed to establish that the witness had knowledge of a material issue, or that People established that witness had no non-cumulative evidence to offer).

14. Double Jeopardy - See People v. Gonzalez, 99 N.Y.2d 76, 751

N.Y.S.2d 830 (2002) (while defendant need not preserve double jeopardy claim regarding re-prosecution after acquittal or conviction, claim based on simultaneous convictions based on single act must be preserved); People v. Ferguson**,** 67 N.Y.2d 383, 502 N.Y.S.2d 972 (1986) ("Where a mistrial is granted without the consent or over the objection of a defendant, retrial is barred by double jeopardy protections unless there was 'manifest necessity' for the mistrial or 'the ends of public justice would otherwise be defeated'); People v. Pearson, 78 A.D.3d 968, 911 N.Y.S.2d 432 (2d Dept. 2010) (where defendant did not object to co-defendant's mistrial motion, consent to mistrial could be implied); In re Marte v. Berkman, 16 N.Y.3d 874, _N.Y.S.2d_ (2011) (defense counsel impliedly consented to mistrial when they failed to object after court provided prior notice of its inclination and opportunity to be heard).

15. Hearsay/Right Of Confrontation - See People v. Rios, 102 A.D.3d 473 (1st Dept. 2013), lv denied 20 N.Y.3d 1103 (claim unpreserved where defendant made vague references to confrontation, to information that "someone else has provided" and to possibility of raising objection, but never claimed that testimony should be excluded pursuant to Confrontation Clause); People v. Rodriguez, 92 A.D.3d 586 (1st Dept. 2012) (claim unpreserved where defendant requested remedies associated with Bruton but court was not alerted to issue of whether remark was testimonial); People v. Palmer, 65 A.D.3d 1389, 885 N.Y.S.2d 621 (2d Dept. 2009), lv denied 14 N.Y.3d 891 (defendant waived Confrontation Clause claim by declining People's offer to call laboratory analyst whose report had been admitted); People v. Rodriguez, 47 A.D.3d 406, 850 N.Y.S.2d 26 (1st Dept. 2007), lv denied, 10 N.Y.3d 770 (defendant did not preserve Confrontation Clause claim where he made successful severance motion in which he alleged that admission of co-defendant's statements at joint trial would violate defendant's right of confrontation, but did not raise objection at trial); People v. Lopez, 25 A.D.3d 385, 808 N.Y.S.2d 648 (1st Dept. 2006), lv denied 7 N.Y.3d 758 (objection on state evidentiary law grounds did not preserve Confrontation Clause claim).

16. Least Restrictive Disposition - Cf. People v. Andreu, 103 A.D.3d 661 (2d Dept. 2013) (excessive sentence claim need not be preserved since court's

review power stems from interest of justice jurisdiction).

C. Legal Sufficiency Of Evidence - A general dismissal motion at the end of the prosecution's case does not preserve a claim that the evidence is legally insufficient; a specific objection must be made. See People v. Hawkins, 11 N.Y.3d 484, 872 N.Y.S.2d 395 (2008) (defense counsel failed to preserve issue by arguing that People "failed to prove that Mr. Hawkins acted with Depraved Indifference Murder"); People v Eduardo, 11 N.Y.3d 484, 872 N.Y.S.2d 395 (2008) (accessorial liability issue preserved where defense counsel stated that drug sale case "came down to an officer allegedly observing three people speaking on the street for a few minutes; then the defendant looking up and down the block," and counsel's efforts were frustrated by trial judge, who also referred to what "look-outs" do and plainly was aware of and expressly decided question raised on appeal); People v. Finger, 95 N.Y.2d 894, 716 N.Y.S.2d 34 (2000) (issue unpreserved where defendant alleged "that the prosecution fail[ed] to prove each and every element of both counts of the indictment, beyond a reasonable doubt, as a matter of law"); People v. Santos, 86 N.Y.2d 869, 635 N.Y.S.2d 168 (1995); People v. Jean-Baptiste, 38 A.D.3d 418, 833 N.Y.S.2d 31 (1st Dept. 2007), lv denied 9 N.Y.3d 877 (claim preserved where defendant, inter alia, argued in motion to dismiss at close of People's case that evidence did not demonstrate that he acted with requisite "callous disregard" or "wanton indifference to human life" necessary to sustain depraved indifference murder); People v. Danielson, 40 A.D.3d 174, 832 N.Y.S.2d 546 (1st Dept. 2007) (defendant cannot obtain review in absence of preservation by disguising legal sufficiency claim as weight of the evidence claim), aff'd, 9 N.Y.3d 342, 849 N.Y.S.2d 480; People v. Palmer, 34 A.D.3d 701, 826 N.Y.S.2d 77 (2d Dept. 2006), lv denied 8 N.Y.3d 848 (defendant's argument regarding depraved indifference element of murder preserved claim as to charge of depraved indifference assault); People v. Flores, 23 A.D.3d 194, 803 N.Y.S.2d 85 (1st Dept. 2005), lv denied 6 N.Y.3d 775 (issue unpreserved where counsel stated: "I ask for a trial order of dismissal, that the People have not proved that defendant acted under circumstances evincing a depraved indifference to human life"); Matter of Marcel F., 233 A.D.2d 442, 650 N.Y.S.2d 274 (2d Dept. 1996); but see People v. Prado, 4 N.Y.3d 725, 790 N.Y.S.2d 418 (2004) (issue

preserved where general objection was made, but court specifically decided corroboration issue).

However, it has been held that because weight of the evidence review necessarily involves an evaluation of whether all elements of the crime were proven beyond a reasonable doubt, such review may be conducted in the absence of a challenge at trial to the legal sufficiency of the evidence. See, e.g., People v. Nisselbeck, 85 A.D.3d 1206, 923 N.Y.S.2d 801 (3d Dept. 2011).

Presentation of a defense after a dismissal motion has been denied at the close of the prosecution's case results in a waiver of that legal insufficiency claim and risks curing a deficiency in the prosecution's case. People v. Hines, 97 N.Y.2d 56, 736 N.Y.S.2d 643 (2001); but see People v. Soto, 8 A.D.3d 683, 779 N.Y.S.2d 251 (2d Dept. 2004) (court interprets Hines as providing for waiver when defendant supplies additional evidence of guilt, but not as changing preservation rules). However, if the trial court reserves decision on the legal insufficiency motion and issues no decision before the defense has presented a case, there is no waiver. People v. Payne, 3 N.Y.3d 266, 786 N.Y.S.2d 116 (2004). When a defense has been presented, another motion to dismiss must be made at the close of the entire case in order to preserve a claim that the evidence presented at trial was legally insufficient to establish guilt. People v. Lane, 7 N.Y.3d 888, 826 N.Y.S.2d 599 (2006); People v. Hines, supra, 97 N.Y.2d 56.

D. Offers Of Proof - If a lawyer has a good faith basis for detailing what a witness's testimony would be if the judge were to permit the prohibited line of cross-examination, the lawyer should do so in an effort to convince the trial judge to allow the inquiry, and so an appeals court will know precisely what was excluded. People v. Rojas, 257 A.D.2d 429, 683 N.Y.S.2d 515 (1st Dept. 1999), lv denied 93 N.Y.2d 902 (defendant failed to make offer of proof in connection with attempt to elicit address defendant gave to police witness at time of arrest). This may be done in a narrative or question/answer format. Mauet, Trial Techniques, §10.5 (author also suggests actual examination of witness, using same questions/line of examination to which objections have been sustained). If the court refuses to let counsel make a record, he or she should consider drafting a handwritten offer of proof for submission as an exhibit.

This type of offer of proof -- that is, a clear statement regarding the nature and relevance of the testimony, and, if the lawyer knows, a specific description of what the witness would say -- also must be made when a judge refuses to allow a lawyer to call, or elicit certain testimony from, a defense witness, or denies an adjournment to secure the presence of a witness. See, e.g., People v. Rivera, 281 A.D.2d 155, 721 N.Y.S.2d 54 (1st Dept. 2001), lv denied 96 N.Y.2d 833 (defendant failed to make offer of proof regarding his testimony explaining why he confessed); People v. Frazier, 233 A.D.2d 896, 649 N.Y.S.2d 542 (4th Dept. 1996) (defendant failed to make offer of proof that his expert would testify that complainant had ingested cocaine on night of burglary or that she had history of drug abuse that would have impaired ability to perceive and recall events); People v. Ross, 197 A.D.2d 713, 602 N.Y.S.2d 919 (2d Dept. 1993), lv denied 82 N.Y.2d 902 (no offer of proof regarding defendant's testimony about specific acts of violence previously committed by victim).

When confronted with a judge's request for an offer of proof before a defense witness is allowed to testify, counsel should first point out that such a request is inappropriate in light of the accused's constitutional right to present a defense. See People v. Hepburn, 52 A.D.2d 958, 383 N.Y.S.2d 626 (3rd Dept. 1976).

Finally, lawyers must be aware of the limits on arguing evidentiary rulings. An attorney "may make a concise statement of the particular grounds for an objection or exception, not otherwise apparent, where it is necessary to do so in order to call the court's attention thereto, or to preserve an issue for appellate review. If an attorney believes in good faith that the court has wrongly made an adverse ruling, he may respectfully request reconsideration thereof." 22 NYCRR § 604.1(d)(4)(ii). However, "[n]o attorney shall argue in support of or against an objection without permission from the court; nor shall any attorney argue with respect to a ruling of the court on an objection without such permission." 22 NYCRR § 604(d)(4)(i). Thus, judges have considerable discretion to cut off argument on evidentiary issues, particularly after they have ruled. So, when a lawyeryou have a legitimate argument supporting exclusion of important evidence, the proper course is to specify the grounds for an objection, and say all that you intend to say, right up front when you first make the objection. If you

wait until after the judge rules, you risk being cut off, and there is a possibility that the appellate court will conclude that you, and not the judge, were at fault. (I do understand that, as a matter of strategy, it sometimes makes sense to lodge a general objection on the off chance that the judge will see an argument for exclusion stronger than anything you have come up with. Just be careful with that.)

Moreover, while you should try to make the record you want, please back off when the judge is expressly threatening you with contempt or otherwise indicating that you must -- absolutely must -- stop talking or else. If you stop talking, you have NOT failed to make an adequate record. The appellate division is not going to penalize the respondent when it is obvious that the judge cut you off, and where the context makes it reasonably clear that appellate counsel is raising an issue you were trying to raise in a timely fashion. See Jordan v. Lefevre, 206 F.3d 196, 200 (2d Cir. 2000).

E. Preservation By Co-Respondent - A motion or objection by one of several respondents at a joint hearing or trial does not preserve a claim on behalf of other respondents who do not explicitly join in the motion or objection. See, e.g., People v. Foster, 64 N.Y.2d 1144, 490 N.Y.S.2d 726 (195); People v. Burnett, 116 A.D.2d 731, 498 N.Y.S.2d 30 (2d Dept. 1986).

F. Motions In Limine - When it is anticipated that the prosecution will offer certain evidence that is objectionable, the respondent should consider making a motion in limine to obtain a ruling on admissibility before trial. An attempt should be made to have the motion heard by a judge other than the trial judge.

By making a motion in limine, the respondent may be able to prevent the trial court from hearing any portion of the excludable evidence. And, regardless of the outcome of the motion, the defense will be better able to plan for trial.

In the motion, the respondent should specify the nature of the evidence, the grounds for the respondent's belief that the prosecution plans to offer the evidence, the specific grounds for the objection and supporting legal argument, and the reasons why a trial objection would offer inadequate protection. If the motion is denied, the respondent should also raise a specific objection when the evidence is offered at trial. See People v. Fleming, supra, 70 N.Y.2d 947; but see Whitehead v. State, 695 S.E.2d

255 (Ga. 2010) (court abandons repetitive objection rule that requires defendant to repeat at trial any pretrial objection to uncharged crimes evidence; rule was at odds with usual rule that party who loses motion in limine need not renew objection when challenged evidence is offered at trial); People v. Sheehan, 105 A.D.3d 873 (2d Dept. 2013), lv denied 21 N.Y.3d 1020 (pretrial objection to People's Molineux motion preserved issue).

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CHAPTER TWO

ETHICS

By: Gary Solomon

Table of Contents

I. Introduction 293
II. Conflict Of Interest 293
A. General Duty To Inform Client 294
B. Waiver Of Conflict: Right To Counsel Of Choice 294
C. Joint Representation 296
1. Generally 296
2. Duty To Inform Multiple Clients Of Potential Conflict Problems 298
3 Court's Duty To Inquire 298
4. Conflicts Within The Legal Aid Society 301
5. Defense Counsel's Representation Of Organization 302
D. Defense Counsel's Present Representation Of Prosecution Witness ...303
E. Defense Counsel's Prior Representation Of Prosecution Witness 305
F. Attorney's Personal Interest 315
1. Attorney's Relationship With Adversary 315
2. Attorney's Relationship With Witness 317
3. Defense Counsel's Time Constraints 317
4. Accusations/Threats Made By Client Against Defense Counsel 318
5. Defense Counsel's Testimony Against Accused 320
6. Contingent Fees 320
7 Loyalty To Fee Provider.....320
8. Defense Counsel's Employment In Prosecutor's Office 321
9. Defense Counsel's Involvement In Criminal Enterprise Or Other Misconduct 322
III. Advocate-Witness Rule 324
A. The State Rule 324

B. Statements By Witnesses To Defense Counsel 325
1. Prosecution Witnesses 325
2. Defense Witnesses 327
C. Visits To The Crime Scene 328
D. Counsel's Contacts With Police During Investigatory Stage 328
E. Disqualification Of Prosecutor 329
F. Bench Trials vs. Jury Trials 331
G. Stipulations 332
H. The "Substantial Hardship" Exception 332
IV. Communications With Represented Parties 333
A. Generally 333
B. Contacts With Represented Witnesses 335
C. Accused's Contacts With Represented Witnesses 337
D. Prosecutor's Contacts With Defense Experts 338
E. Initiation Of Contact By Represented Person 338
F. Contacts With Unrepresented Person 338
V. Preparation And Examination Of Witnesses 340
A. Presentation Of Accused's Testimony 340
1. Introduction 341
2. The Interviewing Process 341
3. Use Of Perjured Testimony 343
B. Self-Incrimination Issues 350
C. Interference With Adversary's Contacts With Witnesses 352
D. Cross-Examination Of Witnesses 354
E. Mid-Testimony Contact With Witnesses 355
VI. Decision-Making By Attorney And Client 356
A. Decisions Made By Attorney 356
B. Decisions Made By Client 357
VII. Disclosure Of Controlling Law And Material Facts 360
VIII. Disruptive Courtroom Behavior 361

A. Criminal Contempt 361
B. Conduct Punishable As Contempt 362
1. Excessive Legal Argument 362
2. Accusations Of Judicial Bias Or Incompetence 364
3. Refusal To Obey Judge's Order 365
4. Failure To Make Timely Appearance 365

I. Introduction

Ethical problems are among those which are most difficult for attorneys to address. Given the existence of numerous authorities that an attorney might consult when faced with an ethical problem, such as court decisions, bar association ethics committee decisions, and the many published codes of ethics, it is unclear which authorities are controlling. In many instances, the dilemma is not likely ever to come to the attention of the court; without court direction or assistance, the attorney will have to evaluate existing authority in light of the presenting circumstances and then make his or her best guess as to how to proceed. The materials which follow are designed to assist the child's attorney in identifying relevant authorities and resolving ethical problems.

Ethical problems are frequently discussed in the context of disciplinary actions. Generally speaking, attorney disciplinary proceedings in New York are governed by three authorities: New York State's Rules of Professional Conduct, rules of the court and decisional law. See 22 NYCRR §§ 605.4, 691.2, 806.2, 1022.17. The discussions in this chapter do include numerous references to the Rules of Professional Conduct, court rules, and decisions rendered by New York courts and ethics committees; attorneys should pay particular attention to those authorities. Any other authorities cited are worth considering when there is no clear rule, but will not be controlling in New York. In addition, remember that, prior to resolving an ethical problem, an attorney can attempt to obtain an informal ruling or, if there is sufficient time, a formal ethics opinion from a bar association committee.

II. Conflict Of Interest

Rules of Professional Conduct, Rule 1.7 states as follows:

> (a) Except as provided in paragraph (b), a lawyer shall not represent a client if a reasonable lawyer would conclude that either:
> (1) the representation will involve the lawyer in representing differing interests; or
> (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.
> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client

> if:
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
> (2) the representation is not prohibited by law;
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
> (4) each affected client gives informed consent, confirmed in writing.

"Reasonably," when used in the context of conflict of interest determinations, "denotes a lawyer acting from the perspective of a reasonably prudent and competent lawyer who is personally disinterested in commencing or continuing the representation." Rules of Professional Conduct, Rule 1.0(q).

Because conflict problems that arise after representation has commenced can sabotage an attorney-client relationship and disrupt the proceeding, an attorney should attempt to identify conflict issues as soon as possible.

A. General Duty To Inform Client

According to Standard 4-3.5(b) of the ABA Standards For Criminal Justice, The Defense Function (hereinafter, "ABA Defense Standards"), "[d]efense counsel should disclose to the defendant at the earliest feasible opportunity any interest in or connection with the case or any other matter that might be relevant to the defendant's selection of a lawyer to represent him or her or counsel's continuing representation."

Arguably, an attorney may seek a prospective waiver of conflicts if certain guidelines are followed. See Ethics Opinion 724, 1998 WL 39561.

B. Waiver Of Conflict: Right To Counsel Of Choice

The Sixth Amendment right to counsel includes a right to select and be represented by one's preferred attorney, whether the accused has selected and retained the lawyer, or has developed a relationship with assigned counsel. This right should be considered whenever the court is deciding whether to disqualify a lawyer because of an ethical problem. But see United States v. Basham, 561 F.3d 302 (4th Cir. 2009) (indigent criminal defendant has no constitutional right to have particular lawyer represent him, and disqualification did not cause prejudice where attorneys were

removed because of advocate-witness problem during "infancy" of proceeding). However, since the primary goal of the Sixth Amendment is to guarantee an effective advocate, the right to be represented by a particular attorney can be abridged when the attorney's conflict of interest jeopardizes the accused's chances for a fair trial. See Wheat v. United States, 486 U.S. 153, 108 S.Ct. 1692 (1988). The courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." Id. at 160. See also United States v. Levy, 25 F.3d 146 (2d Cir. 1994) (if actual or potential conflict exists, court must disqualify attorney if conflict is so severe that no rational defendant could waive it); United States ex rel. Stewart v. Kelly, 870 F.2d 854 (2d Cir. 1989); United States v. Rivera, 2009 WL 1059641 (SDNY, 2009) (defendant could not waive conflict where co-defendants were former clients of counsel and counsel practiced with father, who was representing a co-defendant); United States v. Schlesinger, 335 F.Supp.2d 379 (E.D.N.Y. 2004); State Bar Ethics Opinion 605, 1989 WL 253477. See also United States v. Perez, 325 F.3d 115 (2d Cir. 2003) (concurring judge opines that “no rational defendant” standard is confusing; test should be whether even a rational defendant can be permitted to waive).

Prior to Wheat v. United States, supra, 486 U.S. 153, the New York Court of Appeals had indicated that a decision to waive a conflict should be upheld in almost all instances. See, e.g., People v. Salcedo, 68 N.Y.2d 130, 506 N.Y.S.2d 154 (1986); People v. Tineo, 64 N.Y.2d 531, 490 N.Y.S.2d 159 (1985) (defendant free to employ attorney of choice in absence of clear showing of extraordinary circumstances). However, in People v. Carncross, 14 N.Y.3d 319, 901 N.Y.S.2d 112 (2010), the court held that the trial court did not err in disqualifying defense counsel, despite defendant's waiver of the conflict, where counsel had represented defendant's father and girlfriend before the grand jury and they would be prosecution witnesses at trial. The court noted that although the witnesses never testified, it had appeared possible that they would be needed to rebut a defense theory; that counsel would have been obligated to maintain the confidences of the father and girlfriend and might have chosen the strategy least likely to cause the prosecution to call them as witnesses, and thereby avoid the need to

cross-examine them. See also People v. Glinton, 72 A.D.3d 618, 900 N.Y.S/2d 264 (1st Dept. 2010), lv denied 15 N.Y.3d 920 (conflict not non-waivable where counsel and firm had previously represented potential witnesses in employee disciplinary matters and was still retained by municipal labor union whose members included defendant and prosecution witnesses; although counsel had financial interest in maintaining relationship with union, it was neither actual or potential litigant in matter relating to defendant's trial and had no stake in outcome or interest that was divergent from defendant's); People v. Urie, 34 Misc.3d 1228(A) (City Ct. of Mt. Vernon, 2012) (court would not have permitted defendant waive conflict where defense counsel had represented complainant in connection with prior felony charge; court notes that defense counsel did not question complainant about prior matter even though information could have helped defendant).

Whatever approach the courts take as a matter of constitutional law, there appears to be no ethical impropriety as long as the client has given informed consent. State Bar Ethics Opinion 605, supra.

In juvenile delinquency proceedings, the client's age and maturity must be considered if "informed" consent is sought. See Matter of H. Children, 160 Misc.2d 298, 608 N.Y.S.2d 784 (Fam. Ct., Kings Co., 1994) (minor is presumed to lack ability to make knowing waiver of conflict).

Finally, it should be noted that, after revealing a conflict and asking to be relieved, an attorney is not free to disregard a judge's order to proceed on the grounds that obeying the order would constitute an ethical violation. See Matter of Balter v. Regan, 63 N.Y.2d 630, 479 N.Y.S.2d 506 (1984) (contempt order upheld).

C. Joint Representation

1. Generally

The United States Supreme Court has recognized the "special dangers" involved when an attorney engages in multiple representation in a criminal case:

> Joint representation of conflicting interests is suspect because of what it tends to prevent the attorney from doing ... [A] conflict may ... prevent an attorney from challenging the admission of evidence prejudicial to one client but perhaps favorable to another, or from arguing at the

> sentencing hearing the relative involvement and culpability of one by emphasizing that of another.

Holloway v. Arkansas, 435 U.S. 475, 489-490, 98 S.Ct. 1173, 1181 (1978). See also ABA Defense Standards, 4-3.5(c) ("Except for preliminary matters such as initial hearings or applications for bail, defense counsel who are associated in practice should not undertake to defend more than one defendant in the same criminal case if the duty to one of the defendants may conflict with the duty to another. The potential for conflict of interest in representing multiple defendants is so grave that ordinarily defense counsel should decline to act for more than one of several codefendants except in unusual situations when, after careful investigation, it is clear either that no conflict is likely to develop at trial, sentencing, or at any other time in the proceeding or that common representation will be advantageous to each of the codefendants represented"); People v. Lynch, 104 A.D.3d 1062 (3d Dept. 2013) (joint representation occurred where co-defendant's attorney was of counsel to defense counsel's law firm).

Problems similar to those raised by joint representation can also arise when clients in unrelated cases have conflicting interests. See, e.g., State Bar Ethics Opinion 592, 1988 WL 236150 (public defender should not represent defendants charged in unrelated cases where one defendant reported that the other defendant had confessed to the crime with which the first defendant is charged); Duvall v. State, 923 A.2d 81 (Md. 2007) (conviction reversed where administrative judge denied defense counsel's motion for pretrial continuance to address conflict created when defendant identified as the perpetrator an individual represented by defense counsel's colleague at the Office of the Public Defender; this denied defendant effective representation since defense counsel could not speak to other individual or his attorney, and, even if defense counsel had managed to gain access to information implicating the other individual, she would not be able to inform police or elicit the information at trial); People v. Sanchez, 95 A.D.3d 241 (1st Dept. 2012) (no ineffective assistance where Legal Aid Society represented defendant and also represented an individual who had been investigated by police as suspect in same robbery and had connection to another individual who was subject of defendant's third party culpability defense, since defense counsel

believed there would be no conflict as long as neither defense nor prosecution made other Legal client's possible participation in robbery an issue and counsel was not required to implicate the other client or otherwise act contrary to his interests).

2. Duty To Inform Multiple Clients Of Potential Conflict Problems

Defense counsel should not undertake joint representation unless "(i) the several defendants give an informed consent to such multiple representation; and (ii) the consent of the defendants is made a matter of judicial record." ABA Defense Standards, 4-3.5(c). See Swift v. Choe, 242 A.D.2d 188, 674 N.Y.S.2d 17 (1st Dept. 1998).

3. Court's Duty To Inquire

Putting aside the attorney's duty to disclose a conflict or potential conflict, "the Trial Judge also has an independent obligation to insure that two or more defendants represented by the same attorney are aware of the potential risks involved in joint representation [citations omitted]." People v. Lloyd, 51 N.Y.2d 107, 111, 432 N.Y.S.2d 685, 686 (1980). The judge is required to personally address the accused individuals to ascertain whether each "has an awareness of the potential risks involved in that course and has knowingly chosen it." People v. Gomberg, 38 N.Y.2d 307, 313-314, 379 N.Y.S.2d 769, 775 (1975). (For obvious reasons, this has come to be called a "Gomberg" inquiry.) See also Matter of Glenn F., 117 A.D.2d 1013, 499 N.Y.S.2d 557 (4th Dept. 1986). This obligation exists when the accused individuals are going to trial, or when the attorney has negotiated a plea bargain for them. See People v. Monroe, 54 N.Y.2d 35, 444 N.Y.S.2d 578 (1981). See also People v. Mattison, 67 N.Y.2d 462, 503 N.Y.S.2d 709 (1986) (inquiry required where prosecution witness was co-defendant whose plea bargain had been negotiated by defense counsel's partner); ABA Defense Standards, 4-3.5(c) ("In determining the presence of consent by the defendants, the trial judge should make appropriate inquiries respecting actual or potential conflicts of interest of counsel and whether the defendants fully comprehend the difficulties that defense counsel sometimes encounters in defending multiple clients").

However, although the judge must clearly alert the accused individuals to the problem, the judge's explanation need not be as detailed as that supplied by defense

counsel. For instance, the judge is not required to explain in detail a potential conflict by referring to the facts of the particular case. Indeed, the judge may not be fully aware of the evidence and the nature of the defense, and it would be improper for the judge to force defense counsel, or the clients, to reveal details concerning defense conferences or strategy. See People v. Lloyd, supra, 51 N.Y.2d 107; People v. Gomberg, supra, 38 N.Y.2d 307; see also People v. Cortez, _N.Y.3d_, 2014 WL 210890 (2014) (no valid waiver of potential conflict where court never informed defendant of right to conflict-free representation or of risks involved, court stated that she was not sure she saw conflict "factually," and court almost completely relied on lead counsel, who would have been reluctant to dispense with co-counsel's assistance regarding critical forensic issues, to explain conflict and possible ramifications; Court of Appeals splits as to whether to endorse use of waiver protocol set forth in United States v. Curcio, 680 F.2d 881, with some judges asserting that trial courts should not be constrained by formulaic inquiry).

The court is not required to afford the accused an opportunity to consult with independent counsel before deciding whether to waive a potential conflict. Although the advice of the conflict-impaired attorney is not sufficient to ensure a truly informed choice, it is presumed that the court's careful inquiry will be sufficient. See People v. Caban, 70 N.Y.2d 695, 518 N.Y.S.2d 953 (1987). In a juvenile delinquency proceeding, the respondent's parent should be allowed to consult with the respondent, although a parent's refusal to consent to a waiver should not control when a sufficiently mature respondent is willing to waive the conflict.

Although the Second Circuit Court of Appeals, relying on its reading of prior Supreme Court decisions, had applied a per se reversal rule when a trial judge failed to conduct any inquiry despite being on notice of a possible conflict, the Supreme Court held in Mickens v. Taylor, 535 U.S. 162, 122 S.Ct. 1237 (2002) that, in order to obtain reversal in such circumstances, a defendant must demonstrate that a conflict actually affected the adequacy of his representation.

In its decisions prior to Mickens, the New York Court of Appeals has required the accused to demonstrate that there was a conflict which bore a substantial relationship to the conduct of the defense. People v. Recupero, 73 N.Y.2d 877, 538 N.Y.S.2d 234

(1988). For instance, if the existence of "pronounced variations in the type and quantum of evidence against each defendant suggested different theories and tactics of defense for each," reversal would be required. People v. Baffi, 49 N.Y.2d 820, 822, 427 N.Y.S.2d 615, 616 (1980). See People v. Allah, 80 N.Y.2d 396, 590 N.Y.S.2d 840 (1992) (defendant deprived of effective assistance where his attorney absented himself during jury deliberations and attorneys for co-defendants represented defendant; Court of Appeals notes that key witness for co-defendants testified that she saw defendant running with a gun in his hand but did not see co-defendants); People v. Recupero, supra, 73 N.Y.2d 877 (no reversal where defendant failed to identify theories or tactics that were not pursued; although defendant pleaded guilty and co-defendant, his wife, had charges dismissed, disparate results could be explained by defendants' contrasting criminal responsibility); People v. Cruz, 63 N.Y.2d 848, 482 N.Y.S.2d 259 (1984) (defendant failed to show that defense counsel, who asserted identification defense for each defendant, was deterred from raising different theories); People v. St. Andrews, 82 A.D.3d 1358, 918 N.Y.S.2d 640 (3d Dept. 2011) (no right to counsel violation where jointly represented defendants were charged with allowing parties to occur on their property at which minors were drinking alcohol and smoking marihuana since People did not assert different levels of culpability, and, while counsel may have had incentive to shift blame from husband to defendant because People tried to prove that she personally purchased alcohol for party and he was more passively involved, counsel did pursue the defense that neither defendant was aware that drinking was occurring and did not purchase alcohol); People v. Reape, 162 A.D.2d 634, 557 N.Y.S.2d 94 (2d Dept. 1990), lv denied 77 N.Y.2d 842, 567 N.Y.S.2d 211 (1991) (no conflict where defendant and co-defendant were charged under statutory presumption concerning possession of weapon in vehicle, and both blamed another co-defendant); People v. Cabrera, 108 A.D.2d 819, 485 N.Y.S.2d 102 (2d Dept. 1985)(possibility of conflict found where defendant pleaded guilty to felony of attempted possession of a weapon and co-defendant pleaded guilty to misdemeanor charge; court notes that presumption of possession in PL §265.15 operated against both defendants); People v. Hussain, 20 Misc.3d 1108(A), 866 N.Y.S.2d 94 (Sup. Ct., Kings Co., 2008) (guilty verdict set aside

where defense counsel represented defendant and co-defendant father, since conduct of defense was affected by counsel's conflict: court notes that counsel's failure to raise defense of mistaken identification on behalf of defendant apparently resulted from unavailability of such a defense for father, that counsel was aware of statements in police reports naming father rather than defendant yet referred only briefly to one inconsistent statement and not at all to another or to victim's testimony in Grand Jury indicating that he had asked police for defendant's name before identifying him); see also United States v. Self, 681 F.3d 190 (3d Cir. 2012) (no abuse of discretion where, after one attorney from firm representing co-defendants withdrew, court disqualified defendant's attorney too; there were different and potentially conflicting defenses, defendant's attorney conceded that "no workable 'Chinese Wall' could be erected in what is a four lawyer firm in which the offices of counsel in this case are adjacent to one another and in which there is a common receptionist," and withdrawal of one attorney did not cure problem since there was possibility that defendant's attorney would retain some loyalty to firm's former client); People v. Garcia, 273 A.D.2d 142, 709 N.Y.S.2d 561 (1st Dept. 2000) (no violation of right to effective assistance of counsel where defense counsel simultaneously represented 2 of the co-defendants in unrelated matters; disparate treatment received by co-defendants could be explained by their disparate culpability).

4. Conflicts Within The Legal Aid Society

Given the inherent dangers in joint representation, The Legal Aid Society ordinarily refuses assignment to more than one individual in a group of jointly charged respondents and/or defendants. Thus, the Juvenile Rights Division does not represent a respondent if it knows that The Society's Criminal Defense Division has been assigned to represent a defendant charged with participation in the same criminal transaction. See generally Matter of Bruce W., 114 Misc.2d 91, 450 N.Y.S.2d 734 (Fam. Ct., Queens Co., 1982). It should be noted that recent court decisions have suggested that, when a public defender or "Legal Aid" office is so large that its attorneys do not interact to the same extent as attorneys in a smaller law firm, conflict rules do not apply with their usual force. See (D) and (E) below; see also State v. St.

Dennis, 244 P.3d 292 (Mont. 2010) (alleged conflicts arising from dual representation by Public Defender will be examined on case-by-case basis; given strong precautions and safeguards, including ethical walls, dual representation of co-defendants by attorneys in different offices did not create conflict); Hunter v. Sabourne, 2005 WL 2709176 (SDNY, 2005) (no right to counsel violation where Bronx Legal Aid attorney represented habeas petitioner at trial, and different Bronx Legal Aid attorney represented another individual who was arrested at about the same time, and in close proximity to the site of petitioner's arrest, and who was dressed similarly to petitioner at the time of arrests; the clients were represented by Bronx Legal Aid more than a year apart and multiple representation can be found only by imputing an attorney-client relationship across a large public defender organization, and petitioner's trial counsel presented the defense she claimed she was ethically precluded from raising); but see People v. Cristin, 30 Misc.3d 383, 911 N.Y.S.2d 784 (Sup. Ct., Bronx Co., 2010) (Bronx Defenders, who had represented co-defendant at separate arraignment upon felony complaint, disqualified entirely after defendants indicted together; although Bronx Defenders alleged that they constructed "wall," it had already failed since two different attorneys from Bronx Defenders appeared on two different dates to represent co-defendant and make arguments on her behalf even after Bronx Defenders was relieved from representing her, and Court of Appeals' refusal in People v. Wilkins to impute knowledge to attorneys in Legal Aid Society was in response to ineffective assistance of counsel claim flowing from "unknowing dual representation," while this case involves known conflict).

5. Defense Counsel's Representation Of Organization

Although it is not the equivalent of joint representation, defense counsel's concurrent representation of an organized crime syndicate, or some other group of which the accused is a part, can create conflict problems. See, e.g., United States v. Schwarz, 283 F.3d 76 (2d Cir. 2002) (non-waivable conflict found where defense counsel for 2 of 3 defendants also represented Policeman's Benevolent Association and had interest in satisfying PBA and in not implicating third defendant officer); People v. Brown, 136 A.D.2d 1, 525 N.Y.S.2d 618 (2d Dept. 1988), cert denied 488 U.S. 897,

109 S.Ct. 240 (no evidence that defense counsel, who withdrew after learning that defendant was providing information to federal agents concerning "Weather Underground," had an interest in the movement that created conflict). See also Rules of Professional Conduct, Rule 1.13(a) ("When a lawyer employed or retained by an organization is dealing with the organization's directors, officers, employees, members, shareholders or other constituents, and it appears that the organization's interests may differ from those of the constituents with whom the lawyer is dealing, the lawyer shall explain that the lawyer is the lawyer for the organization and not for any of the constituents").

D. Defense Counsel's Present Representation Of Prosecution Witness

As in cases involving joint representation, the trial judge is required to conduct an inquiry when defense counsel is presently engaged in the representation of an important prosecution witness in an unrelated matter. See, e.g., People v. Prescott, 21 N.Y.3d 925 (2013) (defendant denied effective assistance of counsel on appeal where appellate counsel represented co-defendant at sentencing hearing; counsel argued at sentencing hearing for leniency based on co-defendant's testimony adverse to defendant and these arguments conflicted with his strategy in defendant's appeal, which depended on discrediting co-defendant's testimony, and, although representation of co-defendant ended prior to completion of defendant's appeal, successive representation concerned substantially related matters and depended on legal strategies that undermined counsel's loyalties, and ineffective assistance claim based on conflict would be rendered meaningless if conflicted counsel could merely terminate representation of one party while continuing to represent another); People v. Solomon, 20 N.Y.3d 91 (2012) (no valid waiver where defense counsel advised court that defendant "respects the nature of" counsel's simultaneous representation of police witness in unrelated civil case and "has agreed to waive any conflict in that regard," and, when judge asked defendant whether that was correct, defendant replied, "Yes, sir"); People v. Wandell, 75 N.Y.2d 951, 555 N.Y.S.2d 686 (1990). To win a reversal on appeal based on the court's failure to inquire, the accused must demonstrate that the conduct of the defense was affected by the conflict. See People v. Solomon, 20 N.Y.3d

91 (reversible error where lawyer who represented defendant at Huntley hearing and at trial was simultaneously representing, in unrelated civil matter, detective who testified that defendant confessed; it was in defendant's interest either to discredit testimony or show that confession had been obtained by unlawful or unfair means, and detective's interest was opposite, and, although People cite lack of proof that counsel was less effective in cross-examining detective than she would have been had he not been her client, court declines to hold that such a conflict can be overlooked if it seems the lawyer did a good job); People v. Harris, 99 N.Y.2d 202, 753 N.Y.S.2d 437 (2002) (no right to counsel violation where defendant's former counsel also represented prosecution's informant, but did not know informant was cooperating in defendant's case); People v. Allen, 88 N.Y.2d 831, 644 N.Y.S.2d 478 (1996) (no reversal where defense counsel and witness represented each other in unrelated matters); People v. Kennedy, 78 A.D.3d 1233, 910 N.Y.S.2d 590 (3rd Dept. 2010) (no denial of effective assistance of counsel where Public Advocate's office that employed defense counsel represented prosecution witness in unrelated manner pending in family court, but defense counsel stated that he had never met witness and was not involved in her representation, and witness only identified defendant's voice on tape recordings; prejudice will not be inferred absent showing that conflict inhibited or restrained representation defendant received at trial).

Defense counsel's concurrent representation of the victim presents particularly serious conflict problems. The victim of a crime "may well have an economic interest in the outcome of the criminal prosecution, creating duties on the part of his or her attorney which inherently conflict with the duties owed to the accused [citations omitted]." People v. McDonald, 68 N.Y.2d 1, 10, 505 N.Y.S.2d 824, 828 (1986) (judge should have informed defendant that defense counsel was representing lumber company whose property defendant had allegedly set on fire). Cf. People v. Krausz, 84 N.Y.2d 953, 620 N.Y.S.2d 821 (1994) (conviction reversed where court failed to conduct Gomberg inquiry with respect to defense counsel's representation of sex abuse victim's father). A compelling conflict problem also exists when counsel's duty to maintain the confidences of the client/witness may well have affected the conduct of the

defense. See (E) below.

Rules of Professional Conduct, Rule 1.10(a) states: "While lawyers are associated in a firm, none of them shall knowingly represent a client when any one of them practicing alone would be prohibited from doing so by Rule 1.7, 1.8 or 1.9, except as otherwise provided therein." However, as noted earlier, the size of The Legal Aid Society, and the resulting presumption that an attorney is likely to be insulated from the work of other attorneys, have led some courts to employ looser rules in conflict cases involving The Society. See, e.g., People v. Wilkins, 28 N.Y.2d 53, 320 N.Y.S.2d 8 (1971) (no per se conflict where The Society represented complainant at time of trial in an unrelated criminal matter); State v. Smith, 761 N.W.2d 63 (Iowa, 2009) (defendant's right to counsel of choice violated where trial court disqualified lead counsel three weeks before trial, after counsel had spent a year preparing for trial, because another member of counsel's firm was representing prosecution witness in another criminal matter, but witness was only foundational witness for tape-recording, non-conflicted co-counsel was willing to handle aspects of case related to witness, lead counsel created conflict wall, and defendant voluntarily waived potential conflict; appropriate action is disqualification of lead counsel from any aspect of case involving witness); State v. Cook, 171 P.3d 1282 (Idaho Ct. App., 2007) (no per se rule imputing conflict where defense counsel's colleague in public defender's office represents prosecution witness; per se rule would significantly hamper ability to provide legal representation to indigent clients and concurrent representation creates no economic incentive for diminished advocacy); People v. Liberty, 147 A.D.2d 502, 537 N.Y.S.2d 596 (2d Dept. 1989). Cf. Matter of Balter v. Regan, supra, 63 N.Y.2d 630.

It is also important to recognize the distinction between an application for disqualification that is raised in the trial court, at a time when the court may have various options, and a claim on appeal that a conflict actually resulted in the denial of effective assistance of counsel. This distinction, and related case law, is included in the next section.

E. Defense Counsel's Prior Representation Of Prosecution Witness

Rules of Professional Conduct, Rule 1.9 states as follows:

(a) A lawyer who has formerly represented a client in a

> matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client gives informed consent, confirmed in writing.
> (b) Unless the former client gives informed consent, confirmed in writing, a lawyer shall not knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented a client:
> (1) whose interests are materially adverse to that person; and
> (2) about whom the lawyer had acquired information protected by Rules 1.6 and paragraph (c) that is material to the matter.
> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
> (1) use confidential information of the former client protected by Rule 1.6 to the disadvantage of the former client, except as these Rules would permit or require with respect to a current client or when the information has become generally known; or
> (2) reveal confidential information of the former client protected by Rule 1.6 except as these Rules would permit or require with respect to a current client.

See also Rules of Professional Conduct, Comment, Rule 1.9 ("Matters are 'substantially related' for purposes of this Rule if they involve the same transaction or legal dispute or if, under the circumstances, a reasonable lawyer would conclude that there is otherwise a substantial risk that confidential factual information that would normally have been obtained in the prior representation would materially advance the client's position in the subsequent matter"; however, "[i]nformation acquired in a prior representation may have been rendered obsolete by the passage of time, a circumstance that may be relevant in determining whether two representations are substantially related"); Rules of Professional Conduct, Comment, Rule 1.10 ("In addition to information that may be in the possession of one or more of the lawyers remaining in the firm, information in documents or files retained by the firm itself may preclude the firm from opposing the former client in the same or substantially related matter if (i) the information is protected by Rule 1.6 and Rule 1.9(c) and likely to be significant and material to the current

matter, and (ii) the documents or files containing confidential client information are retained in a place or in a form that is accessible to lawyers participating in the current adverse matter. A law firm seeking to avoid disqualification under this Rule should therefore take reasonable steps to ensure that any confidential information relating to the prior representation that is maintained in the firm's hard copy or electronic files is not accessible to any lawyer who is participating in the current adverse representation"); Rules of Professional Conduct, Rule 1.0(t) ('Screened' or 'screening' denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer or the firm is obligated to protect under these Rules or other law"); Rules of Professional Conduct, Comment, Rule 1.0 ("The purpose of screening is to ensure that confidential information known by the personally disqualified lawyer remains protected. The personally disqualified lawyer should acknowledge the obligation not to communicate with any of the other lawyers in the firm with respect to the matter. Similarly, other lawyers in the firm who are working on the matter should promptly be informed that the screening is in place and that they may not communicate with the personally disqualified lawyer with respect to the matter. Additional screening measures that are appropriate for the particular matter will depend on the circumstances. In any event, procedures should be adequate to protect confidential information. . . . In order to be effective, screening measures must be implemented as soon as practicable after a lawyer or law firm knows or reasonably should know that there is a need for screening"); NY Eth. Op. 723, 1999 WL 1756274 (NYSBA, 12/12/99) ("The most important factor, however, is whether the moving lawyer did or could have obtained confidences and secrets in the former representation that should be used against the former client in the current representation"); NY Eth. Op. 628, 1992 WL 465630 (NYSBA, 3/19/92) (issue "turns on the scope of the prior representation and the likelihood that the lawyer would obtain confidences and secrets of the former client which may be relevant to the current litigation"); MI Eth. Op. RI-46, 1990 WL 504867 (Michigan State Bar, 3/28/90) (matters substantially related if there is likelihood that information obtained in former representation will have relevance to

subsequent representation; for example, criminal history of former client may be relevant to subsequent custody matter).

The Court of Appeals has stated: “The possibility that a lawyer may give one client less than undivided loyalty because of obligations to another client can also exist when the conflicting representations are not simultaneous. Even though a representation has ended, a lawyer has continuing professional obligations to a former client, including the duty to maintain that client's confidences and secrets [citation omitted], which may potentially create a conflict between the former client and a present client." People v. Ortiz, 76 N.Y.2d 652, 656, 563 N.Y.S.2d 20, 23 (1990). See Jamaica Public Service Co. Ltd. v. AIU Insurance Co., 92 N.Y.2d 631, 684 N.Y.S.2d 459 (1998) (defendant failed to show that prior representation was “substantially related,” and generalized allegations that counsel had access to confidences and secrets were insufficient to establish reasonable probability that confidences or secrets would be disclosed); Tekni-Plex v. Meyner & Landis, 89 N.Y.2d 123 (1996) (party can activate irrebuttable presumption of disqualification by proving: existence of prior attorney-client relationship between moving party and lawyer; that matters involved in both representations are substantially related; and that interests of present client and former client are materially adverse); State Bar Ethics Opinion 605, supra (where former representation was in substantially related matter, and former client consents but insists that at least some confidences and secrets be maintained, current client must consent).

Even if there is no deliberate change in strategy, there is a risk that defense counsel will “go lightly” on a former client, and thereby put the present client’s interests aside; the fear of improperly relying on confidential information might cause the lawyer to shy away from areas of impeachment or refrain from conducting a full investigation into a witness’ background.

Arguably, a court should assign substantial weight to defense counsel’s decision to seek disqualification. See United States v. Oberoi, supra, 331 F.3d 44.

In cases involving "successive representations," not "multiple simultaneous representation," a "Gomberg" inquiry is, according to the Court of Appeals, generally not required. See People v. Jordan, 83 N.Y.2d 785, 610 N.Y.S.2d 952 (1994). But see

People v. Lombardo, 61 N.Y.2d 97, 472 N.Y.S.2d 589 (1980) (inquiry required where defense counsel had represented People's chief witness in other criminal cases). However, the Second Circuit Court of Appeals requires an inquiry in such circumstances whenever the court is aware of facts establishing the possibility of a conflict. See Ciak v. United States, 59 F.3d 296, 305 (2d Cir. 1995). In any event, a denial of the accused's right to the effective assistance of counsel will be found if it is established that the conflict problem affected the conduct of the defense.

It should be noted that rules applicable to successive representations, and not rules applicable to simultaneous representations, governs where representations were simultaneous at one point but counsel immediately withdrew from the representation of one of the clients. United States v. Oberoi, 331 F.3d 44 (2d Cir. 2003).

A different analysis is involved where the client claims on appeal that counsel's conflict resulted in a denial of the effective assistance of counsel. Compare People v. Ortiz, supra, 76 N.Y.2d 652 (defendant denied effective assistance where counsel called former client, who had confessed to the crime, to exculpate defendant, but had duty to maintain confidentiality of confession); People v. McGillicuddy, 103 A.D.3d 1200 (4th Dept. 2013) (defendant deprived of effective assistance of counsel where People introduced recorded conversation between defendant and defense counsel's former client to show defendant's motive and intent for burglary and statement by defendant regarding the former client; counsel raised the potential conflict but court failed to ascertain whether defendant was aware of potential risk and knowingly chose to continue with counsel, and conflict affected defense because counsel indicated he was unable to cross-examine officer with respect to defendant's statement concerning former client; stipulated that former client's voice was on recording, and did not call former client to testify regarding recorded conversations with defendant); United States v. Henke, 222 F.3d 633 (9th Cir. 2000) (convictions reversed where, because they feared a violation of a joint defense privilege, defense counsel did not cross-examine prosecution witness who was former co-defendant); United States v. Malpiedi, 62 F.3d 465 (2d Cir. 1995) (actual conflict where counsel accompanied prosecution witness to Grand Jury and was considered by witness to be her attorney); Ciak v. United States,

supra, 59 F.3d 296, 305; People v. King, 248 A.D.2d 639, 670 N.Y.S.2d 525 (2d Dept. 1998), lv denied 91 N.Y.2d 1009, 676 N.Y.S.2d 137 (disqualification proper where counsel had represented prosecution witness on charge of hindering prosecution of same case, and there was no indication former client was willing to waive attorney-client privilege) and People v. Jones, 184 A.D.2d 405, 585 N.Y.S.2d 362 (1st Dept. 1992), lv denied 80 N.Y.2d 905, 588 N.Y.S.2d 830 (defendant denied effective assistance where counsel also represented co-defendant, whose case had been dropped and who testified for defendant; another attorney might have sought evidence of co-defendant's guilt)

with People v. Wright, 99 N.Y.2d 202, 753 N.Y.S.2d 437 (2002) (no right to counsel violation where witness consented to counsel's use of confidential information, and counsel examined witness regarding prior convictions and motives to testify against defendant); People v. Alicea, 61 N.Y.2d 23, 471 N.Y.S.2d 68 (1983) (no violation where defendant was tried 3 years after co-defendant, who had absconded after pleading guilty while represented by same attorney; potential conflict did not affect conduct of defense); People v. Robles, _A.D.3d_, 978 N.Y.S.2d 456 (3d Dept. 2014) (no violation of right to effective assistance where defense counsel had briefly represented witness in connection with same drug charges he was seeking to have reduced through cooperation with People in defendant's case; a potential conflict existed, but defendant failed to demonstrate that defense was affected); People v. Bush, 60 A.D.3d 601, 876 N.Y.S.2d 35 (1st Dept. 2009) (no violation where counsel was disqualified after defendant was indicted, and then represented co-defendant, where co-defendant was not arrested until after defendant was indicted and was later indicted by different grand jury, and defendant failed to show that he would not have been charged by grand jury had he testified); United States v. Feyrer, 333 F.3d 110 (2d Cir. 2003) (no violation where counsel had represented potential witness who was under investigation and did not testify, but counsel likely did not call witness for reasons other than conflict); United States v. Leslie, 103 F.3d 1093 (2d Cir. 1997) (no inquiry by court required where witness waived attorney-client privilege that might hinder cross-examination); Matter of Assane D., 23 A.D.3d 654, 805 N.Y.S.2d 406 (2d Dept. 2005) (no evidence that

representation of prosecution witness affected conduct of defense); People v. Miller, 19 A.D.3d 237, 798 N.Y.S.2d 10 (1st Dept. 2005), lv denied 5 N.Y.3d 808 (no violation where victim, who knew defendant's family and was reluctant to testify, briefly consulted Legal Aid lawyer regarding subpoena, but defendant did not establish conflict or that his Legal Aid lawyer was constrained in any way); People v. Suarez, 13 A.D.3d 320, 788 N.Y.S.2d 37 (1st Dept. 2004) (no right to counsel violation where counsel had represented prosecution rebuttal witness and failed to impeach witness with drug conviction, but conflict-free lawyer reasonably could have concluded that there was no need to belabor point after prosecutor brought out conviction), lv granted 4 N.Y.3d 857; People v. Graham, 283 A.D.2d 885, 725 N.Y.S.2d 145 (3rd Dept. 2001), lv denied 96 N.Y.2d 940, 733 N.Y.S.2d 379 (although Public Defender's Office also had represented 2 prosecution witnesses who testified pursuant to plea agreements, defense counsel impeached the witnesses) and People v. Jenkins, 256 A.D.2d 735, 682 N.Y.S.2d 678 (3rd Dept. 1998), lv denied 93 N.Y.2d 854, 688 N.Y.S.2d 501 (1999) (defendant not denied effective assistance where witness waived right to confidentiality and defense counsel cross-examined witness regarding the information).

However, when the prior representation is not substantially related to the present case, defense counsel will have an easier time avoiding ethical problems.

Compare People v. Fields, 980 N.E.2d 35 (Ill. 2012) (no per se conflict where defense counsel had previously served as guardian ad litem in unrelated proceeding for prosecution witness who testified at sex crime trial that she too had been sexually abused by defendant); People v. Perez, 70 N.Y.2d 773, 521 N.Y.S.2d 215 (1987) (no reversal where Legal Aid defense counsel examined confidential file of witness who had been represented by another Legal Aid attorney in an unrelated case, but was not involved in the prior case and attacked the witness' honesty at trial); Huusko v. Jenkins, 556 F.3d 633 (7th Cir. 2009) (lawyer has duty to protect former client's confidences but not former client's current legal interests; thus, defense counsel could call as a witness, and challenge credibility of, former client who was on probation even if it exposed former client to risk that probation would be revoked); Rhaburn v. Superior Court, 140 Cal.App.4th 1566 (Cal. Ct. App., 4th Dist., 2006) (assistant public defender whose office

has previously represented prosecution witness is not subject to automatic disqualification; court should evaluate totality of circumstances, including, inter alia, whether the assistant was with the office when the witness was represented and whether the assistant who represented the witness remains with the office); People v. Hunter, 283 A.D.2d 248, 724 N.Y.S.2d 604 (1st Dept. 2001), lv denied 96 N.Y.2d 919, 732 N.Y.S.2d 636 (no conflict where Legal Aid defense counsel learned that The Legal Aid Society had represented person who had been arrested for selling marijuana near to the location and time of the charged heroin sale and who resembled defendant, since counsel pursued a line of defense involving the marijuana seller and this line of defense was far-fetched in any event); United States v. Kliti, 156 F.3d 150 (2d Cir. 1998) (no error where court conducted inquiry and determined that there were no conversations between counsel and the witness during the prior representation which were relevant to the case at hand); People v. Nash, 273 A.D.2d 696, 710 N.Y.S.2d 157 (3rd Dept. 2000) (no right to counsel violation where there was no evidence that defense counsel was prevented from fully cross-examining former client); People v. Butts, 254 A.D.2d 823, 680 N.Y.S.2d 761 (3rd Dept. 1998), lv denied 92 N.Y.2d 1029, 684 N.Y.S.2d 494 (court did not err in failing to inform defendant of counsel's representation of prosecution witness years earlier, since prior representation was unrelated and counsel represented defendant vigorously); People v. Griffin, 249 A.D.2d 244, 673 N.Y.S.2d 73 (1st Dept. 1998), lv denied 92 N.Y.2d 898, 680 N.Y.S.2d 62 (no violation of right to counsel where counsel vigorously presented defendant's claim that former Legal Aid client was the perpetrator; counsel did not represent the former client or possess any confidential information); People v. McLean, 243 A.D.2d 756, 662 N.Y.S.2d 629 (3rd Dept. 1997), lv denied 91 N.Y.2d 927, 670 N.Y.S.2d 410 (1998) (defendant indicated on record that she wanted counsel to continue, counsel rigorously cross-examined witness, and defendant failed to show that prior representation affected conduct of defense); United States v. Perrone, 2007 WL 1575248 (SDNY, 2007) (there was no continuing duty of loyalty preventing attorneys from attacking credibility of former client); State Bar Ethics Opinion 605, supra (successive representation is permissible if the subject matter of the new case is unrelated to the old case, the lawyer

will not need to use or attempt to use confidences or secrets, and there is no appearance of conflicting interests) and State Bar Ethics Opinion 628, 1992 WL 465630 with People v. DiPippo, 82 A.D.3d 786, 918 N.Y.S.2d 136 (2d Dept. 2011) (defendant deprived of effective assistance of counsel where initial police investigation identified defense counsel's former client as possible suspect, and counsel failed to disclose prior representation and failed to investigate him as possible perpetrator); United States v. Oberoi, supra, 331 F.3d 44 (although defendant cannot complain on appeal if he and witness who is counsel's former client waive any conflict, question in this case was whether defense counsel should have been permitted to withdraw, and court abused its discretion by accepting former client's consent as sufficient basis for denial of counsel's motion); United States ex rel. Stewart v. Kelly, supra, 870 F.2d 854 (in habeas proceeding arising out of People v. Tineo, supra, 64 N.Y.2d 531, Second Circuit holds that trial court did not err when it refused to reinstate defense counsel, who had asked to be relieved because he had represented government witness in past; Second Circuit notes that defense counsel might have had to cross-examine the witness in a manner inconsistent with his interests); People v. Twedt, 7 Misc.3d 665, 794 N.Y.S.2d 823 (Sup. Ct., Bronx Co., 2005) (where defense counsel previously represented defendant's boyfriend, a prosecution witness, on other matters, Court declares mistrial, and notes, inter alia, that confidentiality was actually breached when defense counsel, without indicating that he had obtained boyfriend's permission to disclose information, stated on record that boyfriend had "certain problems" in his background, and that since prosecutor's theory was that boyfriend was involved in commission of the crime, counsel would have had to question the boyfriend about his prior criminal record and prior bad acts) and People v. McLaughlin, 174 Misc.2d 181, 662 N.Y.S.2d 1019 (Sup. Ct., N.Y. Co., 1997) (Legal Aid Society disqualified where defense was planning to attempt to implicate former client in the alleged crimes and there was potential for disclosing confidences).

It is important to remember that conflict problems which might arise when only one attorney is involved often are avoided when The Legal Aid Society, or any large defense organization, is involved. It is often the case that the attorney who represented

the prosecution witness is not the same attorney who may have to cross-examine the witness. Indeed, the attorney may no longer be employed by The Society. Thus, the risk that privileged information will be revealed is negligible as long as the attorney in the present case is careful to avoid any contact with files or other information concerning the prior client. See, e.g., Cummin v. Cummin, 264 A.D.2d 637, 695 N.Y.S.2d 346 (1st Dept. 1999) (no disqualification of plaintiff's attorney where a member of the firm had had a 1-2 hour consultation with defendant 6 years earlier, but there were no records of the consultation and no indication that the attorney shared any information with colleagues, and the firm used a screening mechanism to shield the case from the attorney with whom defendant had consulted); United States v. Reynoso, 6 F.Supp.2d 269 (S.D.N.Y. 1998) (no disqualification where another lawyer in Federal Defender Division of Legal Aid represented witness 4 years earlier; court notes that, given volume of cases in office, it is unlikely that lawyers will reveal client confidences in routine cases); People v. Chambers, 133 Misc.2d 868, 508 N.Y.S.2d 378 (Sup. Ct., Kings Co., 1986) (court denies People's motion to disqualify The Legal Aid Society, and notes that defense counsel, who was not involved in the prior cases, has assured the court that he will not look in any files); People v. Spencer, 101 Misc.2d 259, 420 N.Y.S.2d 868 (Sup. Ct., Kings Co., 1979) (court denies without prejudice People's motion to relieve Legal Aid attorney where Legal Aid represented People's confidential informant in prior criminal cases; court directs defense counsel to refrain from attempts to ascertain confidential facts about the witness); see also Kassis v. Teacher's Insurance and Annuity Association, 93 N.Y.2d 611, 695 N.Y.S.2d 515 (1999) (defendants' law firm disqualified where firm hired former associate of plaintiffs' firm, who had participated in the litigation; erection of conflicts "wall" was inconsequential, since defendants made only conclusory allegations that the attorney did not acquire material confidences); Solow v. W.R. Grace & Co., 83 N.Y.2d 303, 610 N.Y.S.2d 128 (1994) (court notes that there is a presumption that rights of former client are jeopardized, but, where those who had contact with former client are no longer with firm, presumption could be rebutted by with showing that remaining attorneys possess no confidences or secrets); People v. Cristin, 30 Misc.3d 383, 911 N.Y.S.2d 784 (Sup. Ct., Bronx Co., 2010) (Bronx

Defenders, who had represented co-defendant at separate arraignment upon felony complaint, disqualified entirely after defendants indicted together; although Bronx Defenders alleged that they constructed "wall," it had already failed since two different attorneys from Bronx Defenders appeared on two different dates to represent co-defendant and make arguments on her behalf even after Bronx Defenders was relieved from representing her, and Court of Appeals' refusal in People v. Wilkins to impute knowledge to attorneys in Legal Aid Society was in response to ineffective assistance of counsel claim flowing from "unknowing dual representation," while this case involves known conflict); Matter of Destiny D., 2002 WL 31663251 (Fam. Ct., Queens Co.) (no disqualification where The Legal Aid Society Juvenile Rights Division had represented children since approximately 1997, and Legal Aid's Criminal Defense Division represented father in 2002 and between 1983-1991; court notes that it has not been shown that representation of children by JRD will unavoidably result in disclosure of confidential information, and that issues involved in permanent neglect proceeding are sufficiently dissimilar from issues involved in criminal actions); State Bar Ethics Opinion 723, 1999 WL 1756274; People v. McLaughlin, supra, 174 Misc.2d 181 (Legal Aid Society failed to rebut presumption favoring disqualification by showing that former client's interests would be fully protected; for instance, the court received no information as to whether any attorneys who appeared on behalf of the former client are still employed by The Society).

F. Attorney's Personal Interest

If defense counsel, or the prosecutor, has a personal relationship with an individual involved in the case, or stands to benefit personally from a particular result, the resulting appearance of impropriety usually requires disclosure of the conflict, and, in some cases, should result in disqualification. See ABA Standards For Criminal Justice, The Prosecution Function (hereinafter, "ABA Prosecution Standards"), 3-1.3(f); ABA Defense Standards, 4-3.5(a).

Some examples:

1. Attorney's Relationship With Adversary - See Rules of Professional Conduct, Rule 1.10(h) ("A lawyer related to another lawyer as parent, child, sibling or

spouse shall not represent in any matter a client whose interests differ from those of another party to the matter who the lawyer knows is represented by the other lawyer unless the client consents to the representation after full disclosure and the lawyer concludes that the lawyer can adequately represent the interests of the client"); see also Rules of Professional Conduct, Comment, Rule 1.7 ("When lawyers representing different clients in the same matter or in substantially related matters are closely related, there may be a significant risk that client confidences will be revealed and that the lawyer's family relationship will interfere with both loyalty and professional judgment. As a result, each client is entitled to know of the existence and implications of the relationship between the lawyers, before the lawyer agrees to undertake the representation. Thus, a lawyer who has a significant intimate or close family relationship with another lawyer ordinarily may not represent a client in a matter where that other lawyer is representing another party, unless each client gives informed consent"); ABA Prosecution Standards, 3-1.3(g) ("A prosecutor who is related to another lawyer as parent, child, sibling or spouse should not participate in the prosecution of a person who the prosecutor knows is represented by the other lawyer"); ABA Defense Standards, 4-3.5(f) ("Defense counsel should not defend a criminal case in which counsel's partner or other professional associate is or has been the prosecutor in the same case"), 4-3.5(i) ("Defense counsel who is related to a prosecutor as parent, child, sibling or spouse should not represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor. Nor should defense counsel who has a significant personal or financial relationship with a prosecutor represent a client in a criminal matter where defense counsel knows the government is represented in the matter by such prosecutor, except upon consent by the client after consultation regarding the relationship"); State Bar Ethics Opinion 660, 1994 WL 120198 (couple who date frequently should not appear opposite one another, and, if another member of defense firm or prosecutor's office handles case, disqualified lawyer must not participate); see also People v. Ennis, 11 N.Y.3d 403, 872 N.Y.S.2d 364 (2008) (no conflict of interest requiring usual analysis where defense counsel faced subjective personal dilemma when attorney representing defendant's brother, the co-

defendant, revealed to defense counsel that the brother, while attempting to enter into cooperation agreement, stated that he shot the victim and that defendant was not involved in the shooting, but defense counsel promised brother's attorney that he would not disclose information until trial was over and did not use the information); Commonwealth v. Stote, 922 N.E.2d 768 (Mass., 2010) (no actual conflict where defendant's trial/appellate counsel had intimate relationship with appellate prosecutor that ended 17 years before trial; however, counsel should have disclosed relationship to defendant so that he could either give informed consent or retain different counsel).

2. Attorney's Relationship With Witness - See, e.g., People v. Smart, 96 N.Y.2d 793, 726 N.Y.S.2d 343 (2001) (no error where victim had previously performed security services for defense counsel, and court ascertained that defendant knew of the relationship; Court of Appeals notes that trial courts should conduct a sufficient inquiry where there is evidence of a prior relationship between a defense attorney and a prosecution witness, and the parties should bring such information to the court's attention); United States v. Fulton, 5 F.3d 605 (2d Cir. 1993) (right to effective assistance was violated, and defendant's waiver was invalid, where government told court during ex parte conference that government witness had alleged that he imported heroin for defense counsel); People v. Gabriel, 241 A.D.2d 835, 661 N.Y.S.2d 306 (3rd Dept. 1997), lv denied 91 N.Y.2d 892, 669 N.Y.S.2d 6 (no Gomberg inquiry required where one of defendant's attorneys was a former acquaintance of the victim's brother, and, in any event, defendant advised court that he wanted attorney to continue and both attorneys provided aggressive representation); People v. Jenan, 140 Cal.App.4th 782 (Cal. Ct. App., 5th Dist., 2006) (small DA's office disqualified where prosecutor would have to argue to jury the credibility of 2 colleagues who witnessed crimes)..

3. Defense Counsel's Time Constraints - See Rules of Professional Conduct, Comment, Rule 1.3 ("A lawyer's work load must be controlled so that each matter can be handled diligently and promptly"); ABA Defense Standards, 4-1.3(e) ("Defense counsel should not carry a workload that, by reason of its excessive size, interferes with the rendering of quality representation, endangers the client's interest in the speedy disposition of charges, or may lead to the breach of professional

obligations"); State Bar Ethics Opinion 751, 2002 WL 1303477 (government lawyer employed as staff attorney by a department of social services had duty to decline to represent client if workload was unmanageable and attorney could not competently represent client); United States v. Zackson, 6 F.3d 911, 920 (2d Cir. 1993) (if defense counsel opposed severance because obligation to another client would have made it difficult for him to represent defendant at two separate trials, he "may have violated [the State Bar Code] by allowing his time commitment to another client to influence his judgment concerning Zackson's case").

4. Accusations/Threats Made By Client Against Defense Counsel - See, e.g., People v. Robert Mitchell, People v. Deliser, 21 N.Y.3d 964 (2013) (when counsel takes position that is adverse to defendant's claim that counsel coerced plea, conflict of interest arises and court must assign new attorney to represent defendant on motion to vacate plea); People v. Linares, 2 N.Y.3d 507, 780 N.Y.S.2d 529 (2004) (defendant's request for new lawyer and accusations against counsel did not establish conflict; tensions arising out of differences over strategy do not compel assignment of new lawyer); People v. Garcia, 71 A.D.3d 555, 897 N.Y.S.2d 84 (1st Dept. 2010), aff'd 16 N.Y.3d 93, 917 N.Y.S.2d 74 (no violation of defendant's right to conflict-free representation where counsel stated that defendant appeared to be making claims of ineffective assistance and improper pressure to take plea but did not provide details, and defendant made only generalized claim of being "forced" to take plea; while defendant argued that conflict prevented counsel from providing details, counsel could have revealed, in camera if necessary, what client was alleging without admitting or denying anything); United States v. Findley, 272 F.3d 116 (2d Cir. 2001) (Second Circuit upholds trial court's refusal to disqualify counsel, who feared for his and his family's safety, while noting, *inter alia*, that trial court concluded that defendant would act in same manner with another attorney and that there was not a total lack of communication; that counsel carried out his duties competently; that a finding that defendant's threats created a conflict could encourage defendants to take such action in the hopes of obtaining a reversal of a conviction; and that defendant created most, if not all, of the problems); United States v. Davis, 239 F.3d 283 (2d Cir. 2001) (actual

conflict existed where defendant alleged that counsel threatened not to investigate case and not file motions if defendant did not accept plea); United States v. White, 174 F.3d 290 (2d Cir. 1999) (claim that defense counsel provided ineffective assistance because of disagreements with defendant must be measured under Strickland standard, which requires a showing of objectively unreasonable performance, and prejudice; a defendant's decision to raise complaints about counsel's performance does not create a conflict of interest); Lopez v. Scully, 58 F.3d 38 (2d Cir. 1995) (defendant was prejudiced at sentencing by conflict which resulted from defendant's allegations that defense counsel had coerced him into pleading guilty); People v. Caccavale, 305 A.D.2d 695, 760 N.Y.S.2d 210 (2d Dept. 2003) (new counsel should have been assigned when defendant moved to withdraw plea while alleging that counsel had told him he was going "to blow trial" because he did not have money for counsel); People v. Bolden, 289 A.D.2d 607, 733 N.Y.S.2d 775 (3rd Dept. 2001) (Assistant Public Defender had no conflict where defendant was challenging competence of former APD who was no longer with PD's office); People v. Jones, 180 A.D.2d 427, 580 N.Y.S.2d 5 (1st Dept. 1992) (no error where trial court refused to relieve defense counsel, who had alleged that defendant threatened him, since there was no proof that defense counsel and defendant had irreconcilable differences or that counsel was less than competent); Matter of Malik L., 22 Misc.3d 1130(A), 881 N.Y.S.2d 364 (Fam. Ct., Queens Co., 2009) (court denied Legal Aid Society's mid-trial motion to be relieved where respondent's mother was dissatisfied with performance of attorney and alleged that attorney and another Legal Aid employee had "threatened her son," but respondent denied claim regarding threats and indicated that he wanted attorney to continue representing him; in absence of demonstrable conflict between attorney and respondent, mother had no standing to seek removal of attorney); Rowe v. Miller, 299 F.Supp.2d 231 (S.D.N.Y. 2004) (no conflict where defendant moved to withdraw plea while alleging that counsel gave him incorrect advice regarding prison time).

In People v. Hardin, 840 N.E.2d 1205 (Ill. 2005), the Illinois Supreme Court held that no per se conflict exists when one public defender argues that another public defender in the same office was ineffective, and that the court hearing the post-

conviction proceeding is not required to conduct an inquiry into a possible conflict of interest. The defendant must raise the conflict before the court has a duty to investigate. However, the defendant's burden is not heavy. The defendant need only sketch, in limited detail, a picture of how the working relationship between the two public defenders creates an appearance of impropriety. Relevant factors include the two public defenders were trial partners in the defendant's case, whether one supervised the other, and whether the size, structure, and organization of the particular public defender's office affected the closeness of any supervision.

5. Defense Counsel's Testimony Against Accused - Although it also Raises advocate-witness rule issues, the prosecution's use of defense counsel's testimony against the accused raises conflict of interest issues. See People v. Anthony Lewis, 2 N.Y.3d 224, 777 N.Y.S.2d 798 (2004) (defendant denied effective assistance where defense counsel testified to defendant's disadvantage at Sirois hearing, and the attorney-client relationship was ruptured; an attorney should withdraw in such circumstances).

6. Contingent Fees - See People v. Winkler, 71 N.Y.2d 592, 528 N.Y.S.2d 360 (1988) (although contingent fee retainer in criminal case is unquestionably unethical, in order to win reversal defendant must show that possible conflict affected conduct of defense in manner that prejudiced defendant); People v. Garguilio, 36 Misc.3d 1240(A) (Sup. Ct., Kings Co., 2012) (contingency fee conditioned on full acquittal did create conflict of interest, but defendant failed to show that conflict was reason for attorney's decision not to interpose defense of extreme emotional disturbance; habeas relief was denied in Garguilio v. Heath, 293 F.R.D. 146, with court noting that agreements for such "bonuses" lead to conflict allegations and collateral attacks on convictions, and may induce counsel to cross line of propriety with respect to inducing perjury or tampering with evidence); Rules of Professional Conduct, Rule 1.5(d)(1) (lawyer shall not enter into arrangement for, charge or collect contingent fee for representing defendant in criminal matter); ABA Defense Standards, 4-3.3(f).

7 Loyalty To Fee Provider - See People v. Pina, 35 A.D.3d 45, 824 N.Y.S.2d 220 (1st Dept. 2006) (hearing should have been ordered where defendant

alleged, inter alia, that defense counsel was hired by two individuals who had strong incentive to see defendant go to prison); People v. Campos, 28 A.D.3d 363, 813 N.Y.S.2d 84 (1st Dept. 2006), lv denied 7 N.Y.3d 810 (potential, and not actual, conflict existed where co-defendant, defendant's common law husband, hired defendant's counsel prior to co-defendant's own arrest and paid portion of fee, but counsel did not expect more money from co-defendant after his arrest; no proof that conflict affected representation); Amiel v. United States, 209 F.3d 195 (2d Cir.2000) (possible right to counsel violation where defense counsel - who was paid by defendant's mother, who was a co-defendant - allegedly advised defendant not to testify where it would have been in defendant's interest but would have inculpated mother); United States v. Fernandez, 2000 WL 534449 (S.D.N.Y. 2000), aff'd upon reconsideration 2000 WL 815913 (conflict where man paying fee was involved in conspiracy); Matter of David D., 6 Misc.3d 1008(A), 800 N.Y.S.2d 344 (Fam. Ct., Suffolk Co., 2004) (counsel retained by parents disqualified where respondent's brother was alleged sex crime victim).

8. Defense Counsel's Employment In Prosecutor's Office - Compare People v. Shinkle, 51 N.Y.2d 17, 434 N.Y.S.2d 918 (1980) (appearance of impropriety created where attorney who initially represented defendant became chief assistant in prosecutor's office prior to defendant's trial); People v. Zinkhen, 89 A.D.3d 1319 (3d Dept. 2011), lv denied 18 N.Y.3d 964 (no dismissal or disqualification of District Attorney where DA had previously represented defendant while member of Public Defender's office, but defendant failed to show actual prejudice or substantial risk of abuse of confidence despite being provided access to Public Defender's case file regarding previous representation; inference of impropriety not enough); People v. Good, 62 A.D.3d 1041, 877 N.Y.S.2d 766 (3rd Dept. 2009) (right to counsel violation found where attorney who represented defendant for five months in early stages of case joined District Attorney's office and was employed by that office at time defendant entered guilty plea) and People v. Martin, 168 A.D.2d 794, 564 N.Y.S.2d 503 (3rd Dept. 1990) (conflict existed where defense counsel had previously prosecuted defendant while a member of District Attorney's office) with People v. English, 88 N.Y.2d 30, 643 N.Y.S.2d 16 (1996) (no reversal where, after defendant's conviction, defense counsel

learned that defendant's first attorney became employed by DA while defendant's case was still pending, but the attorney had no contact with defendant's case); State v. McClellan, 216 P.3d 956 (Utah 2009) (public prosecutor's office should have been disqualified where defendant's former defense counsel became associated with prosecutor's office three days before defendant's trial; although entire staff ordinarily need not be disqualified if staff member who previously worked for defendant is isolated from participation, prosecutor's office did not demonstrate that necessary and effective steps were taken to prevent transfer of confidential information) and People v. Terk, 24 A.D.3d 1038, 805 N.Y.S.2d 738 (3rd Dept. 2005) (trial court was not required to disqualify prosecutor, who had represented defendant 10 years earlier). See also People v. Samuels, 276 A.D.2d 302, 714 N.Y.S.2d 29 (1st Dept. 2000), lv denied 96 N.Y.2d 738, 722 N.Y.S.2d 805 (2001) (no denial of right to conflict-free counsel where counsel who had represented defendant before trial later represented the prosecution's principal eyewitness in 2 unrelated cases in which she was defendant; this cannot be analogized to a defection to the prosecution's camp).

Defense counsel's former employment in the prosecutor's office creates no appearance of impropriety. People v. Abar, 99 N.Y.2d 406, 757 N.Y.S.2d 219 (2003) (no conflict where defense counsel had prosecuted defendant as prosecutor); People v. Sawyer, 83 A.D.2d 205, 443 N.Y.S.2d 926 (4th Dept. 1981), aff'd 57 N.Y.2d 12, 453 N.Y.S.2d 418 (1982), cert denied 459 U.S. 1178, 103 S.Ct. 830 (1983).

9. Defense Counsel's Involvement In Criminal Enterprise Or Other Misconduct - See People v. Cortez, _N.Y.3d_, 2014 WL 210890 (2014) (potential conflict that arose where attorney who second-seated lead counsel had been indicted in New York County for allegedly smuggling drugs to client in prison, and faced prosecution by same office that was prosecuting defendant, did not affect conduct of defense); People v. Payton, _N.Y.3d_, 2013 WL 6499349 (2013) (court declines to adopt rule providing that there is per se reversible error anytime there is potential conflict because defense counsel is under investigation or being prosecuted by district attorney's office that is trying client, but actual conflict requiring reversal would exist where defense counsel was implicated in crimes for which client stood trial); People v.

Konstantinides, 14 N.Y.3d 1, 896 N.Y.S.2d 284 (2009) (4-judge majority finds no right to counsel violation where one of defendant's trial attorneys had allegedly attempted to fabricate defense where defendant was fully informed of potential conflict and neither he nor other attorney complained, conflicted attorney did not relinquish any avenue of defense in order to minimize risks he faced if prosecutor called witness to refute certain defense claims as recently fabricated lies in which attorney was complicit, other attorney handled trial except for presentation of defense case, and defendant does not point to evidence elicited by conflicted attorney that was harmful to him; while it would have been better practice for judge to place on record the discussions that took place after prosecutor's application for disqualification, failure to do so did not relieve defendant of obligation to demonstrate that potential conflict actually operated on defense, and court also declines invitation to create per se rule mandating reversal where defense attorney is accused of criminal misconduct directly related to representation of defendant); People v. Cortez, 85 A.D.3d 409 (1st Dept. 2011) (no conflict where court held counsel in contempt and imposed fine for unjustified failure to appear; defendant's claim that contempt citation placed attorney in fear of further antagonizing court and inhibited ability to zealously defend defendant rests on speculation); People v. Elias Langguth, 63 A.D.3d 478, 880 N.Y.S.2d 638 (1st Dept. 2009), lv denied 13 N.Y.3d 797 (no conflict where prosecutor accused defense counsel of obtaining unauthorized trial preparation assistance from officer friendly to defendant); United States v. Nickerson, 556 F.3d 1014 (9th Cir., 2009) (violation of rule prohibiting lawyer from communicating with represented person did not create actual conflict with defendant's interests by inhibiting counsel's performance); Ventry v. United States, 539 F.3d 102 (2d Cir. 2008) (hearing on ineffective assistance claim ordered where witness defense counsel failed to call was counsel's law partner, and that by calling witness counsel may have placed both attorneys in predicament given possible misrepresentations each had made regarding their relationship); States v. Jones, 381 F.3d 114 (2d Cir. 2004) (defense counsel had unwaivable conflict where he and others at his firm were likely to become subjects of grand jury investigation into whether they were passing information between defendant and another client of firm charged with

drug trafficking in a separate case); United States v. Williams, 372 F.3d 96 (2d Cir. 2004) (defendant's right to counsel violated where, because of allegations of his criminal activity with defendant, defense counsel had strong incentive to prevent cooperation agreement between defendant and government); Armienti v. United States, 313 F.3d 807 (2d Cir. 2002) (defendant failed to establish that defense counsel was influenced by any ties to crime family or by a federal grand jury investigation of counsel; court notes, *inter alia*, that defendant had expressed no willingness to plead guilty); Triana v. United States, 205 F.3d 36 (2d Cir. 2000) (no Sixth Amendment violation shown where member of defense team was participant in same cocaine importation scheme from which charges against defendant arose, but there was no evidence that lawyer who conducted trial had actual conflict or that conflicted lawyer had impact on trial).

III. Advocate-Witness Rule

A. The State Rule

The Rules of Professional Conduct, Rule 3.7 states as follows:

> (a) A lawyer shall not act as advocate before a tribunal in a matter in which the lawyer is likely to be a witness on a significant issue of fact unless:
> (1) the testimony relates solely to an uncontested issue;
> (2) the testimony relates solely to the nature and value of legal services
> rendered in the matter;
> (3) disqualification of the lawyer would work substantial hardship on the client;
> (4) the testimony will relate solely to a matter of formality, and there is no reason to believe that substantial evidence will be offered in opposition to the testimony; or
> (5) the testimony is authorized by the tribunal.
> (b) A lawyer may not act as advocate before a tribunal in a matter if:
> (1) another lawyer in the lawyer's firm is likely to be called as a witness on a significant issue other than on behalf of the client, and it is apparent that the testimony may be prejudicial to the client; or
> (2) the lawyer is precluded from doing so by Rule 1.7 or Rule 1.9.

See also Rules of Professional Conduct, Comment, Rule 3.7 (“Testimony relating solely to a formality is uncontested when the lawyer reasonably believes that no substantial evidence will be offered in opposition to the testimony. . . . Whether the tribunal is likely to be misled or the opposing party is likely to suffer prejudice depends on the nature of the case, the importance and probable tenor of the lawyer’s testimony and the probability that the lawyer’s testimony will conflict with that of other witnesses”).

The principles embodied in these provisions comprise the "advocate-witness" rule. Obviously, the appearance of an advocate-witness rule problem during the course of litigation can severely disrupt the proceedings, and thus should be reported promptly to the court. See People v. Gray, 50 A.D.3d 392, 855 N.Y.S.2d 115 (1st Dept. 2008) (defense counsel's request during trial to be relieved so he could be witness regarding type of pants defendant wore at arraignment was untimely where, four months before trial, counsel was made aware that officers would be testifying as to what defendant wore at time of drug sale and arrest; since counsel did not suggest that new attorney would be able to take over trial, granting application would have necessitated mistrial). Consequently, the discussion below will focus not only on the types of advocate-witness rule problems that can arise in a delinquency case, but on ways to avoid such problems.

B. Statements By Witnesses To Defense Counsel

1. Prosecution Witnesses

An essential element in preparing for any type of litigation is an attempt to interview the other side's witnesses. Often, witnesses provide new information that supports the planned defense, or make statements inconsistent with those in the accusatory instrument or in police reports and other documents obtained during discovery proceedings. However, witnesses sometimes revert to their original story while testifying, or, in any event, do not testify in a manner consistent with statements made to defense counsel.

What usually happens first in such instances is that defense counsel asks the witness: "When I interviewed you, didn't you tell me that ....?" Obviously, if the answer is "yes," there is no problem. But, if the answer is "no," or "I don't remember," there is

an advocate-witness rule problem. See, e.g., United States v. Kliti, 156 F.3d 150 (2d Cir. 1998) (clear conflict existed where defense counsel was in position to testify about exculpatory statement made by prosecution witness; the court was required to question defendant to determine whether he was willing to waive his right to a conflict-free lawyer and forgo confronting the witness with the statement through the testimony of counsel); People v. Tillman, 179 A.D.2d 886, 579 N.Y.S.2d 197 (3rd Dept. 1992) (defendant was denied effective assistance of counsel where, after prosecutor objected to inquiry concerning witness' prior statement to defense counsel, counsel abandoned that area of inquiry; court notes that counsel should have continued, and, if his testimony became necessary, he could have sought disqualification).

Clearly, there are ways to avoid such a problem. The best solution is to interview witnesses in the presence of another person, such as an investigator or a paralegal, who can testify about prior inconsistent statements unencumbered by the advocate-witness rule. See ABA Defense Standards, 4-4.3(e) ("Unless defense counsel is prepared to forgo impeachment of a witness by counsel's own testimony as to what the witness stated in an interview or to seek leave to withdraw from the case in order to present such impeaching testimony, defense counsel should avoid interviewing a prospective witness except in the presence of a third person"); People v. DeVecchio, 17 Misc.3d 1114(A), 851 N.Y.S.2d 65 (Sup. Ct., Kings Co., 2007) (while concluding that limited value of counsel's testimony was outweighed by prejudicial effect of disqualification, court notes that "[w]hile counsel interviewing a witness personally in the absence of an additional witness may be imprudent," there is nothing inappropriate or remarkable about an attorney investigating a case on behalf of his client; "Witnesses do not belong to any party and each side in our adversary system has the right, indeed the obligation, to learn as much about the case as they can while acting in a professional and ethical manner"). It is true that the court will be aware of defense counsel's presence during the pre-trial interview, and that counsel impliedly vouches for the truth of the evidence merely by presenting it. See People v. Paperno, 54 N.Y.2d 294, 445 N.Y.S.2d 119 (1981). However, since the advocate-witness rule cannot be applied in a manner that would effectively deprive the accused of the opportunity to

have his or her attorney interview witnesses and then freely cross-examine and impeach them at trial, defense counsel's mere presence should not be an issue.

2. Defense Witnesses

It is true that a friendly defense witness is unlikely to say anything at trial that will require attempts at impeachment. And, even if the witness does change his or her story, there are rules prohibiting the impeachment of a party's own witness that might in any event limit defense counsel's ability to present impeachment evidence. Nevertheless, even putting aside the fact that any careful lawyer should anticipate and prepare for the worst, it is advisable to conduct the interview of a defense witness in the presence of another person.

First of all, the pool of common "defense" witnesses includes reluctant police officers, and individuals who, despite their ability and apparent willingness to testify for the defense, are sympathetic to the prosecution and may "double cross" defense counsel at trial. In many instances, it will be possible to secure a ruling declaring the witness to be "hostile" either before the testimony commences, or, if the court prefers to wait until the witness exhibits signs of "hostility," in the middle of the witness' testimony. In those cases, counsel will be able to impeach the witness.

Moreover, whether or not the witness has been declared hostile, counsel can argue that the accused in a criminal case has a constitutional right to present evidence, even if the admission of certain evidence would violate state evidentiary rules concerning the impeachment of a party's own witness. See Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973). Common law limitations on the ability to impeach a party's own witness can also be overcome when the witness executed a signed statement during the pretrial interview. If the witness "gives testimony upon a material issue of the case which tends to disprove the position of [the respondent]," the respondent "may introduce evidence that such witness has previously made ... a written statement signed by him ...." FCA §343.5(1). Although it is unlikely that complications will arise when counsel offers a written statement containing a signature that can easily be shown to be that of the witness, as always it is a good idea to have another person present during the interview who can later testify that the witness actually examined the

statement and signed it. Obviously, when interviewing an adverse witness it is usually desirable to obtain a statement written and/or signed by the witness. However, it should not be forgotten that such statements, and, more importantly, the statements of friendly witnesses, are subject to disclosure to the prosecution at trial pursuant to FCA §331.4(2)(a).

C. Visits To The Crime Scene

Defense counsel's visit to the crime scene to examine sight lines, lighting conditions, general geography, etc., can lead to an advocate-witness rule problem when a witness testifies at trial in a manner inconsistent with counsel's observations. Again, the simplest solution is to bring a companion to the scene or arrange for another person to review the scene independently. The taking of photographs, either by the attorney or the other person, will further reduce the chances that an advocate-witness rule problem will arise. If an advocate-witness problem does develop and it appears to be necessary for defense counsel to testify, but counsel will merely authenticate a photograph or provide facts which will not be in dispute, it can be argued that there is no advocate-witness rule problem.

D. Counsel's Contacts With Police During Investigatory Stage

When defense counsel enters the case at an investigatory stage during which the police are questioning the accused, factual disputes can arise that are germane to the court's decision on a motion to suppress a confession on right to counsel grounds. For instance, if defense counsel alleges that the accused's New York State constitutional right to counsel attached when counsel "entered" the proceeding by calling the police and directing them not to speak any further to the accused [see, e.g., People v. Skinner, 52 N.Y.2d 24, 436 N.Y.S.2d 207 (1980)], but the police deny receiving such a call, a serious advocate-witness rule problem exists. See People v. Amato, 173 A.D.2d 714, 570 N.Y.S.2d 817 (2d Dept. 1991), lv denied 78 N.Y.2d 961, 574 N.Y.S.2d 940, cert denied 502 U.S. 1058, 112 S.Ct. 935 (1992) (since member of defense firm testified at suppression hearing that he had contacted police, and People indicated an intent to use the illegally obtained statement to impeach defendant if he testified at trial, trial court did not violate defendant's right to counsel of choice by

disqualifying the firm); see also People v. Brand, 13 A.D.3d 820, 787 N.Y.S.2d 169 (3rd Dept. 2004), lv denied 4 N.Y.3d 851 (no disqualification where, after officer testified at Huntley hearing that he did not hear any other officers give defendant Miranda warnings and never told that to defense counsel, and People then called defense counsel because the officer's testimony contradicted counsel's notes, counsel testified that his notes were inaccurate due to a misunderstanding and thereby confirmed officer's testimony and strengthened defendant's suppression argument) People v. Reily, 305 A.D.2d 430, 759 N.Y.S.2d 178 (2d Dept. 2003) (court should have allowed defense counsel to testify regarding suggestiveness at lineup); cf. Schwab v. Crosby, 451 F.3d 1308 (11th Cir. 2006) (no right to counsel violation where members of public defender's office were called to lay foundation for admission of incriminating letter which was received by public defender's office and had defendant's fingerprints on it; defendant not prejudiced).

E. Disqualification Of Prosecutor

The advocate-witness rule also applies to a prosecuting attorney. "If the prosecutor will be called as a witness for the People, to testify to a disputed material issue, he should be disqualified from trying the case." People v. Paperno, supra, 54 N.Y.2d at 300. See also United States v. Torres, 503 F.2d 1120 (2d Cir. 1974) (prosecutor who was sitting at counsel's table should not have been used to testify about impeaching event that occurred before trial); United States v. Pepe, 247 F.2d 838 (2d Cir. 1957); People v. Donaldson, 93 Cal.App.4th 916 (Ct. App., 5th Dist., 2001) (prosecutor violated rule when she called herself to impeach a prosecution witness). Similarly, "if it appears that the court will allow the defense to call the prosecutor as a witness, and that the prosecutor will testify adversely to the People, the prosecutor should be disqualified." People v. Paperno, supra, 54 N.Y.2d at 300.

The court has discretion to deny the accused's application to call the prosecutor as a witness, and thereby avoid advocate-witness rule problems, if there is no showing of necessity. People v. Paperno, supra, 54 N.Y.2d at 302-303. See also United States v. Schwartzbaum, 527 F.2d 249 (2d Cir. 1975), cert denied 424 U.S. 942, 96 S.Ct. 1410 (1976) (defendant showed no "compelling and legitimate need" to call prosecutor

whose memo had been used to refresh witness' recollection); People v. Wynn, 176 A.D.2d 443, 574 N.Y.S.2d 350 (1st Dept. 1991), lv denied 79 N.Y.2d 866, 580 N.Y.S.2d 738 (1992) (denial of recusal motion was proper where defendant alleged that prosecutor had taken defendant's videotaped confession, but failed to show that prosecutor's investigative role would be a material issue at trial). And, as in any case, an apparent advocate-witness rule problem can be defused when the prosecutor's testimony is not a subject of controversy. See, e.g., United States v. Trapnell, 638 F.2d 1016 (7th Cir. 1980) (no plain error where prosecutor briefly testified without objection about uncontested formal matter to which no other witness could have testified); People v. Lester, 99 A.D.2d 611, 472 N.Y.S.2d 162 (3rd Dept. 1984) (no error where co-prosecutor testified on rebuttal to prior inconsistent statements made by defense witness; court notes that there was no violation of advocate-witness rule, since the prosecution had no alternative other than calling the prosecutor, and the prosecutor's testimony was limited to a description of the prior statement).

Issues similar to those raised by an advocate-witness problem arise when a prosecutor has been involved in the investigatory stage of a case, and, as a result, will be eliciting testimony concerning events, such as the taking of a confession or a witness statement, that were witnessed by the prosecutor. By eliciting such testimony, and impliedly vouching for its credibility, the prosecutor becomes an unsworn witness. However, to secure a disqualification of the prosecutor, the accused must show "that there is a significant possibility that the prosecutor's pretrial activity will be a material issue in the case." People v. Paperno, supra, 54 N.Y.2d at 302. See also People v. Ramashwar, 299 A.D.2d 496, 749 N.Y.S.2d 886 (2d Dept. 2002) (reversible error where prosecutor sought to impeach defense witnesses with statements they made to her). The Court of Appeals also noted in Paperno that redaction of references to the prosecutor's involvement can mitigate the problem. Id. at 303-304. However, if redaction is an inadequate remedy because, for example, a confession which was taken by the prosecutor and will be offered at trial was videotaped, the unsworn witness problem remains. Id. at 303, n. 9.

Since the appointment of a special prosecutor whenever an assistant public

prosecutor testifies would constitute an unreasonable burden on the prosecution, the advocate-witness rule "does not contemplate disqualification of all attorneys in the [prosecutor's office] merely because one of them will testify." People v. Freeman, 172 A.D.2d 1045, 1046, 569 N.Y.S.2d 857, 859 (4th Dept. 1991), lv denied 78 N.Y.2d 1011, 575 N.Y.S.2d 819. Thus, if the witness' colleague prosecutes the case, "the `advocate-witness' rule [is] not violated because no attorney serve[s] as both a witness and an advocate ...." Id. See also United States v. Armedo-Sarmiento, 545 F.2d 785 (2d Cir. 1976), cert denied 430 U.S. 917, 97 S.Ct. 1330 (1977) (member of U.S. Attorney's office is not disqualified as witness in case in which he plays no other role); Matter of Johnson v. Collins, 210 A.D.2d 68, 620 N.Y.S.2d 28 (1st Dept. 1994) (defendant failed to establish likelihood of prejudice resulting from testimony of 3 prosecutors); People v. Strawder, 106 A.D.2d 672, 482 N.Y.S.2d 922 (2d Dept. 1985) (no advocate-witness problem where summer intern, who was seated at counsel's table and did not otherwise participate in trial, testified to inconsistent statement made by defense witness).

Like defense counsel, the prosecutor can avoid advocate-witness problems by interviewing witnesses in the presence of a third person. See ABA Prosecution Standards, 3-3.1(g)("Unless a prosecutor is prepared to forgo impeachment of a witness by the prosecutor's own testimony ... or to seek leave to withdraw from the case in order to present the impeaching testimony, a prosecutor should avoid interviewing a prospective witness except in the presence of a third person").

F. Bench Trials vs. Jury Trials

Although a judge "may be better able to take account of a witness-prosecutor's adversarial role in weighing the objectivity of his testimony" and "be less apt than a jury to confuse the roles of witness and prosecutor," and "would not be swayed by the prominence or prestige of a government prosecutor in assessing the credibility of his testimony," it has been held that the rule applies because "the maintenance of public confidence in the ultimate fairness of judicial proceedings is no less applicable to proceedings before a judge than it is to those before a jury." United States v. Johnston, 690 F.2d 638, 644 (7th Cir. 1982). Moreover, it can be argued that in institutional settings in which organizations like The Legal Aid Society operate, it is particularly

important that the attorneys, who appear before the same judges on a regular basis, not place their own credibility into proceedings.

G. Stipulations

An advocate-witness rule problem can be neutralized if the defense obtains a stipulation from the prosecution with respect to what counsel's testimony would be and counsel's credibility will not be an issue. People v. Ortiz, _A.D.3d_, 2014 WL 385523 (1st Dept. 2014) (no advocate-witness problem where defense counsel claimed she would have to testify on defendant's behalf to correct counsel's misstatement of what defendant had said, but stipulation to counsel's testimony protected defendant's interests).

H. The "Substantial Hardship" Exception

The exceptions for testimony concerning an uncontested issue or a matter of formality seem relatively straightforward. People v. Pasillas-Sanchez, 214 P.3d 520 (Colo. Ct. App., 2009), cert denied 2009 WL 2713996 ("uncontested issue" exception contemplates that facts about which attorney would testify are undisputed, and that facts go to issue that is undisputed). Determining when disqualification "would work substantial hardship on the client" (Rule 3.7[a][3]) seems more difficult.

When the advocate-witness problem becomes evident before the commencement of trial, it may be difficult to argue that defense counsel's involvement in the case is so intimate that a substitution of counsel would be unduly prejudicial, particularly when the accused is not in pretrial detention. The absence of a longstanding attorney-client relationship which provides defense counsel with special insight into the issues at hand would also militate against use of the "substantial hardship" exception.

In contrast, when an advocate-witness problem does not surface until the time of trial, a court should be reluctant to order disqualification, since defense counsel's preparation for and/or participation in the trial usually produces a unique perspective that cannot be replaced. See Deans v. Aranbayev, 28 Misc.3d 1220(A), 2010 WL 3153950 (Sup. Ct., Queens Co., 2010) (motion for disqualification denied where counsel had been involved in more than ten related matters and in four appeals); cf.

People v. Baldi, 54 N.Y.2d 137, 149, n. 1, 444 N.Y.S.2d 893, 899 (1981).

Of course, a judge might choose to declare a mistrial when an intractable advocate-witness problem arises. If a mistrial is declared over the accused's objection, double jeopardy rules would bar a subsequent prosecution if the advocate-witness problem did not create a "manifest necessity" for a mistrial. See Hall v. Potoker, 49 N.Y.2d 501, 427 N.Y.S.2d 211 (1980).

IV. Communications With Represented Parties

A. Generally

The Rules of Professional Conduct, Rule 4.2 states as follows:

> (a) In representing a client, a lawyer shall not communicate or cause another to communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the prior consent of the other lawyer or is authorized to do so by law.

This rule applies to criminal prosecutions. Rules of Professional Conduct, Comment, Rule 4.2 ("When communicating with the accused in a criminal matter, a government lawyer must comply with this Rule in addition to honoring the state or federal rights of the accused"); State v. Clark, 738 N.W.2d 316 (Minn. 2007) (in light of rule prohibiting lawyer, including government lawyer, from communicating with represented person, state may not communicate with represented criminal defendant about subject of representation unless defense counsel consents, communication is "authorized by law," or state obtains court order authorizing communication; providing defense counsel with notice and opportunity to be present is insufficient). In Clark, the court found a violation of an attorney conduct rule where it was the police, and not the government prosecutor, who had post-arraignment contacts with the defendant. In other words, the police were treated as the prosecutor's "agents."

However, with respect to investigative activities by prosecutors after a suspect has counsel but before the filing of an accusatory instrument, Rules of Professional Conduct, Comment, Rule 4.2, states: "Communications authorized by law may also include investigative activities of lawyers representing governmental entities, directly or

through investigative agents, prior to the commencement (as defined by law) of criminal or civil enforcement proceedings." The case law on this subject is split. Compare United States v. Hammad, 858 F.2d 834 (2d Cir. 1988) (rule violated where prosecutor sent informant to talk to suspect who had retained lawyer; suppression may be ordered in court's discretion); United States v. Jamil, 707 F.2d 638 (2d Cir. 1983) and United States v. Koerber, _F.Supp.2d_, 2013 WL 4434215 (D. Utah 2013) (evidence suppressed where Federal prosecutors violated state ethics standards and target's due process rights by instructing FBI and IRS agents to interview him without notifying his attorney) with United States v. Ryans, 903 F.2d 731 (10th Cir. 1990), cert denied 498 U.S. 855, 111 S.Ct. 152 (1990) (rule not applicable before indictment); People v. Kabir, 13 Misc.3d 920, 822 N.Y.S.2d 864 (Sup. Ct., Bronx Co., 2006) (no ethical violation where prosecutor caused investigator to communicate with represented witness who was not a suspect, defendant or potential defendant) and In re Amgen Inc., 2011 WL 2418815 (EDNY 2011) (subject of grand jury investigation is not "party" to "matter" under Rule 4.2, and "authorized by law" exception covered communications).

Obviously, Rules of Professional Conduct, Rule 4.2(a) precludes defense counsel from speaking with a co-respondent who is represented. See, e.g., People v. Rice, 30 A.D.3d 172, 815 N.Y.S.2d 563 (1st Dept. 2006), lv denied 7 N.Y.3d 817 (defendant argued that co-defendant's attorney violated Code where defendant handed attorney a written admission in court in presence of defendant's counsel and attorney later introduced statement at trial, over defendant's objection, as declaration against penal interest; court does not reach issue); United States v. Dennis, 843 F.2d 652 (2d Cir. 1988) (if defense counsel acted unethically, sanction would be disciplinary action, not suppression of evidence or limitation of cross-examination).

Since Rule 4.2(a) precludes contact only when the attorney "knows" a person is represented, it has been noted that an attorney without such knowledge may engage in communications. See ABA Formal Opinion 95-396 (although knowledge may be inferred from the circumstances, counsel has no duty to inquire); State Bar Ethics Opinion 663, 1994 WL 592956 (lawyer who wishes to communicate with adverse party may contact the lawyer who may be representing the adverse party and state that it will

be assumed that the lawyer is not representing the party if no response is received). See also McHugh v. Fitzgerald, 280 A.D.2d 771, 719 N.Y.S.2d 785 (3rd Dept. 2001) (commencement of litigation, by itself, does not activate rule).

B. Contacts With Represented Witnesses

Generally speaking, defense counsel is not obliged to notify the prosecutor prior to engaging in contacts with a prosecution witness, including a complainant, since the prosecutor does not "represent" a witness within the meaning of the State Bar Code. See State v. Hofstetter, 878 P.2d 474 (Wash. Ct. App., Div. 2, 1994); United States v. Medina, 992 F.2d 573 (6th Cir. 1993); United States v. Pinto, 755 F.2d 150 (10th Cir. 1985); United States v. Grasso, 552 F.2d 46 (2d Cir. 1977); People v. Eanes, 43 A.D.2d 744, 350 N.Y.S.2d 718 (2d Dept. 1973); People v. Marino, 87 Misc.2d 542 (County Ct., Monroe Co., 1976); New York County Lawyers' Ethics Opinion 711, 1996 WL 592651. And, although counsel cannot give advice to the witness with respect to the wisdom of pressing charges (see Rules of Professional Conduct, Rule 4.3), counsel may ask the witness to request that the prosecutor drop the charges. See New York County Lawyers' Ethics Opinion 711.

Although there appears to be no ethics rule requiring it, it will usually be prudent for counsel to contact in advance the parent of any infant witness counsel plans to interview. Cf. CPLR §309(a) (proper service upon an infant includes service upon parent, or guardian or legal custodian).

When a witness is represented by counsel in an unrelated matter, it can be argued that defense counsel can freely communicate with that person, since the person is not a “party” or even a litigant in the case, and the "subject" of the communications may not encompass the unrelated matter. See, e.g., People v. Santiago, 925 N.E.2d 1122 (Ill. 2010) (prosecutors did not violate no contact rule when they interviewed defendant after arrest for child endangerment and assignment of attorney in child protection proceeding, since attorney did not represent her in criminal matter); United States v. Masullo, 489 F.2d 217 (2d Cir. 1973).

However, given the possibility that a witness’ legal rights will be affected by what he or she says to defense counsel, it can be argued that the term “party” should include

represented non-parties. ABA Formal Opinion 95-396 (if communicating lawyer represents client with respect to crime B and wishes to contact person regarding that crime, representation of that person by counsel with respect to unrelated crime A does not bar communications about crime B; however, in other contexts a lawyer "may, intentionally or otherwise, take advantage of unsophisticated persons who are represented by counsel and thereby circumvent the client-lawyer relationship"); New York State Bar Ethics Opinion 656, 1993 WL 555956 (term “party” includes represented non-parties); New York County Lawyers' Ethics Opinion, Question 676, 1990 WL 677018 (criminal defense counsel may not interview non-party potential witness who is represented by counsel in non-related criminal proceeding without consent of witness's attorney, since "disclosures made by the defendant to another lawyer without the knowledge and consent of the defendant's own lawyer may have a significant effect on the legal rights of the defendant"); see also United States v. Nickerson, 556 F.3d 1014 (9th Cir., 2009) (violation of rule prohibiting lawyer from communicating about subject of representation with person lawyer knows to be represented by another lawyer in matter, unless lawyer has consent of the other lawyer or is authorized to do so by law or court order, does not constitute ineffective assistance of counsel per se).

Obviously, when a jointly charged accomplice is cooperating with the prosecution and will be testifying against the accused in exchange for a plea bargain, the witness cannot be interviewed without the consent of counsel. But cf. Grievance Committee For Southern District Of New York v. Simels, 48 F.3d 640 (2d Cir. 1995) (no violation of rule where counsel interviewed witness who was a potential co-defendant in another case).

There are other frequently confronted scenarios. For instance, if the accused has commenced a civil damages action against the arresting officer, who is represented by counsel in the civil suit, it can be argued that communications would have to go through the officer's counsel. Similarly, if a complaining witness has retained counsel for purposes of commencing a civil action against the accused, defense counsel may not be free to interview the witness without the witness' counsel's consent.

Finally, it has been argued that, where litigation has not commenced, but a person is represented by counsel, contact with that person is prohibited if inquiring

counsel knows that the person is a potential litigant. See State Bar Ethics Opinion 607, 1990 WL 304225. If applied across-the-board, such a rule would, for example, bar communications between defense counsel and a person who eventually may be charged as a co-perpetrator. The argument for such a rule is certainly undercut by the case law governing investigative contacts between a government prosecutor and a suspect who has counsel. And, given an accused's constitutional right to the effective assistance of counsel, there are policy reasons for not applying such a rule to criminal defense attorneys even if it is concluded that the term "party" includes certain potential litigants.

C. Accused's Contacts With Represented Witnesses

Rules of Professional Conduct, Rule 4.2(b) states: "Notwithstanding the prohibitions of paragraph (a), and unless otherwise prohibited by law, a lawyer may cause a client to communicate with a represented person unless the represented person is not legally competent, and may counsel the client with respect to those communications, provided the lawyer gives reasonable advance notice to the represented person's counsel that such communications will be taking place." See also Commentary to Rules of Professional Conduct, Rule 4.2 ("Persons represented in a matter may communicate directly with each other. A lawyer may properly advise a client to communicate directly with a represented person, and may counsel the client with respect to those communications, provided the lawyer complies with paragraph (b). Agents for lawyers, such as investigators, are not considered clients within the meaning of this Rule even where the represented entity is an agency, department or other organization of the government, and therefore a lawyer may not cause such an agent to communicate with a represented person, unless the lawyer would be authorized by law or a court order to do so. A lawyer may also counsel a client with respect to communications with a represented person, including by drafting papers for the client to present to the represented person. In advising a client in connection with such communications, a lawyer may not advise the client to seek privileged information or other information that the represented person is not personally authorized to disclose or is prohibited from disclosing, such as a trade secret or other information protected by

law, or to encourage or invite the represented person to take actions without the advice of counsel. . . . A lawyer who advises a client with respect to communications with a represented person should be mindful of the obligation to avoid abusive, harassing, or unfair conduct with regard to the represented person. The lawyer should advise the client against such conduct. A lawyer shall not advise a client to communicate with a represented person if the lawyer knows that the represented person is legally incompetent. See Rule 4.4"); State Bar Ethics Opinion 768, 2003 WL 22379946 (lawyer may silently attend meeting involving client and represented party if lawyer gives reasonable advance notice to opposing counsel); City Bar Ethics Opinion 2002-3, 2002 WL 1040177.

D. Prosecutor's Contacts With Defense Experts

There appears to be no general ethical barrier preventing communications between a prosecutor and a defense expert, since the expert is unrepresented. See State Bar Ethics Opinion 577, 1986 WL 68786. However, although defense counsel may not issue a general direction to the witness to avoid speaking to the prosecution, it would be appropriate for defense counsel to identify confidential information possessed by the expert and instruct the expert not to reveal it.

E. Initiation Of Contact By Represented Person

According to ABA Formal Opinion 95-396, the relevant Model Rule precludes a waiver of the rule's protection by a represented person who initiates contact with an attorney for an adverse party. But see ABA Informal Ethics Opinion 905 (1966) (no ethical problem for attorney approached by client in civil matter where client is represented by another attorney in criminal matter; but "it might be courteous" for civil attorney to inform criminal attorney of representation).

F. Contacts With Unrepresented Person

Under Rules of Professional Conduct, Rule 4.3, a lawyer, "[i]n communicating on behalf of a client with a person who is not represented by counsel … shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall

not give legal advice to an unrepresented person other than the advice to secure counsel if the lawyer knows or reasonably should know that the interests of such person are or have a reasonable possibility of being in conflict with the interests of the client." See also Rules of Professional Conduct, Comment, Rule 4.3 ("An unrepresented person, particularly one not experienced in dealing with legal matters, might assume that a lawyer is disinterested in loyalties or is a disinterested authority on the law even when the lawyer represents a client. In order to avoid a misunderstanding, a lawyer will typically need to identify the lawyer's client and, where necessary, explain that the client has interests opposed to those of the unrepresented person. . . . The Rule distinguishes between situations involving unrepresented parties whose interests may be adverse to those of the lawyer's client and those in which the person's interests are not in conflict with the client's. In the former situation, the possibility that the lawyer will compromise the unrepresented person's interests is so great that the Rule prohibits the giving of any advice apart from the advice to obtain counsel. Whether a lawyer is giving impermissible advice may depend on the experience and sophistication of the unrepresented party, as well as the setting in which the behavior and comments occur. This Rule does not prohibit a lawyer from negotiating the terms of a transaction or settling a dispute with an unrepresented person. So long as the lawyer has explained that the lawyer represents an adverse party and is not representing the person, the lawyer may inform the person of the terms on which the lawyer's client will enter into an agreement or settle a matter, prepare documents that require the person's signature, and explain the lawyer's own view of the meaning of the document or the lawyer's view of the underlying legal obligations"); Opinion 843, 2010 WL 3961381 (New York State Bar Association, 9/10/10) (lawyer who represents client in pending litigation, and has access to Facebook or MySpace network used by another party, may access and review public social network pages of party to search for potential impeachment material as long as lawyer does not "friend" other party or direct third person to do so); Formal Opinion 2010-2, 2010 WL 8265845 (Ass'n of the Bar of the City of New York, Sept. 2010) (lawyer may not use deception to access information from social networking webpage, and Rules are violated whenever attorney "friends" an individual

under false pretenses to obtain evidence even if lawyer employs agent, such as investigator, to engage in ruse; however, lawyers can and should seek such information by availing themselves of informal discovery, such as truthful "friending" of unrepresented parties, or formal discovery devices such as subpoenas directed to non-parties in possession of information maintained on individual's social networking page); NYC Bar Association Formal Opinion 2009-2: Ethical Duties Concerning Self-Represented Persons, 2009 WL 399765 (February, 2009) (lawyer may advise self-represented party to retain counsel and identify legal issues that could be usefully addressed by counsel, and may be obligated to do so when it would advance interests of layer's own client; may provide certain incontrovertible factual or legal information, such as client's own position in negotiations, or existence of legal right such as right against self-incrimination; may direct a self-represented adversary to available court facilities designed to aid those litigants; should avoid misleading self-represented party; should be ready to clarify when necessary that lawyer does not and cannot represent the self-represented person, represents another party who may or does have interests adverse to the self-represented person, and cannot give any advice other than to secure counsel or consult available court facility designed to assist self-represented persons, and lawyer must provide this clarification whenever lawyer knows or has reason to know self-represented person misapprehends lawyer's role; and should determine whether explanation should be in writing).

Also, Rule 8.4(c) of the Rules of Professional Conduct states that "[a] lawyer or law firm shall not: ... engage in conduct involving dishonesty, fraud, deceit or misrepresentation." See People v. Perez, 37 Misc.3d 272, 946 N.Y.S.2d 835 (Sup. Ct., Queens Co., 2012) (ADA's "preamble" prior to issuance of Miranda warnings misled defendant into believing that prosecutor was there to help him and suggested that speaking to prosecutor would benefit him because prosecution would investigate defendant's side of story, and violated Rule 8.4[c]; court precludes People from using defendant's statement on direct case).

V. Preparation And Examination Of Witnesses

A. Presentation Of Accused's Testimony

1. Introduction

As in any other type of litigation, defense counsel in a criminal case is often faced with ethical issues arising out of counsel's knowledge, or mere suspicion, that the client's version of events is untruthful. If the client wishes to take the stand and testify, what are counsel's options?

First of all, there is a critical distinction between counsel's knowledge that a client intends to give perjured testimony, and counsel's subjective, even well-reasoned, opinion concerning the veracity of the client's story. For example, if a client tells the attorney that he is guilty, but has no intention of being incarcerated if he can help it and will make up a story that the judge might believe, counsel is squarely confronted with an ethical dilemma. In contrast, if the prosecution has five seemingly reliable witnesses to a robbery, but the respondent has four alibi witnesses, defense counsel's personal belief that the defense witnesses are lying appears to present no ethical dilemma at all, since counsel has no duty to decide who is and is not telling the truth. This is true even if the defense witnesses contradict each other, or provide an unlikely version of events, as long as counsel is not in possession of information that makes it clear that the witnesses will be perjuring themselves. The only issue facing counsel in the latter scenario is a strategic one: will any or all of these possibly dishonest witnesses further the defense cause?

2. The Interviewing Process

It is clear that defense counsel is in a position to help the accused develop testimony designed to enhance the probability of acquittal. Indeed, an attorney concerned only with winning the case might want to describe the version of events that would be most helpful before the accused says anything, or at least make suggestions identifying the "better" scenarios while the accused is describing the relevant events. However, there are ethical rules limiting counsel's ability to conduct this type of questioning.

Rules of Professional Conduct, Rule 3.4(a)(5) provides that a lawyer shall not “participate in the creation or preservation of evidence when the lawyer knows or it is obvious that the evidence is false.” Addressing the issue more directly, section 4-3.2 of

the ABA Defense Standards states:

> (a) As soon as practicable defense counsel should seek to determine all relevant facts known to the accused. In so doing, defense counsel should probe for all legally relevant information without seeking to influence the direction of the client's responses.
>
> (b) Defense counsel should not instruct the client or intimate to the client in any way that the client should not be candid in revealing facts so as to afford defense counsel free rein to take action which would be precluded by the lawyer's knowing of such facts.

Read together, these provisions make it clear that defense counsel should not knowingly assist a person in the development of false testimony. And, by prohibiting lawyers from "seeking to influence the direction of the client's responses," the ABA Defense Standards seem to preclude any suggestions by counsel concerning scenarios that would be most helpful, whether those scenarios are presented before, during, or after the accused has given a statement. Finally, section 4-3.2(b) of the ABA Defense Standards clearly makes it improper for counsel to state prior to the interview that the accused should not admit guilt if he or she plans to give perjured testimony, or tell defense counsel which portions of the planned testimony are untrue.

Although these rules encourage defense counsel to conduct an open-ended fact-finding inquiry and avoid putting words in the accused's mouth, the use of leading questions during an interview will often be necessary, and should not be considered unethical. For instance, if the accused is raising a justification defense, there would be nothing unethical in asking the accused if he has ever been threatened by the complainant, or has ever heard about violent incidents involving the complainant. Similarly, after interviewing the accused about a street encounter with the police, it would not be unethical to ask whether the officers displayed their guns. Such questioning constitutes a legitimate attempt to obtain relevant information, not an attempt to signal to the accused that certain facts would be helpful.

Moreover, it has been suggested that "as long as the attorney in good faith does not believe that the attorney is participating in the creation of false evidence," he or she

may advise the client of applicable law before hearing the client's version of the facts. Nassau Bar Ethics Opinion 94-6, N.Y.L.J., 3/23/94, p. 4, col. 4. To require an attorney to withhold legal information until after the interview "would in effect be to legislate mistrust of the client's honesty, would run counter to the attorney's basic function ... and would impede the attorney's ability to avoid a lengthy discourse on extraneous matters by focusing the client's attention on the relevant elements." Id. It might be noted that the Nassau Bar opinion was provided in the context of a civil matter: given the accused's constitutional right to the effective assistance of counsel and to present a defense, it is even more important for a criminal defense attorney to be unfettered by overly restrictive rules when providing advice to the accused. In any event, there is a notable difference between literally telling a client what it would be best to say, and providing a description of the legal rules governing the case.

3. Use Of Perjured Testimony

The Rules of Professional Conduct, Rule 3.4(a)(4) states that a lawyer shall not "knowingly use perjured testimony or false evidence." Addressing the issue more comprehensively, Rule 3.3 states as follows:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; * * *
> (3) offer or use evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.
> (b) A lawyer who represents a client before a tribunal and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.
> (c) The duties stated in paragraphs (a) and (b) apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

See also Rules of Professional Conduct, Rule 1.0(b) ("'Belief' or 'believes' denotes that the person involved actually believes the fact in question to be true. A person's belief may be inferred from circumstances"); Rules of Professional Conduct, Rule 1.0(k) ('Knowingly,' 'known,' 'know,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from circumstances"); Rules of Professional Conduct, Rule 1.0(r) ('Reasonable belief' or 'reasonably believes,' when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable"); ABA Defense Standards, 4-3.7(b), 4-7.5(a) ("Defense counsel should not knowingly offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses, or fail to take reasonable remedial measures upon discovery of its falsity"); People v. Bournes, 60 A.D.3d 687, 874 N.Y.S.2d 556 (2d Dept. 2009), lv denied 12 N.Y.3d 913 (reversible error where detective testified inaccurately that defendant had admitted he "forcibly raped and sodomized the victim," and prosecutor failed to correct testimony).

This issue was addressed by the United States Supreme Court in Nix v. Whiteside, 475 U.S. 157, 106 S.Ct. 988 (1986). The murder defendant, who claimed justification based upon his belief that the deceased had had a gun, told defense counsel that he had, in fact, seen something "metallic" in the deceased's hand, and opined that, "[i]f 'I don't say I saw a gun I'm dead." When the defendant insisted on giving such testimony despite counsel's protestations concerning perjury, counsel indicated that he would seek to withdraw if the defendant insisted on committing perjury, and would disclose to the court any perjury committed by the defendant. At trial, the defendant testified but did not claim that he had seen a gun, and was convicted of murder. In a federal habeas proceeding commenced after he exhausted state appeals, the defendant argued that he had been denied the effective assistance of counsel, and his right to present a defense, by counsel's refusal to allow him to testify.

While rejecting the defendant's claim, the Supreme Court concluded that counsel's actions fell within "the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment." 475 U.S. at 166. The Court noted that in various codes of professional conduct, the legal profession has affirmed

that a lawyer may not allow a client to give false testimony. Specifically, the Court stated that "[i]t is universally agreed that at a minimum the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client from the unlawful course of conduct [citations omitted]." Id. at 169. The Court then noted that certain codes permit an attorney to withdraw in response to a threat to commit perjury and to disclose actual perjury to the court, and that the duty of confidentiality does not protect a client's stated intention to commit a future crime. See also People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005) (at Huntley hearing, defense counsel properly discharged ethical obligations by advising defendant against lying on witness stand and encouraging defendant not to take the stand at all); People v. Darrett, 2 A.D.3d 16, 769 N.Y.S.2d 14 (1st Dept. 2003) (counsel was ineffective and defendant was denied due process when counsel advised the court at a Huntley hearing that she expected defendant to falsely claim either self-defense or an alibi, but that she did not believe defendant had perjured himself regarding his claim that he was coerced into giving the statements he made to the police, since these disclosures were unnecessary, and were especially harmful given that the court was the finder of fact at the hearing; generally, counsel should make every reasonable effort to limit amount of information conveyed to judge and judge should discourage attorneys from disclosing more information than is necessary); People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001) (no ineffective assistance of counsel where, after attempting to dissuade defendant from his planned course, defense counsel revealed to the court defendant's intention to commit perjury); People v. Campos, 249 A.D.2d 237, 672 N.Y.S.2d 680 (1st Dept. 1998), lv denied 92 N.Y.2d 923, 680 N.Y.S.2d 464 (no conflict of interest existed after defense counsel revealed to court defendant's intent to lay a false foundation for speedy trial claim); Andrades v. Ercole, 2010 WL 3021252 (SDNY 2010) (as a practical matter, it is difficult for counsel to allow defendant to testify via narrative without prior explanation; if defendant begins to testify via narrative, there would likely be objection from prosecution, and use of narrative form also would signal to court that counsel believes defendant intends to commit perjury); Comment, Rule 3.3 ("If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce or use false

evidence, the lawyer should seek to persuade the client that the evidence should not be offered…. If only a portion of a witness's testimony will be false, the lawyer may call the witness to testify but may not (i) elicit or otherwise permit the witness to present testimony that the lawyer knows is false or (ii) base arguments to the trier of fact on evidence known to be false").

Consistent with the definition of "knowingly," "known," "know," and "knows" in Rule 1.0(k), court decisions have made it clear that counsel must have well-founded knowledge, and not merely suspicions, regarding the perjurious nature of the accused's testimony before any ethical duty arises. See State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (absent the most extraordinary circumstances, knowledge must be based on client's unambiguous admission made directly to counsel); Commonwealth v. Mitchell, 781 N.E.2d 1237 (Mass. Sup. Jud. Ct., 2003) (counsel may disclose belief that defendant will testify falsely when counsel has a firm basis in fact for such belief); People v. Bolton, 166 Cal.App.4th 343 (Cal. Ct. App., 4th Dist., 2008) (defense counsel should not have asked to be relieved when he suspected, but did not know, defendant was going to perjure himself); United States v. Midgett, 342 F3d 321 (4th Cir., 2003) (defendant's right to effective assistance of counsel violated where defense counsel disbelieved defendant's proffered testimony, but did not have information sufficient to justify his conclusion that defendant's testimony would be perjurious since defendant never indicated that he would testify untruthfully, and had been consistent in his statements to counsel); see also Rules of Professional Conduct, Comment, Rule 3.3 ("A lawyer's reasonable belief that evidence is false does not preclude its presentation to the trier of fact. A lawyer's actual knowledge that evidence is false, however, can be inferred from the circumstances. Thus, although a lawyer should resolve doubts about the veracity of testimony or other evidence in favor of the client, the lawyer cannot ignore an obvious falsehood"); New York County Lawyers' Ethics Opinion, Question 712, 1996 WL 592653 (lawyer may not decide to reveal that client gave false deposition testimony based on lawyer's prediction that client will lie on the witness stand); but see United States v. Litchfield, 959 F.2d 1514 (10th Cir. 1992) (counsel was not ineffective or unethical when he told judge during trial that he was worried his client might lie on

the stand; counsel was not obligated to remain silent until he knew for certain the defendant would lie).

With respect to defense counsel's ethical duty before perjured testimony is presented, Rule 3.3(b) states that when counsel "knows that a person intends to engage . . . in criminal or fraudulent conduct related to the proceeding," counsel "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal." This provision arguably precludes counsel from seeking to withdraw without disclosing the false evidence to the court since withdrawal, which does prevent counsel from participating in the presentation of false evidence, can facilitate the presentation of false evidence by new counsel, who may be unaware of the false nature of the evidence. However, the authorities have gone in different directions regarding this issue. See People v. Andrades, 4 N.Y.3d 355, 795 N.Y.S.2d 497 (2005) (defense counsel sought to withdraw prior to hearing; while counsel told court that ethical dilemma concerned defendant's right to testify, counsel never stated that defendant intended to commit perjury or otherwise disclose client secrets and court inferred defendant's perjurious intent); People v. DePallo, 96 N.Y.2d 437, 729 N.Y.S.2d 649 (2001) (substitution of counsel would not have solved problem and might have facilitated a fraud; with respect to bench trials, court states in footnote that it was not addressing whether similar disclosure in a bench trial would be appropriate or implicate due process concerns, while citing authorities suggesting disclosure is inappropriate); State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (counsel should attempt to dissuade client and consider moving to withdraw if client is not dissuaded); People v. Bolton, 166 Cal.App.4th 343 (Cal. Ct. App., 4th Dist., 2008) (disqualification can lead to endless cycle of defense continuances and motions to withdraw as accused informs each new attorney of the intent to testify falsely, or the accused may be less candid with his new attorney and keep his perjurious intent to himself and thereby facilitate the presentation of false testimony or find an unethical attorney who would knowingly present and exploit false testimony); United States v. Bruce, 89 F.3d 886 (D.C. Cir. 1996) (rather than reveal defendant's request that counsel lie to court, counsel should have sought leave to withdraw); State Bar Ethics Opinion 681, 1996 WL 421808 (lawyer who requests

disqualification must do so without revealing secret or confidence; lawyer is permitted to reveal "secret" if ordered by court to reveal reason, and, if lawyer believes information is a confidence protected by attorney-client privilege, lawyer has a duty to follow court order to disclose but may be obligated to attempt to appeal order); see also Rules of Professional Conduct, Rule 1.16(b)(1) (lawyer shall withdraw when lawyer knows or reasonably should know that representation will result in violation of Rules or of law); Rule 1.16(c) (lawyer may withdraw when "(1) withdrawal can be accomplished without material adverse effect on the interests of the client," or "(2) the client persists in a course of action involving the lawyer's services that the lawyer reasonably believes is criminal or fraudulent," or "(13) the client insists that the lawyer pursue a course of conduct which is illegal or prohibited under these Rules"); Rules of Professional Conduct, Comment, Rule 3.3 ("The lawyer's ethical duty may be qualified by judicial decisions interpreting the constitutional rights to due process and to counsel in criminal cases").

Although Rule 3.4(a)(4) states that a lawyer shall not "knowingly use perjured testimony or false evidence," courts have held that after disclosure regarding false testimony is made by counsel to the court, the court may permit counsel to present false testimony in narrative form. People v. DePallo, supra, 96 N.Y.2d 437; Commonwealth v. Mitchell, supra, 781 N.E.2d 1237; People v. Bolton, 166 Cal.App.4th 343 (Cal. Ct. App., 4th Dist., 2008) (calling defendant to witness stand to testify in free narrative manner is solution that best balances defendant's constitutional right to testify and counsel's ethical obligations); State v. McDowell, 681 N.W.2d 500 (Wis. 2004) (defense counsel should inform opposing counsel and court of change of questioning style prior to use of narrative form); United States v. Bruce, supra, 89 F.3d 886; American Trial Lawyer's Association Code, Chapter I., Illustrative Cases (presentation of false testimony not barred); People v. Johnson, 72 Cal.Rptr.2d 805 (Ct. App., 4th Dist., 1998); see also People v. Tyler, 245 A.D.2d 1100, 667 N.Y.S.2d 578 (4th Dept. 1997), lv denied 91 N.Y.2d 978, 672 N.Y.S.2d 858 (1998) (no ineffective assistance of counsel where defense counsel refused to conduct direct and defendant, upon taking stand, refused to give narrative account); Rules of Professional Conduct, Comment,

Rule 3.3 ("If the criminal defendant insists on testifying and the lawyer knows that the testimony will be false, the lawyer may offer the testimony in a narrative form").

In those instances in which defense counsel learns after-the-fact that he/she has, in fact, presented false testimony through traditional direct examination, it appears that the only remedial action available usually will be to ensure that some type of disclosure is made to the court. But it may suffice to simply withdraw the evidence. See Rules of Professional Conduct, Comment, Rule 3.3 ("A lawyer who has offered or used material evidence in the belief that it was true may subsequently come to know that the evidence is false. Or, a lawyer may be surprised when the lawyer's client or another witness called by the lawyer offers testimony the lawyer knows to be false, either during the lawyer's direct examination or in response to cross-examination by the opposing lawyer. In such situations, or if the lawyer knows of the falsity of testimony elicited from the client during a deposition, the lawyer must take reasonable remedial measures. The advocate's proper course is to remonstrate with the client confidentially, advise the client of the lawyer's duty of candor to the tribunal, and seek the client's cooperation with respect to the withdrawal or correction of the false statements or evidence. If that fails, the advocate must take further remedial action. If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal confidential information that otherwise would be protected by Rule 1.6. It is for the tribunal then to determine what should be done, such as … ordering a mistrial, taking other appropriate steps or doing nothing…. The lawyer … may be required by Rule 1.16(d) to seek permission of the tribunal to withdraw if the lawyer's compliance with this Rule's duty of candor results in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client"); see also NY State Bar Ethics Opinion 837, 2010 WL 2977924 (3/16/10) (where lawyer learned that document admitted into evidence based on client's testimony was forged, and that some of client's testimony concerning the document was false, lawyer was required to take reasonable remedial measures, but disclosure of falsity is required only if necessary; Committee

approves of lawyer's suggestion that he inform tribunal that specific item of evidence and related testimony were being withdrawn, and also notes that in criminal, as opposed to civil sphere, mandate to disclose confidential information may be limited by Fifth Amendment right against self incrimination and/or Sixth Amendment right to effective assistance of counsel); People v. Berroa, 99 N.Y.2d 134, 753 N.Y.S.2d 12 (2002) (while counsel has duty to disclose perjury to court, counsel is not required to provide testimony rebutting perjury; thus, defendant was denied effective assistance of counsel when defense counsel not only revealed to court that alibi witnesses had previously told her they could not provide alibi, but also stipulated to that fact and mentioned it during summation); Torres v. Donnelly, 554 F.3d 322 (2d Cir. 2009) (no violation of right to effective assistance of counsel where defense counsel stipulated that, contrary to witness's testimony, she had identified defendant when counsel showed her photo array; tension between counsel's duty to zealously represent defendant, and duty to be candid with court and correct the record, did not result in conflict of interest, nor did counsel's decision to enter into stipulation).

With respect to counsel's duties when he/she learns that evidence is false after the conclusion of the proceeding, see Formal Opinion 2013-2, 2013 WL 2997051 (Association of the Bar of the City of New York Committee on Professional Ethics, 2013) ("[w]hen counsel learns that material evidence offered by the lawyer, the lawyer's client or a witness called by a lawyer during a now-concluded civil or criminal proceeding was false, whether intentionally or due to mistake, the lawyer is obligated, under Rule 3.3(a)(3), to take 'reasonable remedial measures,' which includes disclosing the false evidence to the tribunal to which the evidence was presented as long as it is still possible to reopen the proceeding based on this disclosure, or disclosing the false evidence to opposing counsel where another tribunal could amend, modify or vacate the prior judgment").

B. Self-Incrimination Issues

Defense counsel is sometimes in a position to interview, and then call to the stand, a witness who will give self- incriminating testimony concerning the charges. Although some attorneys might feel uneasy about coaxing a witness to walk into such a

"trap," the ABA Defense Standards state in section 4-4.3(c) that "[i]t is not necessary for defense counsel or defense counsel's investigator, in interviewing a prospective witness, to caution the witness concerning possible self-incrimination and the need for counsel." Indeed, since defense counsel's primary duty is to zealously prepare a defense, even at the expense of the interests of a witness, it would be unreasonable to require counsel to take affirmative action that could result in the witness' refusal to make a statement. See State Bar Ethics Opinion 728, 2000 WL 1692766 (lawyer for municipality may advise pro se civil claimant of risk of self incrimination, but is not required to do so). Of course, if the witness raises self-incrimination concerns, defense counsel cannot say anything that would constitute "advice" in order to encourage the witness to testify. Rules of Professional Conduct, Rule 4.3. Obviously, ethical issues arise if the witness is represented by counsel.

On the other hand, it does the accused no harm, and is not improper, for defense counsel to inform a prosecution witness of the potential for self-incrimination. A prosecutor may not advise a defense witness that he or she may be the subject of a criminal prosecution "for the purpose of influencing the witness in favor of or against testifying." ABA Prosecution Standards, 3-3.2(b); see also State v. Feaster, 877 A.2d 229 (NJ, 2005) (prosecutor violated state Constitution by threatening defense witness with perjury prosecution if witness recanted trial testimony); United States v. Straub, 538 F.3d 1147 (9th Cir., 2008) (in order to establish entitlement to use immunity for defense witness, defendant must show that witness's testimony was relevant; that prosecutor either intentionally caused witness to invoke Fifth Amendment for purpose of distorting fact-finding process or granted immunity to prosecution witness to obtain testimony but denied immunity to defense witness whose testimony would have directly contradicted government witness; and that fact-finding process was so distorted as a result that defendant was denied due process right to fundamentally fair hearing). However, it can be argued that defense counsel's special responsibility to zealously defend the accused permits counsel to make reference to self-incrimination problems while talking with a prosecution witness even if counsel's hope is that the witness will have second thoughts about testifying. And, since the prosecutor must inform such a

witness that he or she may be prosecuted [ABA Prosecution Standards, 3-3.2(b)], defense counsel can hardly be faulted for providing such information. However, it would be improper to encourage the witness not to testify or provide information to the prosecutor, or otherwise give the witness legal "advice." Rules of Professional Conduct, Rule 4.3; ABA Defense Standards, 4-4.3(d).

C. Interference With Adversary's Contact With Witness

The ABA Defense Standards state in section 4-4.3(d) that "[d]efense counsel should not discourage or obstruct communication between prospective witnesses and the prosecutor," and that "[i]t is unprofessional conduct to advise any person other than a client, or cause such person to be advised to decline to give to the prosecutor or defense counsel for codefendants information which such person has a right to give." Defense counsel should also ensure that the accused does not engage in such behavior, or other forms of tampering. See ABA Defense Standards, 4-5.1(c).

And, it is clear that a prosecutor may not engage in this type of conduct in order to deprive defense counsel of an opportunity to speak with prosecution witnesses. See ABA Prosecution Standards, 3-3.1(c); Pennsylvania Ethics Opinion 98-134, 1999 WL 516727 (1999); State v. Zhao, 137 P.3d 835 (Wash. 2006) (Sanders, J., concurring, criticizes prosecution policy denying plea bargains to sex offenders who interview their alleged victim); State v. Hofstetter, 878 P.2d 474 (Wash. Ct. App., Div. 2, 1994) (counsel may request opportunity to be present, but may not make presence a condition of interview); United States v. Carrigan, 804 F.2d 599 (10th Cir. 1986); State v. York, 632 P.2d 1261 (Or. 1982) (prosecutor may not state that “it would be better if [witness] didn’t say anything”); United States v. Peter Kiewit Sons’ Co., 655 F.Supp. 73 (D. Colorado, 1986) (prosecutors improperly discouraged witnesses from talking to defense by persuading them that if they gave interviews, what they said would be twisted so that it would appear they had given conflicting versions of the facts, and by giving the witnesses the clear impression that the prosecutors preferred that they not talk to the defense).

However, although defense counsel should not "discourage or obstruct" communication with the prosecutor when the witness has a genuine desire to

communicate, it cannot be the case that defense counsel, who has an obligation to zealously defend the accused's interests, must stand by idly and say nothing when a prosecutor intends to interrogate defense witnesses. Surely, defense counsel can inform a witness of the advantages and disadvantages of speaking to the prosecutor, such as the risk of being impeached at trial with pretrial statements. Indeed, faced with an inquiry from a witness, particularly one who is a member of the accused's family, no one should expect a competent (and ethical) defense attorney to remain aloof from the witness' decision-making. Consistent with the spirit of ABA Defense Standards, 4-4.3(d), defense counsel should be permitted to advise the witness that he or she has the right to decline to speak to the prosecutor, and that, in the end, it is the witness' decision. See United States v. Black, 767 F.2d 1334 (9th Cir. 1985) (advice given to witnesses that they could speak to defense "but have no obligation to do so" was appropriate); United States v. Pinto, 755 F.2d 150 (10th Cir. 1985); United States v. Bittner, 728 F.2d 1038 (8th Cir. 1984) (no impropriety where special agent advised witness that she had right to decline interviews with defense).

Of course, expert witnesses and others who have been retained by the defense team can be specifically instructed not to reveal privileged information.

In Gregory v. United States, 369 F.2d 185 (D.C. Cir., 1966), the court held that defendant was denied a fair trial where the prosecutor advised witnesses not to talk to anyone unless the prosecutor was present. Sanctions also may result where a party improperly interferes with an adversary's access to a witness. See United States v. Gonzales, 164 F.3d 1285 (10th Cir. 1999) (court abused discretion in suppressing witness' statements and testimony); United States v. Carrigan, supra, 804 F.2d 599 (no error where court ordered that government witnesses be deposed); United States v. Peter Kiewit Sons' Co., supra, 655 F.Supp. 73 (court directs that witnesses be deposed); People v. Marino, 87 Misc.2d 542 (County Ct., Monroe Co., 1976) (where defense counsel's attempts to interview witnesses were "frustrated," court orders production of witnesses for interview). In United States v. Causey, 2006 WL 44073 (S.D. Tex., 2006), the court, to reassure potential witnesses and their attorneys, issued an order stating, inter alia, that should a witness provide information or assistance to

defense counsel, the government shall not view that witness's decision as any lack of cooperation with the government and shall not use such cooperation as a basis for decisions regarding prosecution.

In addition, when a witness' refusal to be interviewed by defense counsel is relevant to the witness' credibility, the accused should be permitted to cross-examine the witness about such refusal. See State v. Riggs, 942 P.2d 1159 (Ariz. 1997).

D. Cross-Examination Of Witnesses

Without seeking to intimidate or humiliate any witness, defense counsel may vigorously cross-examine prosecution witnesses and impeach them even though counsel believes, or even knows, that the witnesses are testifying truthfully and accurately. ABA Defense Standards, 4-7.6(a), (b). This aspect of an attorney's duty to zealously defend the client has long been recognized by the courts:

> He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth. Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.

United States v. Wade, 388 U.S. 218, 256-258, 87 S.Ct. 1926, 1947-1948 (1967) (White, J., dissenting in part, concurring in part).

In contrast, although the prosecutor may cross-examine a witness the prosecutor knows is testifying truthfully, the prosecutor's duty to see that justice is done precludes the use of cross-examination to discredit or undermine such a witness. ABA Prosecution Standards, 3-5.7(b).

It is not appropriate to question a witness in a way that suggests, or even implies, the existence of facts concerning which the attorney has no good faith belief. ABA Defense Standards, 4-7.6(d). For example, it would be improper to ask a witness whether he or she has committed certain specified "bad acts" about which the attorney has no information. However, it is clear that any information provided by the client, his or her family, or defense witnesses, constitutes a good faith basis for questioning unless the attorney knows that the information is false.

E. Mid-Testimony Contact With Witnesses

It is generally agreed that an attorney should not discuss his or her witness' testimony with the witness during breaks in the testimony. Indeed, judges often issue formal directives, or cautionary "reminders," to that effect. There appear to be no formal ethical rules prohibiting such contacts. See United States v. Bautista, 23 F.3d 726, 731 (2d Cir. 1994) ("While the contact may well have been improper, it did not rise to the level of a constitutional violation or a violation that would in some way cause us to exercise our supervisory powers"). Sometimes a prosecutor has a legitimate reason to speak to a witness, but a sanction should be sought if it appears that improper coaching caused a change in the witness's testimony. Compare People v. Branch, 83 N.Y.2d 663, 612 N.Y.S.2d 365 (1994) (no error where court allowed prosecutor to question witness during recess to determine whether witness had been intimidated by defendant's family); United States v. Guthrie, 557 F.3d 243 (6th Cir. 2009) (no right of confrontation violation where court permitted AUSA to speak to complainant during overnight break in cross-examination, but court stated that prosecutor "may have conversations with his witness" but "may not coach the witness"); People v. DelPilar, 293 A.D.2d 365, 742 N.Y.S.2d 200 (1st Dept. 2002), lv denied 98 N.Y.2d 696 (where witness initiated contact and told prosecutor she had originally been too frightened to identify defendant but had changed her mind, truth-seeking function of trial was not

impaired); People v. Neil, 289 A.D.2d 611, 733 N.Y.S.2d 528 (3rd Dept. 2001), lv denied 97 N.Y.2d 758 (2002) (no proof that witness's changed answers and failure of memory were result of improper coaching, and defense did not request that ADA be questioned about contents of alleged discussion with witness) and People v. Giap, 273 A.D.2d 54, 709 N.Y.S.2d 62 (1st Dept. 2000), lv denied 95 N.Y.2d 872 (no sanction where defendant was able to exploit prosecutor's contact with witness resumed cross-examination) with People v. Robinson, 190 A.D.2d 697, 593 N.Y.S.2d 279 (2d Dept. 1993) (officer was "prepped" during recess, and changed testimony the next day).

However, the accused's Sixth Amendment right to counsel may be violated when the court bans attorney-client contacts while the accused is on the stand. Generally, a ban is permissible if it covers a brief recess, but overnight bans, especially when they effectively cover several days, usually are improper. See, e.g., Geders v. United States, 425 U.S. 80, 96 S.Ct 1330 (1976); People v. Joseph, 84 N.Y.2d 995, 622 N.Y.S.2d 505 (1994); United States v. Triumph Capital Group, 487 F.3d 124 (2d Cir. 2007).

VI. Decision-Making By Attorney And Client

A. Decisions Made By Attorney

Generally speaking, decisions concerning legal arguments, the choice of witnesses, cross-examination of prosecution witnesses, investigation priorities, and other matters that come under the heading of litigation strategy and legal analysis, are made by the attorney. See, e.g., People v. Colville, 20 N.Y.3d 20 (2012) (decision whether to seek jury charge on lesser-included offenses is matter of strategy and tactics which rests with defense counsel); People v. LaValle, 97 N.Y.2d 721, 744 N.Y.S.2d 114 (2002) (appellate counsel may be required to take approach different from that urged by client); People v. Ferguson, 67 N.Y.2d 383, 502 N.Y.S.2d 972 (1986) (whether mistrial is in defendant's best interest is for lawyer to decide); Puglisi v. State, 112 So.3d 1196 (Fla. 2013) (defense counsel has ultimate authority to decide whether to present witnesses at trial); United States v. Gates, 709 F.3d 58 (1st Cir. 2013), cert denied 134 S.Ct. 264 (lawyer may seek continuance and waive defendant's rights under Speedy Trial Act without first obtaining defendant's personal consent; court notes well-settled principle that consent by counsel is controlling with respect to scheduling and trial

management matters); People v. Hambrick, 96 A.D.3d 972 (2d Dept. 2012) (decision whether or not to move for mistrial entrusted to counsel and thus defendant's consent was not necessary); United States v. Washington, 198 F.3d 721 (8th Cir. 1999) (same as Ferguson); People v. Campbell, 802 N.E.2d 1205 (2003) (defendant's right of confrontation not violated when defense counsel stipulated to witness's testimony in absence of waiver by defendant; defense counsel may waive right of confrontation if defendant does not object and decision is matter of trial tactics and strategy, and stipulation does not establish guilt); People v. Rivera, 12 Misc.3d 1158(A), 819 N.Y.S.2d 212 (Sup. Ct., Bronx Co., 2006) (defense counsel called witness against better judgment, which was decision counsel improperly ceded to defendant's family without adequate discussion); Rules of Professional Conduct, Rule 1.2(e) ("A lawyer may exercise professional judgment to waive or fail to assert a right or position of the client, or accede to reasonable requests of opposing counsel, when doing so does not prejudice the rights of the client").

However, although the attorney makes the final decisions, he or she should consult with the client, and keep the client informed, with respect to litigation decisions and strategies and the overall progress of the case. ABA Defense Standards, 4-3.1(a), 4-3.8, 4-5.2(b); Rules of Professional Conduct, Rule 1.4. If disagreements arise concerning significant matters of strategy, it is prudent for the attorney to make a record of the circumstances, the client's and the lawyer's positions, and the decision that was made. ABA Defense Standards, 4-5.2(c); see also People v. Henriquez, 3 N.Y.3d 210, 785 N.Y.S.2d 384 (2004) (no right to counsel violation where defendant attempted to abuse the process by refusing to proceed pro se and refusing to allow his lawyer to mount a defense; dissenting judge asserts that defense counsel and trial court had obligation to ensure that defendant received effective assistance).

B. Decisions Made By Client

According to Rules of Professional Conduct, Rule 1.2(a): "Subject to the provisions herein, a lawyer shall abide by a client's decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client's decision

whether to settle a matter. In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." In Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308 (1983), the Supreme Court noted that "the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal [citations omitted]." 463 U.S. at 751. The attorney should, of course, provide the respondent with information and guidance concerning those decisions. Rules of Professional Conduct, Rule 1.4; ABA Defense Standards, 4-5.1(a), (b). See also Florida v. Nixon, 543 U.S. 175, 125 S.Ct. 551 (2004) (no ineffective assistance where counsel conceded guilt at capital trial after defendant failed to respond upon discussion with counsel); People v. Mason, 263 A.D.2d 73, 706 N.Y.S.2d 1 (1st Dept. 2000) (defendant denied effective assistance where counsel convinced judge that he was responsible for deciding whether defendant would testify, and objected when defendant testified); United States v. Mullins, 315 F.3d 449 (5th Cir. 2002) (for purpose of ineffective assistance claim, it cannot be reasonable trial strategy for counsel to override ultimate decision of defendant to testify contrary to counsel's advice); Brown v. Artuz, 124 F.3d 73 (2d Cir. 1997) (decision whether or not to testify is defendant's, and effective assistance of counsel includes the burden of ensuring that defendant is informed of the nature and existence of the right to testify); Parker v. Ercole, 582 F.Supp.2d 273 (N.D.N.Y., 2008) (under existing authority, defendant's right is a trial right only).

The respondent should also be allowed to decide what disposition should be sought, and whether to agree to a proposed disposition. There may well be other decisions which, given their importance, the respondent should be entitled to make. See, e.g., People v. Petrovich, 87 N.Y.2d 961, 641 N.Y.S.2d 592 (1996) (decision whether to request submission of affirmative defense of extreme emotional disturbance fell to defendant); People v. Colletta, 106 A.D.3d 927 (2d Dept. 2013), lv denied 21 N.Y.3d 1072 (defendant found competent to stand trial has ultimate authority to reject use of psychiatric defense); People v. Bergerud, 223 P.3d 686 (Colo. 2010) (decision to make concession of guilt amounting to judicial admission belongs to defendant); United

States v. Holman, 314 F.3d 837 (7th Cir. 2002), cert denied 538 U.S. 1058, 123 S.Ct. 2238 (2003) (counsel's performance was deficient where he strategically conceded defendant's guilt of one charge without defendant's consent); United States v. Zackson, 6 F.3d 911 (2d Cir. 1993) (defense counsel was required to inform defendant of, and discuss with defendant, counsel's decision to oppose court's offer to sever charges); Haziel v. United States, 404 F.2d 1275 (D.C. Cir. 1968) (counsel improperly waived hearing in connection with transfer from juvenile to criminal court without consulting with client); People v. Radcliffe, 25 Misc.3d 1245(A), 906 N.Y.S.2d 782 (Sup. Ct., Bronx Co., 2009) (counsel should have consulted with defendant regarding decision to rest on testimony elicited at suppression and on stipulations of fact; however, counsel's decision was part of reasonable trial strategy and did not prejudice defendant); Commentary to Rules of Professional Conduct, Rule 1.2 ("lawyers usually defer to their clients regarding such questions as. . . concern for third persons who might be adversely affected," and, "[a]t the outset of a representation, the client may authorize the lawyer to take specific action on the client's behalf without further consultation"; "[i]n a case in which the client appears to be suffering diminished capacity, the lawyer's duty to abide by the client's decisions is to be guided by reference to Rule 1.4," but "if the lawyer intends to act contrary to the client's instructions, "the lawyer must consult with the client").

Although ethical rules do not refer to the parent of a minor, it is appropriate to solicit the opinion of the parent and involve the parent in the decision-making process. Disputes between the respondent and the parent should be resolved in favor of the respondent. See State Bar Ethics Opinion 648, 1993 WL 560288 ("If the attorney discerns that the infant's best interests conflict with the actions or views of the parent, the attorney should, nevertheless, act in the child's best interest").

Finally, it must always be remembered that the decision-making process in juvenile delinquency cases is complicated by the age and maturity level of the client. Obviously, an attorney should always attempt to bring the child into the decision-making process whether or not the decision involved is one which ought to be made by the client. However, faced with a youthful client's diminished ability to understand complex

factors and strategies, the attorney might properly refrain from discussing certain matters which would be discussed with an adult client, or give less weight to the wishes of the client. It is up to the attorney to strike the appropriate balance, although it would be problematic in any case for the attorney to substitute his/her judgment for the client's as to any of the core decisions, such as whether to take a plea or whether to take the stand, which are traditionally within the client's domain. Every effort should be made to avoid doing so.

VII. Disclosure Of Controlling Law And Material Facts

One of the strictures commonly found in ethical codes provides that a lawyer "shall not knowingly: … fail to disclose to the tribunal controlling legal authority known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel." Rules of Professional Conduct, Rule 3.3(a)(2); see also ABA Prosecution Standards, 3-2.8(d) (prosecutor shall disclose adverse controlling authority); People v. Brown, 25 Misc.3d 1226(A), 906 N.Y.S.2d 774 (Jefferson Co. City Ct., 2009) (where lawyer knows of controlling legal authority directly adverse to position of client, lawyer should inform tribunal of its existence).

However, such a requirement is clearly problematical if applied to defense counsel in a criminal case. In litigation in which mere pecuniary interests are involved, it may be desirable to encourage attorneys to act primarily out of loyalty to our system of justice in certain instances. However, given the compelling liberty interests involved in a criminal or juvenile delinquency proceeding -- a criminal defendant's life may be at stake -- and the single-minded loyalty that an attorney must have when defending a client faced with the awesome machinery of the State, the disclosure of controlling authority to an unknowing judge should not even be an available option; rather, it seems that the disclosure of controlling authority to the court at a suppression hearing, or under other circumstances in which a finding of guilt and a risk of incarceration could be prevented, is a serious breach of the attorney's ethical obligation to provide a zealous defense.

According to Rules of Professional Conduct, Rule 3.3(a)(1), "[a] lawyer shall not knowingly: … make a false statement of fact or law to a tribunal or fail to correct a false

statement of material fact or law previously made to the tribunal by the lawyer." With respect to this requirement, New Jersey has adopted a very strict rule. See NJ Rule of Professional Conduct, 3.3(a)(5); In re Seelig, 850 A.2d 477 (2004) (lawyer was required to disclose information so that court would not be misled as to double jeopardy implications of acceptance of defendant's guilty plea).

VIII. Disruptive Courtroom Behavior

A. Criminal Contempt

In the heat of the moment, attorneys sometimes make, or are tempted to make, angry and/or contemptuous remarks to the court. Consequently, it is important for attorneys to be familiar with the limits of the court's summary contempt power.

Under Judiciary Law §750, a court may punish for a criminal contempt a person who engages in the following acts:

> 1. Disorderly, contemptuous, or insolent behavior, committed during its sitting, in its immediate view and presence, and directly tending to interrupt its proceedings, or to impair the respect due to its authority.
>
> * * *
>
> 3. Wilful disobedience to its lawful mandate.
> 4. Resistance wilfully offered to its lawful mandate.

A criminal contempt may be punished summarily when it is "committed in the immediate view and presence of the court ...." Jud. Law §751(1). See generally Matter of Katz v. Murtagh, 28 N.Y.2d 234, 321 N.Y.S.2d 104 (1971). Contempts such as those referred to above may be punished by a fine of up to $1000, a sentence of up to 30 days in jail, or both, at the discretion of the court. Jud. Law §751(1).

Under First Department rules, a court should exercise its summary contempt power "only in exceptional and necessitous circumstances," to wit:

> (i) Where the offending conduct either
> (a) disrupts or threatens to disrupt proceedings actually in progress; or
> (b) destroys or undermines or tends seriously to destroy or undermine the dignity and authority of the court in a manner and to the extent that it appears unlikely that the court will be able to continue to conduct its normal business

in an appropriate way; and
(ii) The court reasonably believes that a prompt summary adjudication of contempt may aid in maintaining or restoring and maintaining proper order and decorum.

Rules Of Court, 22 NYCRR §604.2(a)(1). See also 22 NYCRR §701.2(a) (Second Department rule to same effect). These rules appear to provide more protection to attorneys than Jud. Law §750. Cf. Matter of Kunstler v. Galligan, 168 A.D.2d 146, 571 N.Y.S.2d 930 (1st Dept. 1991) (Wallach, J., dissenting), aff'd 79 N.Y.2d 775, 579 N.Y.S.2d 648 (1991).

When practical, punishment should be imposed at the time of the contempt adjudication, but the court may defer punishment when a prompt summary adjudication has satisfied the necessity for immediate remedial action. 22 NYCRR §604.2(a)(2), §701.2(b). Before a summary adjudication of contempt, "the accused shall be given a reasonable opportunity to make a statement in his defense or in extenuation of his conduct." 22 NYCRR §604.2(a)(3), §701.2(c). But see Matter of Kunstler v. Galligan, supra, 168 A.D.2d 146 (court complied with Rules by giving counsel a chance to be heard after holding him in contempt but before imposing punishment); Matter of Werlin v. Goldberg, 129 A.D.2d 334, 517 N.Y.S.2d 745 (2d Dept. 1987), lv denied 70 N.Y.2d 615, 524 N.Y.S.2d 677 (1988) (given counsel's conduct, the "spirit and purpose" of the rule was fulfilled despite absence of opportunity for statement).

Finally, when the attorney's behavior does not disrupt or threaten to disrupt the proceeding, or destroy or undermine or tend seriously to destroy or undermine the court's dignity and authority in a manner that makes it appear unlikely that the court can conduct its normal business, the attorney is entitled to a plenary hearing. 22 NYCRR §604.2(b), §701.3.

B. Conduct Punishable As Contempt

1. Excessive Legal Argument

An attorney is entitled to explain the grounds for an objection in order to make the nature of the objection clear or preserve an issue for appellate review. 22 NYCRR §604.1(d)(4)(ii), §700.4(d). Similarly, an attorney should be permitted to "press argument on a court and to direct a line of questioning of a witness that may not at the

moment appear relevant to the trial judge [citations omitted]," and "to make good-faith efforts to present his client's case [citations omitted]." United States v. Giovanelli, 897 F.2d 1227, 1231 (2d Cir. 1990). Thus, after the court has made an initial ruling, an attorney may to some extent continue the debate without crossing the line into the realm of contempt. See also ABA Defense Standards, 4-7.1(d) (lawyer "should comply promptly with all orders and directives of the court," but "has a duty to have the record reflect adverse rulings or judicial conduct which counsel considers prejudicial to his or her client's legitimate interests" and "has a right to make respectful requests for reconsiderations of adverse rulings").

The Rules Of Court do preclude an attorney from arguing in support of or against an objection, or with respect to a ruling on an objection, without court permission. 22 NYCRR §604.1(d)(4)(i), §700.4(d). Thus, without court permission, an attorney who has been permitted to state the grounds of an objection, or preserve an issue for appeal by explaining, for instance, why a particular line of examination is relevant, is not permitted to continue arguing the point after the court has either ruled or indicated that it understands counsel's argument. However, although such behavior violates the Rules Of Court, it can be argued that an attorney should not be held in contempt merely for engaging in spirited argument in support of an objection, a proposed line of questioning, or an offer of evidence. Indeed, even conduct that defies a judge's ruling does not always justify a contempt adjudication. Compare In re Jefferson, 657 S.E.2d 830 (Ga., 2008) (court rejects standard that looks to whether attorney's conduct posed "clear and present danger to orderly administration of justice," and applies standard providing that attorney may be held in contempt for statements made in court only after court has found that statements and attendant conduct either actually interfered with or posed imminent threat of interfering with administration of justice, *and* that attorney knew or should have known that statements and conduct exceeded outermost bounds of permissible advocacy); United States v. Giovanelli, supra, 897 F.2d 1227; Matter of Scott v. Hughes, 106 A.D.2d 355, 483 N.Y.S.2d 18 (1st Dept. 1984) (although defense counsel continued to explain the grounds of his objections and argue after rulings, his conduct "does not appear to have been insolent, contemptuous or defiant of the court's

authority and dignity," and, "[a]t its worst, it was merely reflective of the intensity of the competitiveness of the trial and the zealousness of counsel") and Matter of Thau v. Fitzer, 69 A.D.2d 800, 415 N.Y.S.2d 430 (1st Dept. 1979) with United States v. Allocco, 994 F.2d 82 (2d Cir. 1993) (contempt adjudication upheld where counsel repeated line of examination despite judge's numerous warnings). Yet, once the judge clearly indicates that further defiance will lead to a contempt finding, counsel's license to argue has usually ended. Cf. Matter of Scott v. Hughes, supra, 106 A.D.2d at 356; 22 NYCRR §604.2(c), §701.4 (judge should warn and admonish person before contempt adjudication except in cases involving "the most flagrant and offensive misbehavior which in the court's discretion requires an immediate adjudication").

2. Accusations Of Judicial Bias Or Incompetence

Unlike imprudent behavior during legal argument, an attorney's accusation that the judge is biased in favor of the prosecution, or is incompetent or otherwise not fit to be a judge, will not be viewed with a measure of indulgence. See Matter of Kunstler v. Galligan, supra, 168 A.D.2d 146 (summary contempt order upheld where counsel stated, inter alia, "You have exhibited what your partisanship is. You shouldn't be sitting in court. You are a disgrace to the bench"); Matter of Werlin v. Goldberg, supra, 129 A.D.2d 334, 342 (counsel accused judge of "protect[ing] a prosecution witness," "doing a tremendously damaging job in limiting" the defense, leaving "the role of being an impartial arbiter," and sabotaging the defense case; Second Department warns against "engaging in this course of conduct ... to compel a mistrial"); Matter of Levine v. Recant, N.Y.L.J., 10/21/99, p. 28, col. 6 (Sup. Ct., N.Y. Co.), aff'd 278 A.D.2d 124, 718 N.Y.S.2d 173 (1st Dept. 2000), lv denied 96 N.Y.2d 706, 725 N.Y.S.2d 278 (2001) (summary contempt finding upheld where lawyer made rude remark to judge when ordered to leave courtroom and then made another insolent remark when given the chance to apologize; however, vacatur of 10-day sentence is also upheld). See also ABA Defense Standards, 4-7.1(a) (counsel "should support the authority of the court and the dignity of the trial courtroom by strict adherence to codes of professionalism and by manifesting a professional attitude toward the judge ..."). But see Matter of Breitbart v. Galligan, 135 A.D.2d 323, 525 N.Y.S.2d 219 (1st Dept. 1988) (although counsel accused judge of

holding ex parte conferences with prosecutor, "planning ... the trial," and perpetrating "a fraud on the People of the State of New York," he did not prevent the court from proceeding in an orderly manner).

3. Refusal To Obey Judge's Order

Compare Matter of Frankel v. Roberts, 165 A.D.2d 382, 567 N.Y.S.2d 1018 (1st Dept. 1991), appeal dism'd 78 N.Y.2d 1071, 576 N.Y.S.2d 220 (attorneys were improperly ordered to remove "Ready To Strike" buttons while in court; act of wearing button was exercise of First Amendment rights, and presented no serious and imminent threat to the administration of justice) with Matter of Brostoff v. Berkman, 170 A.D.2d 364, 566 N.Y.S.2d 927 (1st Dept. 1991) (contempt order upheld where ADA disobeyed court's demand that he leave the well, "an area in which it may well be disruptive to court proceedings to have persons carrying on conversations while cases are being heard").

4. Failure To Make Timely Appearance

Attorneys should be aware that financial sanctions or costs may be imposed "upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court." 22 NYCRR §130-2.1(a). The factors relevant to the "good cause" determination include, inter alia, whether the attorney provided advance notice of an inability to appear and/or filed an affidavit of actual engagement. 22 NYCRR §130-2.1(b). See, e.g., Matter of Gurwitch, 256 A.D.2d 180, 681 N.Y.S.2d 534 (1st Dept. 1998) ($50 sanction properly imposed where attorney failed to timely appear and did not explain why he did not telephone court or arrange for another attorney to advise court of his lateness); Walsh v. People, 206 A.D.2d 434, 614 N.Y.S.2d 441 (2d Dept. 1994) (sanction improper where attorney was actually engaged in another hearing if different part of courthouse, asked a fellow attorney to advise court of his whereabouts, appeared about 20 minutes late, and had not been late for prior appearances in same action); Sweet v. Sweet, 177 Misc.2d 454, 676 N.Y.S.2d 853 (Fam. Ct., Albany Co., 1998) (court declines to impose sanction where attorney did not appear because she had been discharged by client). Such sanctions or costs may be imposed upon "a partnership, firm, corporation,

government agency, prosecutor's office, legal aid society or public defender's office with which the attorney is associated and that has appeared as attorney of record." 22 NYCRR §130-2.1(c).

CHAPTER THREE

APPEALS

By: Gary Solomon

Table of Contents

I. Governing Statutes 369
II. Appeals To Appellate Division As Of Right 369
A. Respondent 369
B. Presentment Agency 369
III. Appeals To Appellate Division By Permission 370
A. Respondent 370
B. Presentment Agency 370
IV. Appeals By Other Aggrieved Parties 371
V. Procedure 371
A. Notice Of Appeal 371
B. Time Of Appeal 372
1. Taking Appeal 372
2. Perfecting An Appeal 373
C. Assignment Of Counsel 373
D. Fees 373
E. Preferences 374
F. Stays 374
G. Applicability Of CPLR 374
VI. Duties Of Trial Counsel 374
A. Consultation With Client Regarding Appeal 374
B. Action Required On Behalf Of Client Who Wishes To Appeal 374
C. Reconstruction Of Record 375
VII. Dismissal Of Appeal 376
A. Mootness 376
B. Abandonment By Absconding Appellant 377

C. Presumption In Appeals From Bench Trials 378
VIII. Right To Speedy Appeal 378

I. Governing Statutes

Appeals in juvenile delinquency proceedings are governed in the first instance by FCA §§ 365.1 - 365.3. As to all matters not covered by those sections, FCA Article Eleven, and, where appropriate, the CPLR, govern. FCA §1118; Douglas J. Besharov and Merril Sobie, *Practice Commentaries*, FCA §365.3; *Matter of Jose R.*, 83 N.Y.2d 388, 610 N.Y.S.2d 937 (1994) (court rejects juvenile's argument that FCA Article Three does not provide for presentment agency appeal to Court of Appeals, and concludes that the Legislature intended to leave operative earlier court decisions applying CPLR Article 56).

II. Appeals To Appellate Division As Of Right

A. Respondent

The respondent can take an appeal to the Appellate Division as of right from any order of disposition. FCA §§ 365.1(1). *See Matter of Yamoussa M.*, 220 A.D.2d 138, 646 N.Y.S.2d 319 (1st Dept. 1996) (failure to appeal from original dispositional order precluded respondent from challenging original order when appealing from new disposition ordered after he violated probation).

B. Presentment Agency

The presentment agency can take an appeal as of right from:

- an order dismissing the petition *prior to* the commencement of a fact-finding hearing. FCA §§ 365.1(2)(a). *See Matter of Leon H.*, 83 N.Y.2d 834, 601 N.Y.S.2d 158 (1994) (presentment agency could not appeal post-fact-finding dismissal on speedy disposition grounds); *Matter of Devon H.*, 225 A.D.2d 135, 650 N.Y.S.2d 120 (1st Dept. 1996) (presentment agency could appeal dismissal after commencement of fact-finding hearing where family court re-opened suppression hearing during trial and granted suppression); *Matter of Lee M.*, 126 A.D.2d 645, 511 N.Y.S.2d 79 (2d Dept. 1987) (presentment agency could appeal from order dismissing certain counts of the petition since the separate counts could have been presented in separate petitions).

- an order of disposition, but only upon the ground that such order was invalid as

a matter of law. FCA §365.1(2)(b). *Cf.* CPL §440.40 (People may appeal from sentence which is invalid as a matter of law).

Note: The family court has inherent power to correct a mistake or error in a dispositional order which is clerical in nature or results from the court's inadvertent misstatement. *See People v. Wright,* 56 N.Y.2d 613, 450 N.Y.S.2d 473 (1982).

- an order, entered before the commencement of the fact-finding hearing, suppressing evidence pursuant to FCA §330.2, provided that the presentment agency files a statement pursuant to FCA §330.2(9) (*i.e.*, statement alleging that deprivation of use of evidence has rendered available proof insufficient as a matter of law or so weak in its entirety that any reasonable possibility of proving allegations has been effectively destroyed). FCA §365.1(2)(c). *See Matter of Devon H.*, 225 A.D.2d 135. The taking of such an appeal constitutes a bar to prosecution of the case, at least in the absence of extraordinary circumstances, unless and until the order of suppression is overturned. FCA §330.2(10); *People v. McIntosh*, 80 N.Y.2d 87, 587 N.Y.S.2d 568 (1992) (since People withdrew appeal after filing required statement, prosecution was not barred); *Matter of Forte v. Supreme Court of the State of New York*, 48 N.Y.2d 179, 422 N.Y.S.2d 26 (1979) (to allow People to seek superseding indictment would frustrate Legislature's purpose of discouraging frivolous appeals); *Matter of Yarter v. Winn,* 220 A.D.2d 1, 645 N.Y.S.2d 333 (3rd Dept. 1996), *appeal dism'd* 89 N.Y.2d 862, 653 N.Y.S.2d 284 (newly discovered evidence constituted exceptional circumstance permitting re-prosecution).

III. Appeals To Appellate Division By Permission

A. Respondent

The respondent can take an appeal in the discretion of the appropriate Appellate Division from any order. FCA §365.2.

B. Presentment Agency

Article Three contains no provision granting the presentment agency the right to

take an appeal by permission. Although FCA §1112(a) provides that an appeal from any order under the Family Court Act may be appealed in the discretion of the Appellate Division, Article Three's appeals provisions supersede their counterparts in FCA Article Eleven, and, therefore, the presentment agency cannot take an appeal by permission. *See Matter of Leon H.*, 83 N.Y.2d 834. On the other hand, if the presentment agency does appeal from a dispositional order, the appeal brings up for review any nonfinal order which necessarily affects the final judgment. CPLR §5501(a)(1). *See Matter of Dora P.*, 68 A.D.2d 719, 418 N.Y.S.2d 597 (1st Dept. 1979).

IV. Appeals By Other Aggrieved Parties

The Fourth Department held in *Matter of Lavar C.*, 185 A.D.2d 36, 592 N.Y.S.2d 535 (4th Dept. 1992) that FCA §365.1 was designed to limit the presentment agency's ability to appeal, but not that of another aggrieved party to an order who would otherwise have standing to appeal pursuant to CPLR §5511. Since the New York State Division for Youth was a party to the dispositional order, which directed DFY to place the respondent at one of three specified sites, DFY had standing to appeal in *Lavar C.*

V. Procedure

A. Notice Of Appeal

An appeal is taken by filing a written notice of appeal, in duplicate, with the clerk of the family court in which the order was entered. The clerk must endorse upon the notices the filing date and transmit the duplicate notice to the clerk of the appropriate Appellate Division. FCA §365.3(1), (4).

The respondent must also serve copy of notice upon presentment agency. FCA §365.3(2). The Presentment Agency must also serve respondent and the attorney who last appeared for respondent. FCA §365.3(3). *But see Matter of Delila M.*, 238 A.D.2d 342, 656 N.Y.S.2d 306 (2d Dept. 1997) (citing CPLR §5520(a), court holds that failure to serve respondent was not fatal defect); *Matter of Steven S.*, 234 A.D.2d 13, 650 N.Y.S.2d 156 (1st Dept. 1996) (same as *Delila M.*); CPLR §5520(a) (if appellant serves timely notice of appeal but neglects through mistake or excusable neglect to do another

required act within time limit, court may grant extension of time to cure omission).

B. Time Of Appeal

1. Taking Appeal

An appeal must be "taken" - that is, the notice of appeal must be filed - by the earliest of the following dates: no later than thirty days after the adverse party serves the order from which the appeal is taken, ***or*** thirty days from receipt of the order by the appellant in court, ***or*** thirty-five days from the mailing of the order to the appellant by the clerk of court. FCA § 1113.

Service of an order by the court does *not* start the clock running unless two conditions are met: the order must contain the following statement: "Pursuant to section 1113 of the family court act, an appeal must be taken within thirty days of receipt of the order by appellant in court, thirty-five days from the mailing of the order to the appellant by the clerk of the court, or thirty days after service by a party or CHILD'S ATTORNEY upon the appellant, whichever is earliest," ***and*** there is an official notation in the court record as to the date and manner of service. FCA §1113.

In New York, the statutory deadline for filing a notice of appeal in a civil proceeding (CPLR §5513[a]) has been treated as a "jurisdictional" matter. Thus, while there are statutory rules that extend the filing deadline in specific instances (*see, e.g.*, CPLR §1022), an untimely filing may not otherwise be excused. *Hecht v. City of New York*, 60 N.Y.2d 57, 467 N.Y.S.2d 187 (1983); *Jones Sledzik Garneau & Nardone v. Schloss*, 37 A.D.3d 417, 829 N.Y.S.2d 230 (2d Dept. 2007) (time period for filing notice of appeal is jurisdictional and nonwaivable).

In criminal proceedings, a 30-day deadline applies as well. CPL §460.10. Prior to enactment of the Criminal Procedure Law, the general rule had been that, regardless of the circumstances and equities, courts had no power to extend the time for taking an appeal. *People v. Dimmie*, 15 N.Y.2d 578, 255 N.Y.S.2d 95 (1964); *People v. Stottlemeyer*, 9 A.D.2d 1022, 194 N.Y.S.2d 101 (4th Dept. 1959). Now, however, CPL §460.30 contains an exception to the rule that is broader than any found in the CPLR. Under §460.30(1), a defendant may make a motion in an intermediate appellate court or in the Court of Appeals seeking an extension of time for filing a notice of appeal or

application for leave to appeal. The motion must be made with due diligence after the time for the taking of the appeal has expired, and in any case not more than one year thereafter. The court may grant an extension to a date not more than thirty days after determination of the motion, "upon the ground that the failure to so file or make application in timely fashion resulted from (a) improper conduct of a public servant or improper conduct, death or disability of the defendant's attorney, or (b) inability of the defendant and his attorney to have communicated, in person or by mail, concerning whether an appeal should be taken, prior to the expiration of the time within which to take an appeal due to defendant's incarceration in an institution and through no lack of due diligence or fault of the attorney or defendant." In *People v. Stevenson*, 176 A.D.2d 516, 574 N.Y.S.2d 707 (1st Dept. 1991), *lv denied* 79 N.Y.2d 832, the court, citing "unique circumstances," excused the untimely filing of a notice of appeal even though the defendant had made no motion pursuant to §460.30.

Arguably, the broad exception contained in CPL §460.30, which bears on the fundamental right to appeal, is applicable in juvenile delinquency proceedings on constitutional grounds.

2. Perfecting An Appeal

According to FCA §1121(7), an appeal must be perfected within 60 days of receipt of the transcript or within any different time prescribed by the Appellate Division. At present, the 60-day rule has no practical effect since each Appellate Division has a governing rule. *See* 22 NYCRR §§ 600.11(3) (in First Department, necessary papers and briefs must be filed within nine months of date of notice of appeal), 670.8(e) (in Second Department, appeal shall be deemed abandoned unless perfected within six months after date of notice of appeal).

C. Assignment Of Counsel

The appointment of the child's attorney pursuant to FCA §249 shall continue without further court order or appointment where the attorney or the presentment agency files a notice of appeal. The attorney may be relieved upon application to the Appellate Division, and another attorney appointed. FCA §1120(b).

D. Fees

The fees required by CPLR §8002 are not required where the appellant or counsel certifies that the appellant has been assigned counsel pursuant to FCA §249 or is represented by a legal aid society or federally-funded legal services program for indigents. FCA §1118.

E. Preferences

Appeals from orders in Article Three proceedings shall be given preference and may be brought on for argument on such terms and conditions as the Appellate Division may direct. CPLR 5521.

F. Stays

The timely filing of a notice of appeal does not stay the order from which the appeal is taken. FCA §1114(a). A justice of the Appellate Division may stay execution of the order on such conditions, if any, as may be appropriate. FCA §1114(b).

G. Applicability Of CPLR

The provisions of the civil practice law and rules apply where appropriate. FCA §1118.

VI. Duties Of Trial Counsel

A. Consultation With Client Regarding Appeal

Upon the filing of a dispositional order:

- counsel must advise the client in writing of the right to appeal to the appropriate Appellate Division, the time limitations involved, the manner of instituting an appeal and obtaining a transcript of the testimony, and the right to apply for leave to appeal as a poor person if the client is unable to pay the cost of an appeal. FCA §1121(2).
- counsel must explain the procedures for instituting an appeal, the possible reasons upon which an appeal may be based, and the nature and possible consequences of the appellate process. FCA §1121(2).
- counsel must ascertain whether the client wishes to appeal. FCA §1121(3).

B. Action Required On Behalf Of Client Who Wishes To Appeal

- counsel must serve and file the notice of appeal and, when necessary, apply for leave to appeal as a poor person. FCA §1121(3).

- when trial counsel does not intend to represent the client on appeal, counsel must, when appropriate, apply for assignment of appellate counsel for the client. FCA §1121(5).

- so that the client will be presumed eligible for poor person relief and for assignment of counsel on appeal without further motion in the appellate division, counsel also must file a certification of continued indigency and continued eligibility for appointment of counsel pursuant to FCA §1118, and such other documents as may be required by the appropriate appellate division. FCA §1121(3),(5).

- trial (now appellate) counsel must, no later than ten days after filing the notice of appeal, request preparation of the transcript of the proceedings, FCA §1121(6)(a), and counsel assigned or appointed for purposes of appeal must request the transcripts no later than ten days after receipt of notice of appointment. FCA §1121(6)(b).

- the transcript shall be completed within thirty days of receipt of the request**,** and, if the transcript is not completed within that time, the court reporter or the director of the transcription service must notify the administrative judge of the appropriate judicial district, who shall establish procedures to effectuate the timely preparation of the transcript**,** and the appellate division may establish additional procedures to effectuate the timely preparation of transcripts. FCA §1121(7).

C. Reconstruction Of Record

After *People v. Parris*, 4 N.Y.3d 41, 790 N.Y.S.2d 421 (2004), it is clear that certain duties arise when counsel learns that transcripts have been lost or for some other reason cannot be obtained. Having held in the past that a loss of reporter's minutes is rarely sufficient reason in itself for reversing a conviction, the Court of Appeals concluded that, "where a significant portion of the minutes has been lost: (1) a reconstruction hearing should normally be available for a defendant appealing his

conviction after trial, if the defendant has acted with reasonable diligence to mitigate the harm done by the mishap; but (2) a defendant who has pleaded guilty is entitled to a reconstruction hearing only where he can identify a ground for appeal that is based on something that occurred during the untranscribed proceeding." The court noted that, under the reasonable diligence requirement, a defendant should be diligent in maximizing the possibility that a reconstruction hearing can accomplish its purpose. At a minimum, the defendant should move for a reconstruction hearing promptly after learning that the minutes have been lost, and pursue promptly other available means of reconstruction, such as contacting the defendant's trial counsel, the prosecutor and the judge to jog their recollections and ask that they preserve whatever notes or other records of the proceedings might exist. "A defendant who does not proceed diligently is open to the suspicion that he thinks the likelihood of really finding significant appellate issues remote - and would prefer failure in reconstructing the proceedings to success, hoping to claim prejudice when reconstruction proves impossible."

VII. Dismissal Of Appeal

A. Mootness

A challenge on appeal to the initial disposition ordered by the family court will be rendered moot when the period covered by the dispositional order has elapsed before the appeal can be decided. *Matter of Shamasia M.*, 4 A.D.3d 359, 771 N.Y.S.2d 541 (2d Dept. 2004) (appeal from dispositional order moot where initial placement period had expired and order extending placement had been entered); *Matter of Leonardo Q.*, 171 A.D.2d 563, 567 N.Y.S.2d 446 (1st Dept. 1991) (challenge to restrictive placement was moot where appellant had already completed the two six-month periods in secure and residential placement which was directed in the order). However, the appeal from the adjudication of delinquency, based on a challenge to the underlying fact-finding (or, it can be argued, based on a claim that the matter should have been dismissed at disposition), is not moot in light of the possible collateral consequences resulting from a delinquency adjudication (e.g., the use of delinquency records in criminal sentencing proceedings pursuant to FCA §381.2[2]). *Matter of Daniel H.*, 236 A.D.2d 874, 653

N.Y.S.2d 756 (4th Dept. 1997); *see also Matter of Brittny MM.*, 51 A.D.3d 1303, 858 N.Y.S.2d 815 (3rd Dept. 2008), *lv denied*, 11 N.Y.3d 713 (although respondent's PINS placement ended after appeal was filed, appeal not moot because finding that respondent violated probation, and resulting order of placement, may have collateral legal consequences).

B. Abandonment By Absconding Appellant

An appeal brought by a child who has absconded from placement is subject to dismissal as abandoned since the appellant is not available to obey the mandate of the court. This is referred to as the "fugitive disentitlement" doctrine. *Matter of Magdalene N.*, 180 A.D.2d 799, 580 N.Y.S.2d 435 (2d Dept. 1992); *see also People v. Del Rio*, 14 N.Y.2d 165, 250 N.Y.S.2d 257 (1964); *People v. Reyes*, 292 A.D.2d 271, 738 N.Y.S.2d 850 (1st Dept. 2002), lv denied 98 N.Y.2d 701, 747 N.Y.S.2d 420 2002) (appeal dismissed where defendant has been deported and is not available to obey mandate of court in event of affirmance; regardless of whether defendant was "voluntarily" or "involuntarily" deported, he has become unavailable as a consequence of remaining in the United States for 4 years on a 3-month visa); *but see People v. Ventura*, 17 N.Y.3d 675 (2011) (Appellate Division abused discretion in dismissing appeals after defendant involuntarily deported; dismissals have been predicated on rationale that courts should not aid in deliberate evasion of justice through continued consideration of appeals, but in these cases defendants were involuntarily removed from country, and they have greater need to avail themselves of appellate process in light of tremendous ramifications of deportation); *People v. Taveras*, 10 N.Y.3d 227, 855 N.Y.S.2d 417 (2008) (doctrine did not apply where defendants were tried and sentenced in absentia, but were apprehended and returned to court's jurisdiction before filing appellate brief; whether appeals should be permitted to proceed in such circumstances is subject to broad discretion of Appellate Division, which may consider whether defendant's flight caused significant interference with operation of appellate process; whether defendant's absence so delayed appeal that the People would be prejudiced in locating witnesses and presenting evidence at retrial; length of defendant's absence; whether defendant voluntarily surrendered; importance and novelty of issues raised; and merits of appeal).

C. Presumption In Appeals From Bench Trials

Making it extremely difficult to win a "fair trial" argument upon appeal from a delinquency adjudication is the presumption which appellate courts invoke in favor of the judge at a bench trial. That is, whenever the accused is arguing not that the judge *admitted* evidence illegally - *e.g.*, in a suppression ruling - but rather that the judge's ability to provide a fair trial was fatally compromised because the judge *heard* unduly prejudicial evidence - *e.g.*, because of a *Sandoval* ruling, or a ruling denying a mistrial motion provoked by a prosecutor's or a witness' improper reference to inadmissible evidence - the appellate courts ordinarily presume that the judge did not give the evidence any, or any undue, weight. *See People v. Moreno*, 70 N.Y.2d 403, 521 N.Y.S.2d 663 (1987).

VIII. Right To Speedy Appeal

In *Matter of Jermaine J.*, 6 A.D.3d 87, 775 N.Y.S.2d 287 (1st Dept. 2004), *lv denied* 3 N.Y.3d 606, the First Department rejected an argument that the respondent's due process rights were violated by delays in the appellate process. The court noted that "[t]he factors considered on a speedy appeal claim are similar to those of a constitutional speedy trial claim, and include the extent of the delay, the reason for the delay, the nature of the underlying charge, and whether or not there is any indication that the defense has been impaired by reason of the delay (citations omitted)." However, "[w]hile the delay. . . was unusually long," respondent did not establish prejudice based upon a deprivation of his liberty given the negative reports about him and the fact that he threatened another person with a knife.