

EVIDENCE (33 Qs)

I. Relevance

A. Logical Relevance (Probativeness)

1. Standard of admissibility – does the evidence have **any tendency to make a material fact more probable than it would be without the evidence** (relate to time / person / event)
2. Exceptions where admissible – *similar occurrences*
 - a. *Prior accidents or claims*
 - (i) *P's prior accident history* – inadmissible; EXCEPT
 - (a) Prove *common plan & scheme of fraud*; or
 - (b) When *cause of P's damages is in issue*
 - (ii) *D's prior conditions* – ONLY involving the same instrumentality or condition, and occurring under **substantially similar circumstances**, to prove:
 - (a) Existence of a dangerous condition
 - (b) D had prior notice
 - (c) Causation
 - b. *Intent is issue* – draw inference of intent from prior conduct e.g. gender discrimination
 - c. *Similar sales to establish value*
 - d. *Habit Evidence* – to infer a person acted on the occasion at issue
 - (i) Disposition evidence – NOT admissible
 - (ii) Prior Act evidence (propensity) – NOT admissible
 - (iii) *Habit* – Admissible (key words – always, invariably, automatically, instinctively)
 - (a) *particularity*; AND (b) *frequency* (judge's discretion how often is enough)
- e. *Industrial or Business Routine* (business habit) – admissible
- f. *Industrial Custom as Standard of care* (what do other similar companies do)

- * **NY Distinctions – Habit Evidence** (*more suspicious*)
1. *Personal habit on issue of due care in negligent – INADMISSIBLE*
 2. *Personal habit in use of product – Admissible (in products liability case)*

B. Judicial Discretionary Exclusion

1. Probative value is substantially outweighed by danger of – (1) *danger of unfair prejudice*; (2) *confusion of issues*; (3) *misleading the jury*; (4) *undue delay*; (5) *waste of time*; (6) *unduly cumulative*
2. NOT – unfair surprise

C. Public Policy Based Exclusion

1. *Liability Insurance*
 - a. Not admissible to show negligence or ability to pay
 - b. EXCEPTIONS
 - (i) prove *ownership or control* (when disputed, get limiting instructions); OR
 - (ii) *impeachment*
2. *Subsequent Remedial Measure*
 - a. Not admissible to show negligence / culpable conduct / product or design defect / need for warning
 - b. EXCEPTIONS
 - (i) prove *ownership of control* (when disputed); OR
 - (ii) rebut or impeach a claim that *precautions were not feasible* (when feasibility is disputed)

- * **NY Distinctions – Subsequent Remedial Measures** (*Strict Liability case*)
1. *Manufacturing Defects – Admissible to establish defectiveness of product when made*
 2. *BUT, design defect OR failure to warn – NOT admissible (except for feasibility dispute)*

- c. Subsequent remedial measures by 3rd parties – admissible
3. *Settlements*
 - a. Civil Cases
 - (i) Not admissible – *evidence of a settlement of offer to settle*, to prove liability or weaken other party
 - (ii) Not admissible – *statements of fact* made in course of settlement
 - (iii) Requirements (at the time of settlement discussion)
 - (a) There *must be a claim* – if someone admits before claim, it's admissible; AND
 - (b) There *must be a dispute as to liability or amount* – if D admits to full liability, it's admissible
 - (iv) EXCEPT – for impeachment

riminal Cases

- (i) Offer to plead guilty – Not admissible (all criminal & subsequent civil cases based on same facts)
- (ii) Withdrawn guilty plea – Not admissible (all criminal & subsequent civil cases based on same facts)

* **NY Distinctions – Withdrawn guilty pleas**
Admissible in subsequent civil litigation based on same facts as party admission.

- 4. *Offer to pay Medical Expenses*
 - a. Not admissible – to prove culpable conduct
 - b. BUT, *admissions of fact* accompanying an offer to pay medical expenses are Admissible
- 5. *Prior Sexual Conduct*
 - a. In any civil or criminal proceeding involving sexual misconduct, the following is NOT admissible
 - (i) Opinion or reputation about the victim’s sexual propensity, or
 - (ii) Evidence of specific sexual behavior of the victim
 - b. Exceptions
 - (i) Specific sexual behavior to prove *someone other than D was the source of semen or injury*;
 - (ii) Victim’s sexual activity with D if the defense of *consent* is asserted; or
 - (iii) Where exclusion would violate D’s right of due process (placed in controversy by victim)

* **NY Distinctions – Prior Sexual Conduct**
Conviction of prostitution within last 3 years allowed

D. Character Evidence

- 1. Purpose of character evidence
 - a. Direct evidence – person’s character is a *material element* in the case
 - b. Circumstantial evidence – infer *conduct in conformity with character* at time of litigated event
 - c. Impeach witness credibility
- 2. Method of proving character
 - a. Specific acts
 - b. Opinion testimony
 - c. Reputation testimony
- 3. Civil Cases
 - a. Circumstantial evidence – *NOT admissible* to prove conduct in conformity (even civil case involving criminal conduct)
 - b. Direct evidence – admissible where essential element of a claim or defense (e.g. *defamation, negligent hiring or entrustment*); methods – *Specific acts, Opinion, or Reputation*
- 4. Criminal Cases
 - a. D proves character
 - (i) Evidence to prove conduct in conformity is NOT admissible during prosecution’s case-in-chief (D’s character trait is never an element)
 - (ii) BUT, D may introduce evidence of a **relevant** character trait, which opens the door for rebuttal
 - Methods – *Opinion & Reputation*

* **NY Distinctions – Character witness in criminal cases**
Only REPUTATION as circumstantial evidence is allowed – both for D & prosecution

- b. Prosecution’s Rebuttal – when D opens door (*only through character witness*), prosecution may:
 - (i) *Cross-examining character witness (specific acts)* – inquiring *D’s relevant specific acts* (but can not prove them in trial) that reflect adversely on particular character trait introduced by D – to impeach character witness; and/or
 - (ii) *Calling its own character witness (opinion or reputation)* – to contradict D’s witness

* **NY Distinctions – Prosecution rebuttal against character witness**

- 1. *Cross-examining – can only begin to ask “Have you heard”*
- 2. *Calling own witness – introduce (1) reputation evidence; and (2) introduction of prior convictions which reflect adversely on the character trait in issue.*

- c. Victim’s Character – SELF-Defense Case
 - (i) D may introduce victim’s BAD character (*opinion or reputation*) – opens door for prosecution

* **NY Distinctions – Victim in self-defense criminal case**
Character evidence of victim is NOT admissible to prove that victim was the first aggressor.

- (ii) Prosecution may rebut by showing:
 - (a) Victim's Good character; and/or
 - (b) D's Bad character for the *same trait (opinion or reputation)*
- (iii) Separate rule of relevance – if D, at the time of alleged self-defense, was *aware of the victim's violent reputation or prior specific acts of violence*, such awareness may be proven to show *D's state of mind – fear* – to infer that D acted reasonably in responding as he did to victims' aggression
- 5. Specific Acts of Misconduct – for **non-character purposes**
 - a. Prior acts are admissible if they are *relevant to some issue other than D's character or disposition* (not dependent on D's introduction of character evidence because MIMIC is not character evidence)
 - (i) *Motive*
 - (ii) *Intent*
 - (iii) *Mistake or accident, absence of*
 - (iv) *Identity (modus operandi)*
 - (v) *Common Scheme or Plan*
 - b. Criminal case – on D's request, prosecution must give pretrial notice of intent to introduce MIMIC evidence
 - c. Requirements for admissibility
 - (i) Sufficient evidence to support a jury finding that D committed the prior act; AND
 - (ii) Court must weigh probative value v. prejudice (must give limiting instruction)
- 6. Prior acts of sexual assault or child molestation
 - In sexual assault or child molestation case, evidence of D's prior acts of such conduct is admissible for any relevant purpose, including defendant's propensity for sex crimes

* *NY Distinctions – sexual assault or child molestation*
Does not allow prior acts of sexual assault or child molestation

II. Writings & Documentary Evidence

A. Authentication

1. Writing is not admissible until *authenticated* – proof must be sufficient to support *jury finding of genuineness* (jury makes the ultimate determination of fact)
2. Method
 - a. Party Admission
 - b. Witness *personal knowledge*
 - c. Proof of handwriting
 - (i) Lay Opinion – based on *personal knowledge of handwriting*
 - (ii) Expert Opinion – *compared with genuine samples* (exemplar)
 - (iii) Jury comparison – jury compares with genuine sample
 - d. *Ancient Document* – presumption of authentication
 - (i) At least 20 years old;

* *NY Distinctions – Ancient Document*
Requires 30 years
 - (ii) Facially free of suspicion; AND
 - (iii) Found in place of natural custody
 - e. *Reply Letter Doctrine* – document can be authenticated by evidence that it was received in response to a prior communication to the alleged author
3. Self-Authenticating Documents – presumption of authentication
 - a. Official publications
 - b. Certified copies of public records or business records
 - c. Newspaper or periodical
 - d. Trade inscriptions and labels
 - e. Acknowledged document – notarized document
 - f. Commercial paper
4. Authentication of Photographs
 - a. Witness testifies on the basis of personal knowledge that “*fair and accurate representation*” of objects or people – need not be the photographer
 - b. Unattended camera – show properly installed, proper removal of film, show chain of custody

B. Best Evidence Rule (Original Document Rule)

1. Definition ⇒ a party seeking to prove the contents of a writing, must either produce the original writing or provide an

acceptable excuse for its absence

- a. Only applies to writings – including sound recordings, X-ray, films
- b. If excuse is acceptable – may introduce secondary evidence (e.g. oral testimony or a copy)
2. When the Best Evidence Rule applies
 - a. Writing is **Legally Operative Document** – writing itself creates rights and obligations (deed, mortgage)
 - b. Where witness is testifying to facts learned **solely from reading in a writing**
3. When NOT apply
 - a. Fact to be proved exists *independent of non-legally operative writing* when a witness with personal knowledge testifies (e.g. birth date – no requirement of birth certificate)
 - b. Writing is *collateral to litigated issue*
 - c. Certified copies of *Public Record*
 - d. Summaries of *Voluminous Record* – provided that original records would be admissible and available
4. What qualifies as the “original writing”
 - a. Writing itself
 - b. Duplicates – any counterpart produced by any mechanical means that accurately reproduced the original (e.g., photocopy, carbon copy, computer print-outs) – duplicate is admissible to same extent as original
 - (i) UNLESS a *genuine question is raised as to authenticity of original*, OR
 - (ii) it would be *unfair to admit the duplicate* (e.g., blurry)

* **NY Distinctions – Duplicates**
Only photographic copies, made, kept or recorded in ordinary course of business

 - Handwritten copy is NEITHER an original nor duplicate
5. Excuses for non-production of original (persuaded by preponderance of evidence)
 - a. Lost or cannot be found with due diligence
 - b. Destroyed without bad faith
 - c. Cannot be obtained with legal process

III. Witness & Testimonial Evidence

A. Competency of Witness

1. Requirements
 - a. *Communicable personal knowledge*
 - b. *Take oath or give an affirmation*

- * **NY Distinctions – Oath Obligation**

 1. *Civil Case – ALL testimony must be sworn (including children)*
 2. *Criminal Case –*
 - a. *Child under age of 9 and anyone with mental defect, who does not understand nature of oath may testify*
 - b. *BUT, this unsworn testimony can not alone be the basis for conviction*

2. Dead Man’s Statute

- a. In civil action, an interested party is incompetent to testify in support of her own interest against the estate of a decedent concerning communications or transactions between the interested party and the decedent
 - There is no federal dead man’s statute, this witness ordinarily not incompetent; BUT, must apply a state’s dead man’s statute where substantive law applies
- b. Requirements
 - (i) *Civil Action*;
 - (ii) Witness must have a *direct stake* in the litigation;
 - (iii) Witness must be testifying *for* his interest (not against it);
 - (iv) Witness must be testifying *against* the decedent, or his representatives
 - (v) Testimony concerns a *personal transaction or communication with the decedent* – the interested survivor isn’t barred from testifying against *everything* that’s relevant, but only *as to matters which the decedent could contradict if he were alive* (in other words, if he couldn’t contradict you when he was alive, you can testify about it when he’s dead)
 - (vi) Unless *waiver* – which usually occurs when the testimony of the decedent somehow gets before the jury through a *deposition of the decedent taken before he died*

- * **NY Distinctions – Dead Man’s Statute (Automobile Exception)**
Dead Man Statute NOT applicable to facts of automobile accident case based on negligence
 1. *An interested survivor may testify about the facts of negligence, or contributory negligence in an accident arising out of the operation of an automobile, airplane, or boat;*
 2. *BUT the exception does not extend to conversation with decedent*

B. Form of Examination of Witness

1. Kind of questions asked – largely matter of judicial discretion (e.g. narrative questions maybe allowed)
2. Leading Questions
 - a. Generally NOT allowed on *direct examination*; BUT allowed
 - (i) For *preliminary introductory matters*
 - (ii) *Youthful or forgetful witness*
 - (iii) *Hostile witness* – witness is adverse party or someone under control of adverse party
 - b. Generally allowed on *cross-examination*
3. Writings in Aid of Oral Testimony
 - a. **Refreshing Recollection** (Present recollection revived)
 - (i) *Any* writing (or any other tangible item) may be used to refresh a witness’ memory; then witness must testify from *present recollection* – Best Evidence Rule not applicable for refresher
 - (ii) Witness can NOT read from the writing while testifying
 - (iii) Safeguards against abuse – adversary has right to:
 - (a) Inspect the memory-refresher
 - (b) Use it on cross-examination
 - (c) Introduce into evidence (as an exhibit)
 - (iv) No hearsay problem
 - b. **Past Recollection Recorded** (Past recollection recorded)
 - (i) Only *writing* that meets **foundational requirements** may be used
 - (a) Showing writing to witness *fails* to refresh memory
 - (b) Witness had *personal knowledge* at former time
 - (c) Writing was either *made by witness*, or *adopted* by witness
 - (d) Statement must have been made or adopted *when event was fresh in witness’s memory*
 - (e) Witness can vouch for *accuracy* of writing when made or adopted
 - (ii) Writing itself is *read* into evidence (writing itself cannot be introduced as evidence – unless by opposing party)
 - (iii) **Hearsay Exception**

C. Opinion Testimony

1. **Lay Witness** Opinion – admissible if (e.g. emotions of others, handwriting, intoxication, speed of car):
 - a. *Rationally based on the witness’s perception* (personal knowledge);
 - b. *Helpful* to jury in deciding a fact in issue; AND
 - c. Not based on scientific / technical / other specialized knowledge
2. **Expert Witness** Opinion (must describe in general terms) – admissible if
 - a. *Qualifications* – education or experience (need not be formal – e.g. skill witness);
 - b. *Proper Subject Matter* – scientific / technical / other specialized knowledge helpful to jury;
 - c. *Proper Basis of Opinion* – opinion based on “reasonable degree of *probability or reasonable certainty*” AND 3 permissible data sources
 - (i) *Personal Knowledge*
 - (ii) *Evidence in trial record, made known to expert by hypothetical question*
 - (iii) *Facts outside record* if a type *reasonably relied upon by experts* in the particular field
 - d. *Reliability* – sufficiently reliable (TRAP factors)
 - (i) Testing of principles or methodology
 - (ii) Rate of error
 - (iii) Acceptance by other experts in same discipline
 - (iv) Peer review and publication

- * **NY Distinctions – Reliability (General Acceptance Rule)**
Principles/methodology must be generally accepted as reliable by relevant professional community

- e. Opinion on **Ultimate Issues**
 - (i) Civil Case – opinion testimony permissible for ultimate issue
 - (ii) Criminal Case – expert can NOT give direct opinion on the mental intent of D in issue

- f. **Learned Treatise** in Aid of Expert Testimony (*Hearsay Exception*)
 - (i) Relevant portions only **read** into evidence (and NOT introduced in as exhibit) in:
 - (a) Direct examination of party's own expert – *as substantive evidence*
 - (b) Cross examination of opponent's expert – both (a) *as substantive evidence* & (b) *to impeach*

- * **NY Distinctions – Learned Treatises (NOT hearsay exception)**
 - 1. Direct examination of own party's expert – only used as basis of opinion (NOT substantive E)
 - 2. Cross examination of opponent's expert – only be used to impeach expert's credibility (NOT substantive E)

- (ii) Reliable authority must be established by
 - (a) Opponent's expert admits; or
 - (b) Own expert testifies; or
 - (c) Court takes judicial notice

D. Cross-Examination

- 1. Party has right to cross-examine any opposing witness who testifies at trial
- 2. Restrictions on Scope
 - a. Matters *within the scope of direct examination*; and
 - b. Matters that test *witness's credibility* (perception, memory, honesty)

E. Credibility – Impeachment

- 1. General
 - a. Impeachment ⇒ casting of an adverse reflection on the veracity of the witness
 - Can impeach either by cross-examination of the target witness or by extrinsic evidence
 - b. Bolstering Own Witness
 - (i) NOT allowed until after witness's credibility has been attacked
 - (ii) EXCEPTION – *prior statement of identification (Hearsay Exception)*
 - (a) Comes in as substantive evidence
 - (b) Prior statement of identification must be made by trial witness *in court* AND *subject to cross-examination*

- * **NY Distinctions – Statement of Identification**
Only in criminal cases

- c. Impeachment of Own Witness – permitted without limitation

- * **NY Distinctions – Impeachment of Own Witness**
In criminal case, permitted only when testimony of the witness did affirmatively damage the case of the calling party (not merely a cloud on credibility)

- 2. Impeachment Methods
 - a. **Prior Inconsistent Statements**
 - (i) Extrinsic evidence allowed
 - (ii) Foundation – witness must be given opportunity to explain or deny the inconsistent statement
 - (iii) Exceptions (**Hearsay Exception**) – can be used as substantive evidence
 - (a) Prior inconsistent statement given under oath, AND as part of formal trial, hearing, proceeding, deposition
 - (b) Prior party admissions
 - b. **Bias, Interest or Motive to Misrepresent**
 - (i) Extrinsic evidence permitted
 - (ii) Foundation – witness must be asked on cross-examination about facts showing bias or interest before extrinsic evidence is allowed
 - (iii) Method to overcome exclusionary rules – e.g. liability insurance, settlement conferences, arrests (trumps other exclusion)
 - c. **Sensory Deficiencies**
 - (i) NO foundation requirement – Extrinsic evidence allowed
 - d. **Conviction of Crime**
 - (i) Types of conviction
 - (a) *Any crime* (felony or misdemeanor) involving *dishonesty or false statement* – can be used against *any* witness; OR
 - (b) *Felony not involving dishonesty or false statement* – trial judge has discretion
 - (ii) Conviction must be within 10 years of trial

* **NY Distinction – Conviction of Crime**

1. Any crime can be used to impeach – no balancing
2. BUT, Criminal Defendant – court must balance prejudice v. probative value on issue of credibility

- (iii) Extrinsic evidence (record of judgment) allowed
- (iv) NO foundation requirement

e. **Bad Acts**

- (i) Specific acts (e.g. lying, deceit, *NOT arrests*), which are probative of truthfulness can be used in cross-examination
 - (a) Must have *good faith* basis;
 - (b) Admissibility lies in court’s discretion
 - (c) Not allowed to prove bad act by extrinsic evidence – bound by any denial

* **NY Distinction – Bad Acts**

Broader standard allows inquiry into immoral, vicious, or illegal acts that effect credibility.

- (ii) Cross-examination ONLY – NO extrinsic evidence allow
- (iii) NO foundation requirement (not applicable)

f. **Bad Reputation or Opinion for Truthfulness**

- (i) Extrinsic evidence allowed; Call character witness to testify (in NY reputation evidence only)
- (ii) NO foundation requirement

3. Rehabilitation – can show

a. **Good Reputation for Truthfulness**

- (i) Can use when under direct attack on the witness – (d) (e) (f)
- (ii) Other witnesses may be called to testify that impeached witness has good character

b. **Prior Consistent Statement**

- (i) Use to **rebut a charge of recent fabrication or improper influence or motive** – statement must be made before the motive to fabricate arose
- (ii) **Hearsay Exception** – becomes substantive evidence, not merely to rehabilitate

* **NY Distinction – Prior Consistent Statement**

Admissible only to rehabilitate.

– NOTE: difference between character evidence & impeachment evidence

- (1) *Methods of proving character when character is “in issue”* – extrinsic evidence is Allowed
- (2) *Impeaching credibility of a witness by evidence of character* – may NOT be proved by extrinsic evidence

| Types of Proof | Occasions for Use of Proof | | |
|--|---------------------------------------|--------------------|-------------------|
| | Initial information about credibility | Direct Examination | Cross Examination |
| Convictions untruthfulness | O | O | O |
| Opinion/Reputation untruthfulness | O | O | O |
| Specific Acts untruthfulness | O | X | O |
| Opinion/Reputation truthfulness | X | O | O |
| Specific Acts truthfulness | X | X | O |

F. Privilege

1. General

- a. Federal action based on federal law – apply common law for privilege
- b. Federal *diversity action* applying state substantive law – apply
 - (i) State Privilege Law; (ii) State Law on Competency; (iii) State Burdens of Proof Law

2. **Attorney-Client Privilege** ⇒ communication between an attorney and client, made during professional consultation, are privileged from disclosure

a. Elements

- (i) *Confidential communications* – not intended to be disclosed to third parties
 - (a) NO privilege to underlying information, pre-existing document, or physical evidence
 - (b) *Joint client rule* – if 2 or more clients with common interest consult attorney
 - Privilege against as to third parties
 - BUT Privilege does not apply as between them
- (ii) Between *Attorney and Client* (or representative of either);
- (iii) Made *during professional, legal consultation*; AND
- (iv) Unless privilege is waived by the client or an exception is applicable
 - Client is the holder of privilege, and alone has power to waive

- b. EXCEPTIONS
 - (i) *Future crime or fraud*
 - (ii) *Client puts legal advice in issue* – if D defends on ground that D relied on advice of attorney
 - (iii) *Attorney-client dispute*
- 3. **Physician-Patient Privilege** (including psychotherapists)
 - a. Elements
 - (i) Confidential communication or information acquired from patient in *the course of treatment*; and
 - (ii) For the purpose of *diagnosis or treatment* of medical condition
 - b. EXCEPTION
 - (i) ***Patient expressly or impliedly puts his physical condition in issue*** – patient is suing for damages for personal injuries, or defendant asserts insanity defense
 - (ii) *Aid wrongdoing; physician-patient dispute*
- 4. **Husband-Wife Privilege**
 - a. ***Spousal Immunity Privilege*** – spouse cannot be compelled to testify against the defendant spouse
 - (i) Applies only in all *criminal case / proceedings*
 - (ii) *Witness-spouse*, not defendant, is holder of privilege (may voluntarily testify)
 - (iii) Requires valid marriage (privilege ends with divorce)
 - (iv) Covers all information learned before & during marriage

* ***NY Distinction – NO Spousal Immunity Privilege***
 - b. ***Martial Communications Privilege*** (*confidential communications between spouses*) – spouse is not required, and is not allowed in the absence of consent by the other spouse, to disclose confidential communication made during marriage
 - (i) Applies in *any type of case*
 - (ii) *Both spouses* hold privilege (requires consent to voluntarily testify)
 - (iii) Privilege survives divorce
 - (iv) Covers only *confidential communications* made only *during marriage*
 - c. EXCEPTIONS (to both)
 - (i) Communications or acts in *furtherance of future crime or fraud*; or
 - (ii) Communications or acts *destructive of family unit*

IV. Hearsay Rule ⇒ out of court statement, offered to prove the truth of the matter asserted

A. Definition

- 1. *Out-of-court statement of person (oral or written)*; AND
 - 2. *Offered to prove the truth of the matter asserted* *Crime ends when asking is done*
- Hearsay Rule – hearsay is inadmissible unless an exception or exclusion applies

B. NON-Hearsay

- 1. Not offered to prove the matter asserted
 - a. ***Verbal Act or Legally Operative Fact*** – legal rights & obligations attach because words were spoken
 - E.g. words of contract, making gift, bribe, perjury, misrepresentation, defamation
 - b. Statements offered to show ***effect on the hearer or reader*** – not offered for truth
 - E.g. notice in negligent case, potential motive
 - c. Statements offered as ***circumstantial evidence of D's relevant State of Mind*** – not offered for truth
 - E.g. evidence of insanity or knowledge
- 2. **EXCLUSION** under FRE
 - a. Witness's prior statement
 - (i) ***Prior Inconsistent Statement*** – *under oath, made in formal trial, hearing, proceeding, deposition*

* ***NY Distinction – impeachment purpose only in criminal case***
 - (ii) ***Prior Consistent Statement*** – *to rebut charge of recent fabrication or improper motive of influence*

* ***NY Distinction – only to rehabilitate***
 - (iii) ***Prior Statement of Identification***

* ***NY Distinction – only in criminal case***
 - b. ***Party Admissions*** ⇒ statement made or act that amounts to a prior acknowledgment by one of the parties of one of the relevant facts

* **NY Distinction – Party Admissions are EXCEPTION not exclusion to hearsay**

- (i) *Adoptive Admissions* – by expressly or impliedly adopting or acquiescing (e.g. *silence* – can be deemed admission in which a reasonable person would have responded)
- (ii) *Vicarious Admissions* – a statement made by an employee concerning a *matter within the scope of employment* is admissible against the employer if *made during the employment relationship*

* **NY Distinction – Vicarious Admissions**
“Speaking Authority” employee was authorized to speak on the employer’s behalf

C. HEARSAY EXCEPTIONS

1. Declarant Unavailable

- Unavailability
 - (i) Death or Illness
 - (ii) Absent from jurisdiction
 - (iii) Privilege
 - (iv) Refusal to testify
 - (v) Lack of memory

* **NY Distinction – Unavailability**
1. NOT allow (i) refusal to testify; or (ii) lack of memory
2. Can be by virtue of “Dead Man’s Statute” (BUT, DMS is not a hearsay exception)

a. Former Testimony

- (i) Had *opportunity to cross-examine* or develop the testimony in the 1st trial
 - (a) Grand jury testimony *inadmissible* because no cross-examined
 - (b) BUT allowed against a party when “declarant unavailable by wrongdoing” of the party
 - Burden of proof or wrongdoing (FRE): preponderance of evidence
 - Burden of proof of wrongdoing (NY): clear & convincing evidence
- (ii) *Issue is essentially the same*

* **NY Distinction – Former Testimony**
In civil cases, additional grounds for unavailability
1. Witness is located 100 miles or more from courthouse
2. Permits prior testimony of a physician without the need to show unavailability

b. Statement against Interest

- (i) Statements against declarant’s *pecuniary, proprietary, or penal* interest when made
- (ii) Criminal case – statements against penal interest, when *offered to exculpate D*, must be supported by corroborating circumstances
- NOTE: difference from party admission
 - (a) Must be *against interest when made*
 - (b) *Any person* (not merely party) can make statement against interest
 - (c) *Personal knowledge* required
 - (d) Declarant must be *unavailable*

c. Dying Declaration

- (i) Statements made while declarant *believed death was imminent*,
- (ii) Must only *concern the cause* or circumstances of the impending death
- (iii) Declarant *need not actually die*
- (iv) Admissible in ***homicide case, or any civil case***

* **NY Distinction – Dying Declaration**
1. Declarant must die
2. Only in homicide case

2. Availability Immaterial

- a. ***Excited Utterance*** – statement made while *under stress of excitement of startling event*
- b. ***Present Sense Impression*** – statement made *concurrently or immediately thereafter* with perception of event described

* **NY Distinction – Present Sense Impression**
Requires corroboration

- c. **Present State of Mind** – statement of declarant’s *then-existing (contemporaneous) state of mind*, emotion, sensation, or physical condition (intent, plan, motive, design, mental emotion)
- d. **Declaration of Intent** – statement of declarant’s *intent to do something in the future*, including the intent to engage in conduct with another person

* **NY Distinction – Declaration of Intent**
Requires corroboration + declarant unavailable

- e. **Present Physical Condition** – statement made to *anyone* about declarant’s *current physical condition*
- f. **Statement for purpose of medical treatment or diagnosis** – statement made to *medical personal* concerning *past or present symptoms or general cause* of condition for purpose of treatment or diagnosis
 - (i) Declarations to doctor made solely for the purpose of diagnosis for giving testimony Allowed
 - (ii) Not apply to accusations of personal fault or responsibility of cause

* **NY Distinction – Statement for purpose of medical treatment or diagnosis**
2. *Declarations for past symptoms NOT recognized;*
3. *Diagnosis for purpose of giving testimony not allowed*

- g. **Business Records** – the (i) *any type of record*, (ii) made in *regular course of business* (germane to business), (iii) business *regularly keeps such records*, (iv) *contemporaneously made*, (v) matters made within *personal knowledge* or statement falls with independent hearsay exception, (vi) by person with a *business duty* (need chain linkage)
 - Foundation – witness testifies (need not be author, can be custodian), or written certification under oath

* **NY Distinction – Business Records**
Accident reports prepared in the regular course of business operations or practice are admissible, even if made in anticipation of future litigation.

- h. Other Exception
 - (i) **Public Records**
 - (ii) **Past Recollection Recorded – only read**
 - (iii) **Ancient Documents**
 - (iv) **Learned Treatises**
- 3. Residual / Catch-All Exceptions
 - a. Hearsay statement not falling within one of recognized exceptions must satisfy the following conditions:
 - (i) Have *circumstantial guarantees of trustworthiness*;
 - (ii) Statement is *strictly necessary*; AND
 - (iii) Notice given to adversary as to nature of the statement

V. Procedural matters

- A. Preliminary questions of fact (competency), upon which admissibility depends
 - 1. Determined by the *judge, who is not bound by the rules of evidence*;
 - 2. Presence of jury during preliminary determination is generally within the discretion of the judge
- B. If hearsay is admitted (under an exception), the *credibility of the hearsay declarant can be impeached* to the same extent as an in-court witness – can use any impeachment methods to attack the credibility of a hearsay declarant (no need to confront the declarant)
- C. Judicial Notice
 - 1. Civil – mandatory
 - 2. Criminal – discretionary (jury may or may not accept)
- D. Burden of Persuasion (never shifts)
 - 1. Civil – *preponderance of the evidence*
 - 2. Fraud – *clear & convincing evidence*
 - 3. Criminal – *beyond a reasonable doubt*