

## 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)

- \* **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)*

- e. *Industrial or Business Routine* (business habit) – admissible
- f. *Industrial Custom as Standard of care* (what do other similar companies do)

#### 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 3<sup>rd</sup> 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
- b. Criminal 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 <b>truthfulness</b>	X	O	O
Specific Acts <b>truthfulness</b>	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 1<sup>st</sup> 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*

## EVIDENCE – ESSAY QUESTIONS

### I. QUESTION – 25

- A. Whether a plaintiff's action may be dismissed for properly invoking the 5<sup>th</sup> Amendment privilege against self-incrimination
- B. Whether witness may be questioned as to *extrinsic facts*
- C. Whether *opinion testimony* is admissible
- D. Whether statement is *hearsay – party admissions*
- E. Whether statement is *hearsay – statement against self-interest*
- F. Whether assertion of a 5<sup>th</sup> Amendment privilege in a civil case can lead to adverse inference by the jury
  - 1. *In a civil case, when the plaintiff bears the burden of proof, it is up to the plaintiff to prove each and every element of the case.*
  - 2. *Failure to testify on an issue in the case when the plaintiff was able to testify give rise to an inference adverse to that plaintiff's interests*

### II. QUESTION – 80 (& CRIMINAL LAW/PROCEDURE)

- A. Whether statement is *hearsay – dying declarations*

### III. QUESTION – 86

- A. Whether the New York's Dead Man's Act operates to preclude Plaintiff from testifying
- B. Whether the New York's Dead Man's Act prevents, a *non-party witness*, from testifying as to his observations
- C. Whether, a *lay witness*, is competent to testify as to his opinion of Defendant
- D. Whether statement is *hearsay – former testimony*
- E. Whether a reputation witness is competent to testify regarding adverse party's witness reputation for truth and veracity – *impeachment*
- F. Whether a reputation witness may testify to prior bad acts – *impeachment*
  - 1. *Limited to cross-examination*
  - 2. *Extrinsic evidence is not admissible to prove witness engaged in specific instances of misconduct*
- G. Whether the New York's Dead Man's Act prevents Plaintiff from rebutting an opponent's case – after the other party has *opened the door*.

### IV. QUESTION – 90

- A. Whether a **withdrawn guilty plea** in a criminal action is admissible in a civil action arising out of the same transaction as the criminal action
- B. Whether a statement to a doctor regarding causation of injuries is admissible
  - 1. *Hearsay – party admissions*
  - 2. *Hearsay – business records exception*
- C. Whether a written record of an admission made by witness, who heard it, but cannot recall
  - 1. *Hearsay – party admission*
  - 2. *Hearsay – past recollection recorded*
  - 3. *Refreshing recollection*
  - 4. *Physician-patient privilege*
- D. Whether transcript of **acquittal** from criminal charges is admissible in a civil action arising from the same transaction as the criminal action
  - 1. *Hearsay – public records*
  - 2. *Hearsay – acquittal (inadmissible because of different standards)*
- E. Whether a witness's specific instances of misconduct can be raised on cross-examination

### V. QUESTION – 21

- A. Whether statement is *hearsay – dying declaration*
- B. Whether defendant who *takes a stand in his own defense* may claim 5<sup>th</sup> Amendment protection (NO)
- C. Whether use of *collateral evidence* to prove prior bad acts of D (NO except for conviction)
- D. Whether D's acquittal in a criminal case can be used to show nonliability in a civil case (NO because of burden of proof)
- E. Whether NY Dead Man's Act precludes all testimony by a party to litigation against the estate of deceased person (only facts in automobile accident case allowed)

### VI. QUESTION – 27 (& CRIMINAL LAW/PROCEDURE)

- A. Legally sufficient evidence presented to grand jury
  - 1. *hearsay – con-conspirators*

### VII. QUESTION – 21

- A. Whether an out-of-court statement made immediately prior to death is admissible

- B. Whether a defendant who takes the stand in his own defense may claim 5<sup>th</sup> Amendment protection
- C. Whether the prosecutor may use collateral evidence to prove prior bad acts of D
- D. Whether a D's acquittal in a criminal case can be used to show non-liability in a civil case
- E. Whether the "Dead Man Act" precludes all testimony by a party to litigation against the estate of a deceased person

**VIII. QUESTION – 60** (& *CRIMINAL LAW / PROCEDURE*)

- A. Whether evidence of a victim's character may be introduced to rebut a charge of rape

**IX. QUESTION – 95** (& *CRIMINAL LAW / PROCEDURE*)

- A. D2's confession would be inadmissible in D1's trial as hearsay.
- B. Whether A County DA can properly use evidence from B County scam to help convict D in a A County scam
  - 1. NOT for criminal disposition – but allow for "signature" (modus operandi)

**X. QUESTION – 77** (& *CRIMINAL PROCEDURE & COMMERCIAL PAPER*)

- A. When may prior bad acts of a D be used to impeach the D by cross-examination
  - 1. D maybe interrogated in cross-examination, with respect to any immoral, vicious, or criminal act – inquiry into bad acts is permitted even though D was never convicted (extrinsic evidence not permitted)
  - 2. If D denies the act, prosecution must accept the answers because cannot bring in extrinsic evidence

**XI. QUESTION – 5** (& *TORTS & NY PRACTICE*)

- A. Whether post-accident design modification may be admissible as evidence
  - 1. Admissible ONLY in *manufacturing defect/product liability*
  - 2. NOT admissible in design defect/product liability

**XII. QUESTION – 8** (& *DOMESTIC RELATIONS / COMMERCIAL PAPER*)

- A. Whether hearsay evidence is admissible in a judicial hearing covered by the Family Court Act
  - 1. Family Court Act – provides that only competent, material, and relevant evidence may be admitted in a fact-finding hearing
  - 2. Entire case file of social worker – though the business records exception may apply, under NY case law, the admissible only if made by someone in the ordinary course of business; thus it is necessary that the statements in the case file have been made by witnesses whose job it was to evaluate (it will be necessary to determine the admissibility of each item in the file individually)