PRACTICAL EVIDENCE

CRIMINAL MOCK BENCH TRIAL - DWI

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* The NCDD is not affiliated with any governmental authority. See Rules of Prof. Con., Rule 7.4(c)(1); Hayes v. New York Attorney Grievance Comm. of the 8th Jud. Dist., 672 F.3d 158 (2d Cir. 2012).

CRIMINAL MOCK TRIAL - DWI

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PRACTICAL EVIDENCE

Introduction

Ruling on evidence at hearings and trials is one of the most challenging aspects of being a Judge. The nature of the proceeding calls for a working knowledge of complex legal issues. While a Judge always has the right to reserve his or her ruling, or to take a recess for the purpose of determining that ruling, this is frequently not practical in the context of a particular hearing or trial. In many instances, Judges will simply listen to the arguments of both sides and make the best ruling they can in the context of their own knowledge and the arguments of counsel.

Evidence is both procedural and substantive, encompassing subjects as complex as hearsay and its multitude of exceptions, as well as defendant statements with all the ramifications ranging from proper notice to defining custodial interrogation. Consequently, most attempts to deal with this subject have resulted in treatises as opposed to outlines such as this.

The goal here is to create an outline providing general guidance with regard to some of the more common evidentiary issues that a Judge is confronted with in a criminal hearing or trial. Accordingly, the treatment of many issues is cursory, and is meant to provide general guidance only. Much is drawn from the most widely recognized source, Prince, Richardson on Evidence, and other treatises dealing with evidentiary issues.

The materials are loosely organized in the chronology of when they tend to arise in the course of the proceedings. Accordingly, the first issue is:

Where Do I Sit?

"Objection, your Honor, she is in my chair." This actually happens. Tradition dictates that the prosecutor or the plaintiff sits at the table closest to the jury. However, the court is certainly not bound by this tradition.

Are We On The Record?

While local criminal courts are not "courts of record," the Office of Court Administration currently provides laptops to most, if not all, local criminal courts for the purpose of

recording all court proceedings. Some local criminal courts utilize the services of certified court stenographers to record pre-trial hearings and trials. In the absence of either a stenographer or an electronic recording, the Judge is required to take longhand notes (which notes constitute the "record").

Judges should bear in mind that the laptop recorders pick up many conversations that a stenographer would consider "off the record" and would not transcribe. Accordingly, it would be wise to keep in mind that almost everything that you say in the courtroom will be recorded.

In the event of an appeal, the Criminal Procedure Law sets forth a Judge's obligation to create and file a "return," which is deemed to constitute the record of a local criminal court. See CPL § 460.10(3)(d). While conferences in chambers or at the bench are sometimes held "off the record," all rulings that come out of those conferences should be placed on the record. While it is generally left to the court's discretion whether such discussions will be held "on" or "off" the record, the court should always allow either party to place its arguments/position "on the record" in open court in order to preserve the matter for a possible appeal.

With the exception of routine objections made during the course of the proceedings, arguments of law should generally be made out of earshot of the jury. Counsel should not be allowed to articulate objections that might tend to influence or prejudice the jury. If this occurs, the jury should be promptly instructed to disregard the arguments of counsel. When the court issues an adverse ruling and the affected counsel wishes to make further argument on the record, the court should allow the argument, but it should be done outside of the hearing of the jury.

Opening Statements vs. Closing Arguments

Jury Trial

The purpose of an opening statement is to outline what each party, in good faith, believes that the evidence will be. The opening statement provides the jury with a roadmap as to what each party believes the trial evidence will prove (or not prove). The reason why the opening statement is called a "statement" as

opposed to an "argument" is because counsel is supposed to refrain from making arguments during the opening statement. This is presumably because at the time of the opening statement no evidence has yet been presented -- and thus it would be improper to argue the significance of anticipated evidence.

In a criminal jury trial, the prosecution *must* deliver an opening address to the jury. CPL § 260.30(3). In that opening address, the People must allege facts that will, if proven, establish each of the elements of the prosecution's case. If the prosecution does not allege sufficient facts, the defense may move to dismiss. In that event, the court cannot grant such a motion without giving the prosecutor the chance to correct the defect. See People v. Kurtz, 51 N.Y.2d 380, 434 N.Y.S.2d 200 (1980).

For the defense, the decision whether or not to deliver an opening statement is optional. CPL § 260.30(4). If the defense does choose to deliver an opening statement, it has the option of doing so either immediately following the People's opening statement or rather after the prosecution rests.

Bench Trial

In a bench trial, it is common for both sides to waive their right to deliver an opening statement. It is noteworthy that CPL § 320.20(3)(a) and CPL § 350.10(3)(a) differ on the issue of whether the court is required to permit the parties to deliver opening statements. In this regard, however, according to official Practice Commentaries to CPL § 350.10(3)(a) this is probably a legislative oversight. Thus, a court should never preclude an attorney who wants to make an opening statement in a non-jury trial from doing so.

Closing Arguments/Summations

Closing arguments are the time for each side to marshal the evidence that was admitted at trial and to make arguments drawn from that evidence. It must be kept in mind, however, that while counsel are afforded wide latitude in summation, "summation is not an unbridled debate in which the restraints imposed at trial are cast aside so that counsel may employ all rhetorical devices at his command." People v. Ashwal, 39 N.Y.2d 105, 109, 383 N.Y.S.2d 204, 206 (1976).

Objections are frequently raised during summations on a variety of grounds. For example, it is improper for a party, in its summation, to:

1. Misstate the law;

2. Attempt to shift the burden of proof;

3. Refer to stricken testimony;

4. Make improper remarks with regard to the strategy, role, personality, motives, etc. of opposing counsel;

5. Stray from the "four corners" of the evidence;

6. Make irrelevant comments that have no bearing on any legitimate issue in the case;

7. Ask the jury to speculate or draw conclusions that are not fairly inferable from the evidence;

8. Vouch for the credibility of its witnesses;

9. Imply that the defendant has an obligation to introduce evidence;

10. Comment on the defendant's failure to testify;

11. Imply that the defendant is guilty of other crimes not in issue at the trial;

12. Make a so-called "safe streets" argument (*i.e.*, suggest to the jury that it must convict the defendant in order to keep the streets of the community safe);

13. Request that the jury "send a message" with its verdict; etc.

If any such comments are made during summation, the court should immediately instruct the jury to disregard them, and should take any other appropriate corrective action.

Direct Evidence vs. Circumstantial Evidence

Direct evidence is evidence that the witness actually saw, heard, smelled, tasted or touched. For example, "I saw the defendant strike Mr. Jones in the nose with his fist." This is

direct evidence because it sets forth something that the witness actually perceived through one of the witness's five senses.

Circumstantial (or indirect) evidence, on the other hand, is evidence which seeks to prove a fact that was not personally observed by a witness by drawing conclusions from surrounding circumstances that were, in fact, observed. For example, if you walk out of your house in the morning and notice that the grass is wet, that might be circumstantial evidence that it had rained the night before. You did not witness the rainfall, but you witnessed a fact that could reasonably lead you to the conclusion that it had rained. The danger of circumstantial evidence is the possibility that the observed fact (*i.e.*, wet grass) could have been caused by something other than rain. For example, the water on the grass could have been caused by a sprinkler system, or by morning dew, or by children playing with a hose, etc.

One of the best examples of circumstantial evidence is from an old English case in which the defendant was accused of assaulting a man by biting off his ear. A witness had testified on direct examination that he was present at the time of the conflict and knew that the defendant had bitten off the other man's ear. On cross-examination, the witness was asked:

Q. "Sir, you did not actually see the defendant bite off the ear?"

A. "No."

Q. "So you have no basis for your belief that the defendant actually bit off the ear?"

A. "Well, I did see the defendant spit it out."

Here, the circumstantial evidence is far more compelling than the wet grass example.

Both direct and circumstantial evidence may be used by the factfinder in rendering its verdict. Interestingly, in a typical DWI case almost every single piece of evidence pertaining to the issue of the defendant's alleged intoxication (e.g., odor of an alcoholic beverage, glassy/bloodshot eyes, impaired speech, impaired motor coordination, etc.) is circumstantial in nature. In fact, even a breath test result is circumstantial evidence, as it both (a) indirectly attempts to determine the amount of alcohol in the defendant's blood by determining the amount of

alcohol in his or her breath, and (b) indirectly attempts to determine the defendant's blood alcohol concentration ("BAC") at the time of operation by determining his or her BAC at a later point in time.

Real Evidence vs. Demonstrative Evidence

Real evidence is akin to direct evidence in that it usually involves physical items that are relevant to the issues in the case. For example, the gun used by the defendant to shoot the victim.

Demonstrative evidence is evidence that is introduced for the purpose of illustrating or explaining real evidence. For example, a diagram depicting an accident scene, or an x-ray illustrating a broken bone.

Sequestration Of Witnesses

To sequester a witness means to direct the witness to remain outside of the courtroom during the testimony of another witness. The purpose of sequestration is to prevent a witness who has not yet testified from hearing another witness' testimony.

Sequestration is particularly important where the testimony of two witnesses concerns the same event. In such a situation, the concern is that the non-testifying witness could hear the testimony of the other witness -- which could cause the witness to testify differently than if he or she had not heard the other witness' testimony (*i.e.*, it could help the witnesses "get their stories straight").

Either party may request sequestration of the other party's witnesses or potential witnesses (with the exception of a criminal defendant, who almost always has the right to remain in the courtroom). While the decision whether or not to grant a request for sequestration is left to the court's discretion, it is hard to imagine a situation where such a request would be denied -- as there is literally no harm in granting the request, but denying the request can lead to tailored testimony.

Since the purpose of sequestration is to prevent a witness who has not yet testified from hearing another witness' testimony, once a witness has finished testifying there is no longer any reason to exclude him or her from the courtroom.

A corollary to the issue of sequestration is that any time a recess is called while a witness is on the stand, the witness should be instructed not to discuss his or her testimony with anyone during the recess. If the testifying witness is a criminal defendant, however, there may be an exception to this rule.

Marking Exhibits

The official court record consists largely of words. Thus, for example, if a witness makes a hand gesture or demonstrates a field sobriety test, the only way for the record to reflect such activity is for someone to verbally describe -- for the record -- what the witness just did. This is particularly true where the record consists of an electronic recording as opposed to a stenographer, as a stenographer can describe certain movements (e.g., witness nodded head in agreement), whereas a tape recorder cannot.

In the case of exhibits, exhibits must be identified verbally and assigned a number or a letter. Prosecutors' or plaintiffs' exhibits are traditionally assigned numbers, whereas defendants' exhibits are traditionally assigned letters. Inasmuch as the alphabet only has 26 letters, if the defendant has more than 26 exhibits the first 26 are labeled A through Z, and subsequent exhibits are assigned double letters (e.g., AA, BB, CC, etc.). Objects or documents that are referred to in the case are typically identified for the record as follows:

Q. "Sir, I show you what has been marked as People's Exhibit 1 for identification, and ask you to tell the court what it is?"

A. "This is the pen that was used to write the note to the bank."

Q. "Sir, I show you what has been marked as People's Exhibit 2 for identification, and ask you to tell the court what that is?"

A. "This is the note that I retrieved from the bank."

Q. "Officer, I show you what has been marked as Defendant's Exhibit A for identification, and ask you to tell the court what that is?"

A. "This is a copy of my arrest report."

The fact that an exhibit is marked and identified does not mean that the exhibit will ultimately be offered or received into evidence. In this regard, the fact that an exhibit is marked and identified does not obligate a party to offer it into evidence; nor does it guarantee that the exhibit is admissible over objection. Indeed, it is common for documents to be marked for identification without any intent of offering them into evidence (for example, showing a police officer a copy of his notes to refresh his recollection).

The Judge and counsel for both parties should keep an evidence list. This is typically a legal-sized sheet of paper with a line drawn through the center. The plaintiff's or prosecution's exhibits are listed on one side and the defendant's exhibits are listed on the other. There are two columns set forth on each side of the page with the headings "ID" (which stands for "offered for identification"), and "EVID" (which stands for "received in evidence"). A check mark is placed under the ID column when the exhibit in question is offered for identification. A check mark is placed under the EVID column if the exhibit is received in evidence.

If this is done, at the end of the trial it is very easy to determine which exhibits will be provided to the finder of fact for its consideration in rendering its verdict, and which will not. Typically, a bench conference will be held at the end of the trial, prior to deliberations, at which the Judge and the attorneys will agree as to which exhibits were received in evidence and which were merely marked for identification.

Once an exhibit is marked for identification with a letter or number, it should be consistently referred to by that letter or number so that the record remains clear. Thus, for the sake of clarity, People's Exhibit 1 should remain identified as such (and should not be referred to as "this" or "it" or "the notes").

The *Prima Facie* Case

Various aspects of a criminal case require that the People present evidence or allegations that, if true, establish each of the essential elements of the offense and the defendant's commission thereof. Such evidence is commonly referred to as a *prima facie* case. It is also referred to as "legally sufficient evidence." See CPL § 70.10(1).

What Are The Elements?

Each offense has elements that must be asserted in order to allege/prove a *prima facie* case. The elements of an offense are the essential components of the offense that must be proved in order for a conviction to be upheld (e.g., the *actus reus* (*i.e.*, an act or action), the *mens rea* (*i.e.*, intent), causation, etc.). The first place you should look to find the elements of an offense is the statute defining it. Sometimes a statute presumes additional elements or incorporates other statutes that might not be immediately obvious. A good source for ascertaining the elements of an offense is the CJI Pattern Jury Instructions.

The elements of common law DWI, in violation of VTL § 1192(3), are:

1. Identification (*i.e.*, the defendant);

2. Operation (*i.e.*, drove);

3. Motor vehicle;

4. Roadway listed in VTL § 1192(7);

5. While (*i.e.*, operation and intoxication must be simultaneous); and

6. Intoxicated by alcohol.

DWI has been referred to as a "strict liability" offense, in that there is no traditional *mens rea* component. While the defendant's intoxication must be voluntary, and the defendant must intend to operate the vehicle, the defendant does not need to otherwise act "intentionally," "knowingly," "recklessly," or with "criminal negligence." See PL § 15.05.

Thus, for example, there is no requirement that the defendant intend to get drunk, or that the defendant have knowledge that his or her BAC is above the legal limit. Similarly, the defendant is not required to drive recklessly to be guilty of DWI. All that is required is that the defendant operate a motor vehicle while intoxicated on a roadway covered by VTL § 1192(7).

While not technically an element of an offense, the jurisdiction of the court (*i.e.*, venue) is always relevant. The jurisdiction of the court is nothing less than the right of the court to hear the case in the first instance. The jurisdiction

of the police officer to make the stop/arrest is another issue which may arise, but is also not an element of the offense.

The failure to allege/prove one of the required elements of a *prima facie* case cannot be remedied by the fact that the evidence regarding all of the other elements is overwhelming. The elements are the skeleton of the case. All of the other evidence is the flesh that is hung on the skeleton. A missing element is like a missing arm. No matter how well built the other parts of the body, it is still not whole.

Prior to the commencement of a trial, the judge (as well as the attorneys) should make a list of the elements of the offenses applicable to the particular case. Check marks should be placed next to each element as the evidence establishes it. If this is done, when the People rest their case and the defendant moves to dismiss for failure to establish a *prima facie* case, the court can easily grant or deny the motion based upon whether or not all of the required elements have been checked off.

Direct Examination vs. Cross-Examination

The distinctions between direct and cross-examination can be confusing, because they appear to give greater latitude to one side over the other. The attorney who calls a witness is far more restricted in the manner in which he or she poses questions than is the attorney who cross-examines that witness. The reason why is that the purpose of direct examination is very different from that of cross-examination. It is vital that both are done well, because the accuracy of the truth-seeking function of our adversarial system is highly dependent upon how thoroughly and competently these two functions are performed.

Direct Examination

The purpose of direct examination is to elicit relevant information from the witness. The key to direct examination is that the information must come from the witness and not from suggestions made by the attorney asking the questions. Accordingly, leading questions (*i.e.*, questions which suggest the answer) are not allowed on direct examination except with regard to preliminary matters such as the witness' background and placing the witness' testimony in context. The rationale is that when a party calls a witness to testify on its behalf the witness is likely to be somewhat biased towards that party and against the opposing party (which is why the party is calling the witness

in the first place). Thus, the witness can generally be expected to agree with most of what the attorney calling him or her has to say, and to disagree (or try to disagree) with most of what the other party's attorney has to say.

Once the witness' background and the reason why he or she has been called as a witness has been established, all further questions on direct must be non-leading. In this regard, the attorney might start with the following question: "I direct your attention to June 4, 2011, at approximately 11:00 PM, and I ask you to tell the court where you were and what you were doing at that time?"

This question places the witness at a specific time and place and seeks information which the attorney believes is relevant to the proceeding. The question is generally not objectionable, because it calls for the witness to provide the relevant information. On the other hand, if the time and/or date of the relevant events is in dispute, then this question might be objectionable as "leading" because it suggests the answer to something that is in controversy and/or assumes facts that are not in evidence.

Generally, however, this is a standard question which is used to orient the witness to the relevant events for which the witness has been called to testify. This would usually be followed by questions designed to elicit the things that the witness saw and heard; and what the witness said and did.

For example, the witness might be asked: Q. "What were you doing?" Q. "Where were you located?" Q. "Were you alone or with a partner?" Q. "Were you in uniform?" Etc. These are examples of non-leading questions attempting to elicit information from the witness. The questions do not suggest the answers.

Common Issues During Direct Examination

1. Leading Questions

As is noted above, a leading question suggests the answer. As a general rule, a question is leading if the attorney asking the question makes a factual assertion in the form of a question and the obvious answer is "yes." For example:

Q. "The defendant was driving a 2010 blue Chevy Malibu, correct?"

Q. "When you approached the defendant, you immediately detected a strong odor of an alcoholic beverage coming from his breath, did you not?"

Q. "Officer, it's fair to say that you conducted the field sobriety tests properly in this case, isn't it?"

By contrast, the following questions would be non-leading:

Q. "Please describe the car that the defendant was driving?"

Q. "What, if anything, did you observe about the defendant when you first approached him?"

Q. "Please describe how you administered the field sobriety tests?"

On direct examination, the witness should be giving more than "yes" or "no" answers. The story should be told by the witness -- not by the attorney asking the questions.

A question is not leading if the answer is not suggested by the question. Thus, a particular question could be either leading or non-leading depending upon the context. For example, the question: "Did the defendant stumble as he exited the vehicle?" is potentially non-leading because the answer could be "yes" or it could be "no" (or it could be "I don't recall"). The same question could be leading, however, if the witness had clearly not mentioned any stumbling in response to the question "Please describe the manner in which the defendant exited the vehicle?" -- and the prosecutor was trying to suggest this desired response with a more specific question.

Take the following questions, for example:

Q. "What, if anything, did you notice about the condition of the defendant's eyes?"

Q. "What, if anything, did you notice about the color of the defendant's face?"

Q. "What, if anything, did you notice about the defendant's breath?"

Q. "What, if anything, did you notice about the defendant's manner of speech?"

Q. "What, if anything, did you notice about the defendant's motor coordination?"

If these questions were asked in the context of a petty larceny case, they would clearly be non-leading. On the other hand, if the same questions were asked in the context of a DWI case, they would clearly be leading. The reason is because in the context of a DWI case the questions clearly suggest to the witness not only the desired response, but also suggest to the witness topics that the questioner deems to be important (and that the witness might not have mentioned without being led by the question).

While leading questions are objectionable, the court generally does not prohibit leading questions unless there is an actual objection.

2. Non-Responsive Answers

This is a common objection that requires prompt judicial intervention. Each witness brings his or her own unique personality into the courtroom. Some witnesses answer the question that was asked. Others behave like politicians in a debate setting, treating questions as an invitation to give any response that they feel like giving. For example:

Q. "Do you recall the weather conditions on January 7th?"

A. "Do you honestly expect me to recall the weather conditions on January 7th? I am lucky if I can recall what I had for breakfast this morning. I have to tell you, my memory is nowhere near where it once was. My Aunt Mary told me that this would happen, but I never believed it. Now, she had a memory that . . . ."

Q. "Please describe the manner in which the defendant exited the vehicle?"

A. "Well, prior to me asking her to exit the vehicle I asked her if she had been drinking, because I could smell a strong odor of an alcoholic beverage coming from the vehicle, and she said . . . ."

Some witnesses need to be judicially instructed that they are to answer the question that is asked and to refrain from making comments beyond the scope of the question. This is particularly the case where the witness might offer prejudicial

or inadmissible kinds of evidence such as hearsay, conjecture or opinion for which no foundation was laid, and which would otherwise be completely inadmissible. In some cases, it is the witness who is attempting to lead the questioner to ask a question that the witness wants to answer (or that the witness feels that the questioner forgot to ask).

A courtroom should be a highly disciplined environment conducted in accordance with the law. This kind of runaway witness should be judicially restrained as soon as possible. It may take a few patient admonishments to deliver the message that the witness must conform to proper courtroom procedure.

3. **Impeaching One's Own Witness**

The general rule is that a party cannot impeach his or her own witness. The exception is where the testimony concerns a material issue that tends to disprove your case.

Example: A prosecution witness has previously testified under oath that he saw the defendant shoot John in the head with a pistol. He now testifies that it was Bob, and not the defendant, who shot John. The ADA attempts to impeach his own witness by confronting him with his prior testimony. The defense objects on the ground that a party may not impeach its own witness.

CPL § 60.35(1) allows a party who called a witness to introduce evidence of a prior signed statement, or an oral statement taken under oath, which contradicts the witness' present testimony, *but only when* the witness' present testimony concerns "a material issue of the case which tends to disprove the position of such party." Accordingly, the ADA in the above example should be allowed to use the prior testimony to impeach the witness, since the central issue in the case is whether the defendant shot John.

Assume that the witness in the example denies giving the prior testimony, and that the transcript of the testimony is received into evidence. What use can the jury make of the prior sworn testimony?

CPL § 60.35(2) provides that the prior contradictory statement "may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon

receiving such evidence at a jury trial, the court must so instruct the jury."

Thus, the fact that the witness previously testified that the defendant shot John can be considered in regard to the witness' credibility. It cannot be used as evidence that the defendant shot John.

Basically, the ADA called the witness thinking that the witness would testify as he had before. The witness now surprises him by saying that Bob shot John. This not only deprives the ADA of the evidence that was expected, but tends to disprove the People's case. In other words, the law allows the ADA to use the prior testimony to show that the witness is unbelievable, but not to prove that the defendant did the shooting.

What if the witness' contradictory testimony involves something that hurts the People's case, but is not a material issue that tends to disprove their position? For example, what if the witness now testifies that the defendant used a shotgun to shoot John, whereas he had previously testified that the defendant used a pistol?

In this regard, CPL § 60.35(3) prohibits *the ADA* from introducing any evidence of the fact that there was a prior inconsistent statement. The ADA can use the prior testimony to refresh the recollection of the witness, but must do so in a manner that does not disclose the contents of the prior statement to the jury.

4. <u>Refreshing The Witness' Recollection</u>

Witnesses frequently cannot recall the information being requested. This is common because hearings and trials often occur months after the relevant events took place. Accordingly, witnesses are dependent upon their notes and documents that they previously prepared. It is, therefore, common for an attorney to seek to "refresh" the witness' recollection.

Q. "Officer, what color was the car that you stopped on January 7, 2011?"

A. "I don't recall."

Q. "Would anything refresh your recollection?"

A. "Yes, I wrote the color of the car down on the supporting deposition that I drafted that night."

Q. "Officer, I show you what has been marked as People's Exhibit 1 for identification, and ask you to tell the court what it is?"

A. "This is a copy of the supporting deposition that I just mentioned."

Q. "Would reviewing this document refresh your recollection with regard to the color of the car?"

A. "Yes, it would."

THE PEOPLE: Your Honor, I request that the witness be permitted to refresh his recollection with regard to the color of the car by reviewing his supporting deposition.

THE COURT: The witness may attempt to refresh his recollection by referring to his supporting deposition.

(People's Exhibit 1 is handed to the witness for his review)

Q. "Officer, have you refreshed your recollection with regard to the issue of color of the car?"

A. "Yes, I have."

(People's Exhibit 1 is removed from the witness' view after the witness indicates that his recollection has been refreshed. A witness may not read directly from a document unless the document has been admitted into evidence. However, this rule is commonly overlooked absent an objection to the witness reading from the document)

Q. "What color was the car?"

A. "Blue."

It should be emphasized that the document being used to refresh the officer's recollection is rarely placed into evidence -- and is in fact not evidence. Rather, it is merely being used for the purpose of refreshing the witness' recollection. Accordingly, the document will be marked for identification and identified so that there is a record of what was used. The document, itself, may not be received or read into evidence, and it must be clear that the witness' recollection was actually

refreshed (as opposed to the witness merely reading into the record something that the witness or someone else had written at a previous time).

Technically, literally anything can be used to refresh a witness' recollection. The critical issue is not what is used, but rather whether it truly refreshes the witness' memory. If a witness reviews the relevant exhibit but claims that his or her recollection is still not refreshed, the attorney can attempt to offer the witness' notes into evidence under the doctrine known as "past recollection recorded."

5. Past Recollection Recorded

Where a witness testifies that the witness has referred to his or her notes, but the notes nonetheless do not refresh the witness' recollection, the attorney can attempt to offer the witness' notes into evidence under the doctrine of "past recollection recorded." In order for a witness' notes to be introduced into evidence under this exception to the rule against hearsay, a proper foundation has to be laid; to wit, that the witness:

1. Observed the information recorded;

2. Recorded the information while his or her recollection was fairly fresh;

3. Can presently testify that the recorded information accurately reflected the witness' recollection when made; and

4. Lacks sufficient present recollection of the recorded information.

See People v. Taylor, 80 N.Y.2d 1, 8, 586 N.Y.S.2d 545, 548 (1992).

Critically, the fact that parts of a document are admissible as past recollection recorded does not mean that the entire contents of the document are admissible. In this regard, all of the other relevant rules of evidence apply.

To the extent that the document contains inadmissible material, opposing counsel can request that the document be redacted.

6. **Redaction**

Redaction is where only part of a document is admissible and other parts must be excluded. Essentially, the part that must be excluded is covered over (or otherwise removed), and the "redacted" document is thereafter copied. The copy is then received in evidence with the objectionable parts deleted.

Redaction of documents or videotapes is a relatively common occurrence; and it is not limited to situations dealing with "past recollection recorded."

Cross-Examination

In stark contrast with direct examination, a party conducting cross-examination may, and is indeed expected to, ask leading questions. It has been famously said that cross-examination is "beyond any doubt the greatest legal engine ever invented for the discovery of truth." 5 Wigmore, Evidence § 1367, at 32.

Unlike direct examination, which seeks to elicit information from the witness, cross-examination seeks to expose flaws in the witness' testimony.

> Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness.

Davis v. Alaska, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110 (1974).

Cross-examination can raise a multitude of challenges to the believability of a witness' direct testimony that are limited only by the talent and diligence of the cross-examiner. The integrity of the factfinding process is dependent upon the diligence of the attorneys in conducting both direct and cross-examination.

Factfinders, whether they be Judges or juries, are heavily dependent upon the credibility of the witnesses providing testimony. Factfinders want to be sure that the witnesses and the exhibits are reliable and trustworthy, and they want all evidence to be thoroughly tested before they rely on it in making a fair and impartial decision. Cross-examination is one of the key tools available to test that evidence. Thus, Judges should allow cross-examination to be rigorous. That, of course, does not mean that cross-examination may be harassing or repetitive, but any cross-examination that is not improper must be allowed.

1. Scope Of Cross-Examination

With certain exceptions, cross-examination is limited to the topics that were discussed on direct examination. When the cross-examiner starts asking questions with respect to topics that were not addressed on direct, opposing counsel will commonly make the following objection: "Objection, beyond the scope."

One exception to the general rule that cross-examination is limited to the scope of direct examination is the rule that a witness' credibility is always a proper subject of cross-examination. Thus, for example, the cross-examiner can always delve into a police officer's training and experience whether or not those topics were addressed on direct.

Another exception to the general rule is that "it is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination." People v. Kennedy, 70 A.D.2d 181, 186, 420 N.Y.S.2d 23, 26 (2d Dep't 1979).

2. Making The Witness Your Own

"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." People v. DeVecchio, 17 Misc. 3d 1114(a), 2007 WL 2994315, *2 (Kings County Supreme Ct. 2007). That said, if a party conducting cross-examination (other than a criminal defendant) seeks to question the witness on a topic that is beyond the scope of the direct examination, the court can allow the party to "make the witness his own." This is permissible so long as the information being sought is relevant to the issues in the case (and is otherwise admissible).

In such a situation, the witness is treated as if the cross-examiner had called the witness -- and the cross-examiner can no longer ask leading questions. And, ironically, the other party (*i.e.*, the party who had called the witness in the first place) can cross-examine the witness regarding the new topics. Thus, a party makes a witness his own at his peril.

3. The Hostile Witness

An exception to the rule that a party who calls a witness -- or who makes the witness his own -- must ask non-leading questions is where the witness has been declared "hostile." Hostile witnesses can be cross-examined on direct examination due to the fact their hostility to the party who called them eliminates any concern that such witnesses will be likely to merely agree with the questions put to them.

It should be noted that there is a critical distinction between a "hostile" witness and an "adverse" witness. The mere fact that a witness is adverse (e.g., the arresting officer in a criminal case), does not mean that the witness is hostile.

4. Badgering The Witness

This is an objection that is made when the examination becomes argumentative or emotional. The fact that the witness is not providing the expected answers does not justify an emotional reaction on the part of the attorney asking the questions.

Similarly, a lawyer should not be argumentative with a witness. Argument should be reserved for summation.

5. Impeachment With Prior Inconsistent Statement

This is one of the most common techniques used in cross-examination. Take the example of a witness in a motor vehicle accident case. At trial, the witness testifies that when Jessica drove through the intersection the light was red in her direction. Previously, however, the witness had signed a supporting deposition saying that the light was green in Jessica's direction. On cross-examination, Jessica's attorney might ask the following questions (all of which can be expected to result in a "yes" answer):

Q. "You testified on direct examination that the light was red for Jessica at the time of the accident?"

Q. "This accident happened almost a year ago?"

Q. "On the date of the accident, you met with the police?"

Q. "The police asked you to fill out a supporting deposition?"

Q. "You agreed to do so?"

Q. "You filled the supporting deposition out to the best of your ability?"

Q. "You filled it out thoroughly?"

Q. "You filled it out completely?"

Q. "You filled it out accurately?"

Q. "You reviewed it before you signed it?"

Q. "You made any changes that needed to be made?"

Q. "And then you signed it?"

Q. "Right below the line advising you that false statements made therein are a crime?"

Q. "So you were basically swearing to the truth of the contents of the document that you drafted?"

Q. "On the date when the events were still freshest in your mind?"

Q. "In the past year you've never made any attempt to change or revise your supporting deposition, have you?"

Q. "Isn't it true that your supporting deposition clearly states that the light was green in Jessica's direction?"

If the witness answers the final question "yes," that is usually the end of it. Note, however, that neither the supporting deposition nor the above testimony is evidence of what color the light actually was at the time of the accident. Rather, they are simply evidence that the witness has made a

prior statement that is inconsistent with the witness' trial testimony (which affects the witness' credibility).

If the witness answers the final question "I don't recall," then the supporting deposition should be marked as an exhibit and shown to the witness to refresh his or her recollection.

If the witness answers the final question "No," then the supporting deposition (minus any necessary redactions) should be received in evidence for impeachment purposes only (*i.e.*, not as direct evidence of the color of the light at the time of the accident).

(a) Exception to the Rule

In 1968, the Court of Appeals carved out an exception to the general rule that a prior inconsistent statement is admissible for impeachment, but not for the truth of the content of the statement. In a *New York Law Journal* article, dated August 4, 2011, Professor Michael J. Hutter cites three cases that carve out this exception: Letendre v. Hartford Acc. & Indem. Co., 21 N.Y.2d 518 (1968), Nucci v. Proper, 95 N.Y.2d 597 (2001), and Kaufman v. Quickway, Inc., 14 N.Y.3d 907 (2010).

Essentially, this exception allows a prior inconsistent statement to be used for the truth of its content, as well as for impeachment, if it meets certain criteria. Professor Hutter explains the criteria as articulated in Letendre cited above:

> Rather, the hearsay exception created in *Letendre* requires that the making of the statement be a testifying witness; that the prior statement be inconsistent with the witness' trial testimony; and that the prior statement possess "sufficient indicia" of reliability. Id. at 603-604.
>
> As to the last element, the court emphasized that the trial court must consider a wide variety of factors. The factors include 'spontaneity, repetition, the mental state of the declarant, absence of motive to fabricate, unlikelihood of faulty recollection, the degree to which the statement was against the [maker's] interest' and as well the status or relationship to the [maker] of the person to whom the statement was made, whether there was a coercive

> atmosphere, whether it was made in response to questioning, and whether the statements reflect an attempt to shift blame or curry favor. Id. at 603.
>
> The Court also noted the availability of the witness for cross-examination is 'only one component of this reliability' equation. Id. at 603.

6. Impeachment With Prior Conviction

Impeachment with a prior criminal conviction is similar to impeachment with a prior inconsistent statement. See CPL § 60.40. One difference is that where the witness denies the existence of the prior conviction, proof of the conviction may require a certified copy of a certificate of conviction or "rap sheet." See CPL § 60.60. The law strictly regulates the types of convictions that may be used for the purpose of impeaching a witness' credibility. Notably, a traffic infraction cannot be used to impeach a witness' credibility. See VTL § 155.

As with a prior inconsistent statement, the purpose of the impeachment is to show that the witness is not credible. Where the witness is the defendant in a criminal case, the general rule is that a prior conviction cannot be used to show that the defendant has a propensity or predisposition to commit the crime with which he or she is presently charged. For example, a defendant charged with DWI generally cannot be cross-examined about having been previously convicted of DWI.

The rationale is that the law requires that the jury render its verdict based solely upon the facts of the present case without being influenced by the fact that the defendant had previously been convicted of the same offense. In other words, allowing the jury to know that a DWI defendant was previously convicted of DWI would result in a substantial likelihood that the jury would unfairly convict the defendant in the present case even if the proof was legally insufficient.

There are situations, however, where prior convictions and/or "bad acts" may be admitted to negate a defense of innocent intent or mistake. For example, a single instance of a driveway repair business failing to honor its commitment to a customer could be construed as an isolated event. Where that same driveway repair business takes money from multiple customers and

similarly fails to honor its commitment, the pattern of behavior becomes relevant to proving a case of criminal fraud.

Where a defendant does have prior convictions, the court is routinely called upon to make a pre-trial ruling as to which, if any, of such convictions can be used for impeachment purposes in the event that the defendant chooses to take the stand. Unless the defendant takes the stand, evidence of prior crimes is generally inadmissible. This, of course, is because the prior convictions are only relevant for impeachment purposes, and impeachment is only an issue if the witness actually testifies.

There are, of course, exceptions. For example, if the defendant is charged with felony DWI, a certified copy of his or her prior DWI conviction(s) would have to be received in evidence in order to prove that the present charge was, indeed a felony -- since one or more prior DWI convictions within the past 10 years is a necessary element of a felony DWI charge.

Obviously, the introduction of such a prior conviction would have a highly prejudicial effect on a jury. Common sense dictates that a person who has committed DWI once is more likely to do it again (and is less worthy of being given the benefit of the doubt). As a result, the law provides a defendant in this type of situation with the option of admitting the predicate DWI conviction out of the presence of the jury (in which case the conviction cannot be brought to the jury's attention). See CPL § 200.60.

Insofar as convictions used for impeachment purposes are concerned, a criminal defendant is entitled to a copy of his or her "rap sheet." See CPL § 160.40(2). The burden is thereafter on the defense to inform the court of the prior conviction(s) it wishes suppressed, and to convince the court of their prejudicial effect. This is typically done at a pre-trial Sandoval hearing. See People v. Sandoval, 34 N.Y.2d 371, 357 N.Y.S.2d 849 (1974). A similar procedure exists for prior "bad acts" (*i.e.*, prior uncharged criminal vicious or immoral acts). See CPL § 240.43; People v. Ventimiglia, 52 N.Y.2d 350, 438 N.Y.S.2d 261 (1981).

There is a fairly comprehensive body of law in regard to whether and under what circumstances prior convictions and/or prior bad acts can be used to impeach a defendant's credibility if he or she chooses to testify at trial. The general idea is that the court must balance the People's right to impeach the defendant's credibility with the defendant's right to a fair trial based solely upon the evidence presented. In this regard, courts frequently "split the baby" and reach what is commonly

known as a "Sandoval compromise." In such a situation, the court allows the People to confront the defendant with the fact that he or she was convicted of a crime, but prohibits the People from divulging the nature of the crime or the facts thereof.

Re-Direct & Re-Cross Examination

The purpose of re-direct examination is to attempt to rebut or clarify issues that were raised on cross-examination. Re-direct examination is not supposed to be an opportunity to bring up topics that the attorney forgot to raise on direct examination. In other words, the scope of re-direct examination is generally limited to matters that were addressed on cross-examination. If the witness was impeached on cross-examination with a portion of a prior statement, the re-direct examination may attempt to introduce other parts of the statement that negate the inconsistency or put the prior statement into context.

Re-cross-examination is similarly limited to matters that were addressed on re-direct examination. Re-cross is not an opportunity to rehash the original cross-examination.

Where a lawyer believes that opposing counsel forgot to cover a crucial topic on direct examination, the lawyer may make a tactical decision to forego -- or to severely limit the scope of -- cross-examination in order to prevent the other lawyer from fixing the mistake on re-direct. Similarly, a lawyer may choose to forego re-direct examination in order to avoid giving his or her opponent a chance at re-cross examination.

The response "no questions" when a lawyer is given an opportunity for cross-examination can be very chilling. It may signal to opposing counsel that he or she has unwittingly made a fatal mistake. Opposing counsel also may have held back on a line of questioning figuring he or she could more effectively use it on re-direct examination. While a court does have discretion to allow a party to re-open its case or to recall a witness, this is rarely done.

Objections

1. Witness Objections

In recent years, witnesses have become more proactive than in the past. In the past, witnesses would generally confine their comments to directly responding to the questions that were

asked (absent requests for water, a bathroom break, or an expression of confusion as to the nature of the question). Today, it is becoming more and more common for witnesses to say things like: "Your Honor, do I have to answer all these questions? I thought this was a pre-trial hearing. I don't see how these questions are relevant."

Although this type of interjection is becoming more common, it remains as inappropriate as ever. This is an instance where judicial intervention is crucial. Neither lawyer should have to respond to that kind of outburst. It is the Judge who is charged with maintaining the order of the courtroom. The witness should be firmly admonished that any objections to the questions or the scope of the proceeding will be made by counsel or the court -- not from the witness stand. Unless instructed otherwise by the court, the witness should be directed to respond appropriately to the questions posed.

2. **Improper Comment**

COUNSEL: Objection, your Honor, counsel is attempting to mislead the jury.

OPPOSING COUNSEL: On the contrary, your Honor, it is my opponent who is attempting to mislead the jury by accusing me of deception.

Unfortunately, these kinds of arguments are made on a regular basis. One side or the other will accuse their opponent of having a bad motivation, or of attempts to deceive. Again, these kinds of comments threaten the order of the court and mandate immediate judicial response. If there is a jury present, the court should stop the proceeding and speak to the attorneys outside the hearing of the jury.

Counsel should be admonished that whatever they believe about each other is not evidence. The counsel's personality, character or motivation is irrelevant to the proceeding and any such comments should be made strictly outside the hearing of the jury. If counsel truly believes that opposing counsel is engaging in misconduct, they should request a recess and bring the matter to the attention of the court on the record but outside the hearing of the jury. This can be done by simply raising an objection and requesting to approach the bench.

Similarly, a lawyer's comments/objections should be directed to the bench (as opposed to opposing counsel). It is improper

for lawyers to engage in arguments with each other. There is no place for such personal comments, attacks or criticism in a courtroom. Where this type of behavior is taking place, the failure of the Judge to take action is itself inappropriate. In this regard, even if one of the lawyers wants to adhere to the rules of procedure, that lawyer may be forced to respond to the other attorney's inappropriate outbursts if the Judge does not immediately intervene and shut down the offending conduct. The lawyer feels compelled to respond to the specious assertions of his opponent in order to protect his client's best interests. This can result in a complete breakdown in court decorum.

The system cannot work properly unless the Judge maintains control of the process. Most lawyers will play by the rules so long as they know that the rules are being applied equally to both sides, and that the court is ready and willing to enforce its rulings. On the other hand, there are always a few lawyers whose strategy is to push boundaries as far as the court will let them; in which case the court must actively step in to avoid a complete loss of control.

3. Objection To The Form Of The Question

Objection to the form of the question is a general objection that can cover several different situations. As a result, the court may ask counsel to be more specific. One common objection to the form of the question is that the question assumes facts that are not in evidence. For example, the attorney might ask: "Would you tell the court what you saw while you were driving northbound on Interstate 87 on January 7, 2011, at approximately 4:00 PM?

If there has been no evidence to indicate the witness had, in fact, been driving, or driving Interstate 87, or driving northbound, or doing so on January 7, 2011 and/or at approximately 4:00 PM, then the question improperly places all of this information into evidence at the same time that it asks for the witness' observations. Accordingly, an objection to the form of the question would be proper. The remedy would be for the attorney to establish the underlying facts prior to asking what the witness saw.

The all-time classic example of this kind of question is: "When did you stop beating your wife?" Absent evidence of spousal abuse, this question is both objectionable and improper.

4. Compound Questions

An objection to the form of the question may be made when more than one question is being asked at the same time and the question is raised in a manner in which the answer would have the potential to be misleading. For example: "Did you graduate from college in 1980 and law school in 1983?" The question is compound because it asks two questions at once (*i.e.*, "Did you graduate from college in 1980?" and "Did you graduate from law school in 1983?"). It has the potential to be misleading because it calls for a "yes" or "no" answer which may need clarification. In the above example, if the witness in actuality graduated from college in 1980 and law school in 1984, the answer to the question would be "no" (even though, standing alone, the portion of the question dealing with the year of college graduation would have resulted in a "yes" answer).

5. Relevance

"Objection, your Honor, relevance." This is one of the most common objections that a Judge is called to rule upon. In order to be relevant, a question must seek an answer that is pertinent to an issue before the court.

Notably, a topic could be relevant to the case in general but yet be irrelevant to a proceeding within the case. For example, it is well settled that in determining whether probable cause existed for a defendant's arrest, evidence obtained subsequent to the arrest (such as incriminating statements, the results of witness interviews, the results of a chemical test, etc.) cannot be considered. See, e.g., People v. Loria, 10 N.Y.2d 368, 373, 223 N.Y.S.2d 462, 467 (1961).

Of course, every rule has an exception. For example, if there is a police station video in a DWI case, and the defendant appears sober on the video, the video might be considered relevant at a probable cause hearing if offered for the purpose of rebutting the arresting officer's claim that a few minutes earlier the defendant appeared highly intoxicated (since intoxication is not something that is turned on and off within a short period of time). In such a case, the video is relevant not for proof of what happened at the station, but rather to impeach the credibility of the arresting officer. Similarly, if the defendant is described as being a falling down drunk at the arrest scene, a low chemical test result may also be relevant.

Relevance is very much a judgment call that must be made by the Judge in the context of the facts of the particular case. Judges should be cautious when a relevance objection is made at trial, because the attorney who asked the question may defend it by making a mini-closing argument in front of the jury. While that argument may be entirely appropriate for the judge to hear, it is not yet time for the jurors to hear it. Thus, a side bar out of the hearing of the jurors is often the best place to resolve relevancy objections.

6. Opinion/Conclusion

This is a common objection that arises when a lay witness testifies as to his or her opinion, or to a conclusion, that the witness drew from his/her observations, as opposed to testifying to the observations themselves. As a general rule, a lay witness can only testify to facts -- the witness cannot render an opinion or conclusion that he or she believes should be drawn from those facts. For example:

Q. "Officer, please describe how the defendant walked to the rear of the vehicle?"

A. "The defendant needed to place his hand on the vehicle the entire time to keep his balance."

DEFENSE COUNSEL: Objection, your Honor, the witness is testifying as to a conclusion.

The problem with the answer is that the witness is claiming to know what the defendant "needed" to do as opposed to what the defendant did do. There could be any number of innocent explanations as to why the defendant placed his hand on the car that have nothing to do with the defendant "needing" to do it. In other words, the witness is putting a "spin" on what happened where he or she should merely testify as to what happened and let counsel draw reasonable inferences from the testimony in summation.

Essentially, admissible evidence lies in what the witness observed rather than what the witness thought about his or her observations. There are two exceptions to this rule. First, an expert witness can give an opinion. Second, where a proper foundation is laid, a lay witness can give an opinion regarding topics that don't require specialized knowledge or experience (such as matters of color, weight, size, quantity, light or darkness, taste, smell, touch, a person's apparent ethnicity,

emotional state, physical condition or level of intoxication, the apparent speed of a moving vehicle, etc.).

7. **Opinion Evidence**

Just as a lay witness generally cannot give an opinion that is properly the subject of expert testimony, an expert witness generally cannot give an opinion that is properly the subject of lay testimony. As a general rule, expert witness testimony is appropriate where the topic at issue is beyond the understanding of a typical juror and needs explanation by a person with specialized knowledge. Essentially, an expert witness tells the finder of fact what the evidence means.

There is a great deal of case law interpreting and limiting the testimony of expert witnesses. For example, even where an expert opinion is admissible, such opinion cannot invade or usurp the province of the jury. In other words, an expert witness generally cannot render an opinion on a so-called "ultimate issue" in the case. Simply stated, it is for the jury to decide whether the defendant is guilty, negligent, etc. -- not an expert witness.

Before an expert witness can render an opinion, a proper foundation must be laid demonstrating that he or she is, in fact, an expert (which is an entirely distinct concept from laying a proper foundation for the expert's opinion). Factors that may be elicited include the witness':

1. Education;

2. Training;

3. Professional licenses;

4. Professional organizations and positions held within those organizations;

5. Actual work experience within his or her field of expertise and positions held;

6. Professional recognition (e.g., awards and honors);

7. Teaching positions held;

8. Lectures and seminars given; and

9. Proceedings in which the witness was previously qualified as an expert witness.

8. **Bolstering**

"Bolstering" (a.k.a. "prior consistent statement") is where an attorney attempts to convince the factfinder that a statement is reliable by letting the factfinder know that the witness has previously made the same statement (e.g., in an arrest report). In effect, the attorney wants the factfinder to conclude that since the witness did not fabricate the claim for the first time on the witness stand, the claim is more likely to be true.

> A witness' trial testimony ordinarily may not be bolstered with pretrial statements. Several rationales underlie the rule: untrustworthy testimony does not become less so merely by repetition; testimony under oath is preferable to extrajudicial statements; and litigations should not devolve into contests as to which party could obtain the latest version of a witness' story.

People v. McDaniel, 81 N.Y.2d 10, 16, 595 N.Y.S.2d 364, 367 (1993) (citations omitted). See also People v. Borgia, 263 A.D.2d 553, 692 N.Y.S.2d 780 (3d Dep't 1999).

An exception to this rule exists where opposing counsel is attempting to demonstrate or infer that the witness has recently fabricated the testimony at issue. For example:

Q. "This accident occurred more than two years ago?"

A. "Correct."

Q. "And you are now telling us that the light was red?"

A. "Yes. The light was red."

Q. "Sir, you did not report this to the police on the day that you supposedly saw it two years ago, did you?"

A. "No, I didn't."

Q. "You did not report it to your employer at that time, did you?"

A. "No, I didn't."

Q. "In fact, you did not tell anyone that the light was red prior to your appearance in court, did you?"

A. "No."

On re-direct examination, the attorney who called the witness might ask:

Q. "It has been suggested that you have fabricated your testimony regarding the light being red because you didn't tell the police or your employer that it was red. However, did you write anything down in regard to the accident?"

A. "Yes."

Q. "What was that?"

A. "A motor vehicle accident report."

Q. "I show you Plaintiff's Exhibit 3 for identification. Do you recognize this document?"

A. "Yes."

Q. "What is it?"

A. "It is the accident report that I filled out in regard to this accident."

Q. "Q: When did you fill it out?"

A. "A few days after the accident."

Q. "After filling out the accident report, did you sign it?"

A. "I did."

Q. "When you signed it, did you realize that you were agreeing that if you made any false statements in the report it would be a crime?"

A. "Yes, I did."

Q. "Did you write anything down in the report about the color of the light?"

A. "Yes, I did."

Q. "What did you write?"

A. "I wrote that the light was red."

While this testimony would have been inadmissible on direct examination since it is self-serving and bolstering, it became admissible on re-direct for the purpose of rebutting the inference raised by opposing counsel that the witness had recently fabricated his testimony. The "recent fabrication rule" is a dangerous trap for the unwary attorney. It opens the door for the admission of otherwise inadmissible and very damaging evidence.

Note that the above testimony is not evidence that the light was, in fact, red. It is merely evidence that the witness did not recently fabricate his direct testimony. Even with a jury instruction to this effect, however, most jurors would tend to lend a lot of credence to the witness' testimony that the light was red; and, perhaps more importantly, that he is not a liar.

> Of course, not every inconsistency developed on cross-examination implies that the witness' testimony is perjurious. "Mere impeachment by proof of inconsistent statements does not constitute a charge that the witness' testimony is a fabrication."

People v. McDaniel, 81 N.Y.2d 10, 18, 595 N.Y.S.2d 364, 369 (1993) (citations omitted).

9. Referring To Document Not In Evidence

"Objection, your Honor, counsel is referring to a document not in evidence."

A document can be used to refresh a witness' recollection, and/or to impeach a witness' credibility, without the document itself being offered or received into evidence. The reason is that the document is not itself evidence or being offered into evidence. Rather, it is being used to refresh/impeach the witness. In fact, not only does a document not have to be introduced into evidence in order to be used to refresh/impeach,

but the document may contain a slew of inadmissible information that should not be available to the factfinder.

Accordingly, under these circumstances the above objection should be overruled.

Of course, the fact that the document is not being offered or received into evidence does not mean that it should not be shown to opposing counsel.

10. Objection To Admissibility Of Photographs

Before a photograph can be admitted into evidence, a proper foundation must be laid. A proper foundation requires testimony that the witness is familiar with the scene depicted in the photograph, and that the photograph constitutes a fair and accurate representation of what it appears to depict. For example:

Q. "I show you Defendant's Exhibit A for identification. Can you tell us what it is?"

A. "Yes, it is a picture of the front of the car right after the time of the accident."

Q. "How do you know that?"

A. "I am familiar with the car and I saw the accident."

Q. "Where were you when the picture was taken?"

A. "I was standing near the photographer."

Q. "When was the picture taken?"

A. "Within an hour after the accident happened."

Q. "Does the picture fairly and accurately depict the way the front of the car looked right after the accident."

A. "Yes."

The fact that a proper foundation has been laid does not necessarily mean that a photograph is automatically admissible. The photograph must be relevant to the issues in the case. In addition, a photograph can be ruled inadmissible if the court finds that its prejudicial effect upon the jury outweighs any

potential probative value that it might have. See, e.g., People v. LaPetina, 9 N.Y.3d 854, 840 N.Y.S.2d 890 (2007); People v. Wood, 79 N.Y.2d 958, 582 N.Y.S.2d 992 (1992).

11. Hearsay Evidence

"Objection, your Honor, this is hearsay."

The rule with regard to hearsay evidence is relatively simple. Exceptions to the rule are enormously complicated. Hearsay is, in effect, any statement made outside of the court that is offered in evidence as proof of the matter asserted. For example: "John told me that he saw the defendant bite Robert's ear off."

The primary problem with hearsay is that it is not cross-examinable. That is, the witness making the above statement may be highly credible, but that doesn't mean that John is. If the statement is admitted through the witness, as opposed to through John, then there is no ability to cross-examine it or otherwise challenge it in any meaningful way. For example, cross-examining the above "witness" will not provide any meaningful test of whether John did, in fact, see the defendant bite Robert's ear, the conditions under which the observation was allegedly made, whether John had a motive to implicate the defendant, etc.

A basic premise of the American adversarial system is that evidence must be cross-examined in the crucible of the courtroom before a finder of fact can properly evaluate it. The right to confront and cross-examine opposing witnesses is one of the cornerstones of the Constitution. It not only protects the rights of the citizen accused; it is fundamental to the maintenance of our system of justice, both civil and criminal.

That said, there are multiple exceptions to the rule against hearsay. The list that follows is by no means an attempt to handle this vast area of the law in a comprehensive manner.

12. Exceptions To Hearsay Rule

(a) Pre-Trial Suppression Hearings

Although hearsay is generally inadmissible at trial, hearsay is admissible at pre-trial suppression hearings. See CPL § 70.10(2); CPL § 710.60(4). However, the mere fact that hearsay is *admissible* does not necessarily mean that it will satisfy the

People's burden of proof. See, e.g., People v. Gonzalez, 80 N.Y.2d 883, 587 N.Y.S.2d 607 (1992); People v. Havelka, 45 N.Y.2d 636, 641, 412 N.Y.S.2d 345, 347 (1978); People v. Lypka, 36 N.Y.2d 210, 366 N.Y.S.2d 622 (1975).

In Gonzalez, the Court of Appeals held that:

> Although Detective Grossman's hearsay testimony was admissible (CPL 710.60[4]), it did not supply the necessary proof of consent. That Grossman, who had no personal knowledge of the relevant facts, testified truthfully as to what the detectives told him has no bearing on the pertinent issue of whether the other detectives' statements were true. Thus, the finding of the hearing court that Grossman was credible is irrelevant.

80 N.Y.2d at 885, 587 N.Y.S.2d at 608.

In Havelka, the Court of Appeals noted that:

> [T]he Appellate Division was correct in its initial determination that the People failed to justify the challenged search at the first suppression hearing. The People argue that the search of defendant was reasonable in light of the police communication received by Bassano because, although hearsay, the knowledge transmitted in a police radio communication is imputed to the receiver who is charged with that knowledge. But on a motion to suppress, the challenged police conduct can be sustained only by proof that the sender actually possessed the requisite knowledge or that the personal observations of the receiving officer justified the search. Assuming in this case that the police communication prima facie supported the police action taken, it was nevertheless incumbent on the People to produce the sending officer Sergeant Arlotta at the suppression hearing.

45 N.Y.2d at 641, 412 N.Y.S.2d at 347 (citations omitted).

Similarly, the Lypka Court found that:

> [W]here on a motion to suppress, a challenge to the receiver's action is made, the presumption of probable cause that originally cloaked that action disappears from the case. At that point, bare reliance on an unsubstantiated hearsay communication from the instigating officer or department will not suffice for probable cause. Ultimately, to sustain their burden at the suppression hearing, the People must demonstrate that the sender or sending agency itself possessed the requisite probable cause to act.

36 N.Y.2d at 214, 366 N.Y.S.2d at 625-26 (citations omitted). See also People v. Randall, 135 A.D.2d 915, 916, 522 N.Y.S.2d 314, 315 (3d Dep't 1987) ("As the Court of Appeals has held, probable cause cannot be established solely upon hearsay evidence").

(b) Prior Inconsistent Statements

The use of a prior inconsistent statement to impeach a witness is covered in a previous section of these materials. Interestingly, the use of a prior inconsistent statement to impeach a witness does not violate the rule against hearsay because a prior inconsistent statement used for this purpose is not hearsay. This is because a statement is only hearsay if it is offered as proof of the matter asserted. A prior inconsistent statement is not offered as proof of the matter asserted. Rather, it is simply evidence that the witness has made a prior statement that is inconsistent with the witness' trial testimony (which affects the witness' credibility).

(c) Admissions by a Party

Out-of-court admissions by a party to an action dealing with any material fact at issue in the action are admissible as an exception to the rule against hearsay. Although admissions are commonly referred to as "declarations against interest," there is a distinction between the two concepts. In this regard, a declaration against interest is always an admission, but an admission is not always a declaration against interest.

Similarly, in criminal cases there is a distinction between an admission and a confession -- which is a direct acknowledgment of guilt made by a criminal defendant (whereas an admission is

only circumstantial evidence of guilt). In this regard, a confession is always an admission, but an admission is not always a confession.

When an admission is offered into evidence against a party, that party has the right to offer an explanation or otherwise put the admission into context (if the party believes that the admission was taken out of context).

(d) Present Sense Impressions And Excited Utterances

Another exception to the rule against hearsay exists with regard to "present sense impressions" and "excited utterances." In this regard, in People v. Vasquez, 88 N.Y.2d 561, 574-76, 647 N.Y.S.2d 697, 702-04 (1996), the Court of Appeals summarized the exception as follows:

> The "present sense impression" exception is a close relative of the analytically similar "excited utterance" exception to the rule against the admission of hearsay. Indeed, both are members of a larger category of exceptions that were formerly grouped together and classified, inaptly, as res gestae. "Present sense impression" statements and "excited utterances" are both often loosely described, sometimes misleadingly, as "spontaneous" statements. The imprecise use of that adjective, however, should not be permitted to obscure the critical distinction between the two exceptions: the underlying reliability factor that justifies their admission.
>
> "Excited utterances" are the product of the declarant's exposure to a startling or upsetting event that is sufficiently powerful to render the observer's normal reflective processes inoperative. "Present sense impression" declarations, in contrast, are descriptions of events made by a person who is perceiving the event as it is unfolding. They are deemed reliable not because of the declarant's excited mental state but rather because the contemporaneity of the communication minimizes the opportunity for calculated misstatement as well as the risk

of inaccuracy from faulty memory. In our State, we have added a requirement of corroboration to bolster these assurances of reliability. Thus, while the key components of "excited utterances" are their spontaneity and the declarant's excited mental state, the key components of "present sense impressions" are contemporaneity and corroboration.

We have stated that the present sense impression exception is available when the statement describes or explains an event or condition and was "made while the declarant was perceiving the event or condition, *or immediately thereafter*." The italicized language, however, was meant to suggest only that the description and the event need not be precisely simultaneous, since it is virtually impossible to describe a rapidly unfolding series of events without some delay between the occurrence and the observer's utterance. The language in question was certainly not intended to suggest that declarations can qualify as present sense impressions even when they are made after the event being described has concluded. Indeed, we noted in Brown that the description of events must be made "substantially contemporaneously" with the observations.

Thus, although we recognize that there must be some room for a marginal time lag between the event and the declarant's description of that event, that recognition does not obviate the basic need for a communication that reflects a *present* sense impression rather than a recalled or recast description of events that were observed in the recent past. Without satisfaction of this requirement, the essential assurance of reliability -- the absence of time for reflection and the reduced likelihood of faulty recollection -- is negated and there is then nothing to distinguish the declaration from any other postevent out-of-court statement that is offered for the truth of its contents.

> The corroboration element of the present sense impression exception is more complex and concomitantly more difficult to delineate. The general idea, as we stated in Brown, is that there must be some independent verification of the declarant's descriptions of the unfolding events. Although we stated in People v. Brown that "there must be some evidence * * * that the statements sought to be admitted were made spontaneously and contemporaneously with the events described," we did not mean by that language that such proof would suffice to satisfy the entirely separate requirement that the content of the communication be corroborated by independent proof. Rather, we merely intended to reiterate the basic foundational requirements for admitting an out-of-court declaration purporting to be a "*present* sense impression." Accordingly, contrary to appellants' arguments here, the corroboration element cannot be established merely by showing that the declarant's statements were unprompted and were made at or about the time of the reported event.
>
> The extent to which the content of the declaration must be corroborated by extrinsic proof is, as we have previously said, dependent on the particular circumstances of the individual case. Because of the myriad of situations in which the problem may arise, it would not be productive to attempt to fashion a definitive template for general application. It is sufficient at this point to note that in all cases the critical inquiry should be whether the corroboration offered to support admission of the statement truly serves to support its substance and content.

(Citations omitted).

(e) Business Records

In litigation, the parties often desire to introduce written records into evidence in order to prove a point. Of course, the

contents of such documents constitute hearsay. However, with certain exceptions and with certain limitations, business records fall within a recognized exception to the rule against hearsay.

CPLR § 4518(a)

The primary statute dealing with the admission of business records is CPLR § 4518 (a.k.a. the business records rule). CPLR § 4518(a) provides, in pertinent part:

> (a) Generally. 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. An electronic record, as defined in [State Technology Law § 302], used or stored as such a 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. All other circumstances of the making of the memorandum or record, including lack of personal knowledge by the maker, may be proved to affect its weight, but they shall not affect its admissibility. The term business includes a business, profession, occupation and calling of every kind.

In order to lay a foundation that complies with CPLR § 4518(a), a live witness is required. The witness must establish the following:

1. that the record was made by a "business";

2. "that [the record] was made in the regular course of such business";

3. "that it was the regular course of such business to make [the record]";

4. that the record was made "at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter"; and

5. in the case of an electronic record, that "the exhibit is a true and accurate representation of such electronic record."

In addition, it must be demonstrated that "the record was made as a part of the duty of the person making it, or on information imparted by persons who were under a duty to impart such information." Johnson v. Lutz, 253 N.Y. 124, 128 (1930). See also Matter of Leon RR, 48 N.Y.2d 117, 122, 421 N.Y.S.2d 863, 866-67 (1979).

Once this foundation has been laid, the attorney offering the document into evidence should hand the document to his or her opponent. At that time, the opposing attorney may interpose various objections, ranging from whether the document falls within the framework of CPLR § 4518 to whether various information in the document is inadmissible for some other reason.

Critically, the mere fact that some portion of a document is admissible does not mean that every single thing written in the document is admissible. Similarly, the mere fact that CPLR § 4518 is satisfied does not mean that a document is automatically admissible. In this regard, all of the other rules of evidence still apply. See, e.g., Bostic v. State of New York, 232 A.D.2d 837, 839, 649 N.Y.S.2d 200, 201-02 (3d Dep't 1996); People v. Tortorice, 142 A.D.2d 916, 918, 531 N.Y.S.2d 414, 416 (3d Dep't 1988).

CPLR § 4518(c)

While a foundation under CPLR § 4518(a) requires live witness testimony, CPLR § 4518(c) provides an exception in the case of "certified" hospital, library and government records. In this regard CPLR § 4518(c) provides, in pertinent part:

> (c) Other records. All records, writings and other things referred to in [CPLR §§] 2306 and 2307 are admissible in evidence under this rule and are prima facie evidence of the facts contained, provided they bear 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.

A proper CPLR § 4518(c) certification provides the proponent of a document with two significant benefits: (1) a live witness is not required to lay a CPLR § 4518(a) foundation, and (2) a document properly certified pursuant to CPLR § 4518(c) not only is admissible over a hearsay objection but, more importantly, constitutes "prima facie evidence of the facts contained" therein.

> In order to take advantage of CPLR 4518(c), the proponent must ensure that the certification of the record is properly made. The persons authorized by the statute to make the certification are either the head of the organization whose records are in question, any employee of the organization to whom the task of certification has been delegated, or a qualified physician. (The latter authorization presumably covers medical records or laboratory reports in cases where a physician is not employed by the facility).
>
> The certificate will serve to authenticate the record, *i.e.*, establish its genuineness. But the certificate must do more than this. The contents of the certification must demonstrate that the requirements of subdivision (a) of CPLR 4518 have been met, *i.e.*, that the record was made in the regular course of business, that it was the regular course of the business to make a record of this type and that the record was made at or about the time of occurrence of the event recorded. In other words, the elements of the business records hearsay exception must still be demonstrated; the certification procedure of subdivision (c) merely dispenses with the need for in-court foundation

> testimony. The certificate must contain the same information that would be provided by a witness if the record were being sponsored through live testimony.

Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR § 4518, at 469-70 (citation omitted). See generally People v. Gower, 42 N.Y.2d 117, 121, 397 N.Y.S.2d 368, 370 (1977) ("It would seem that the requirements of CPLR 4518 could very easily be met and thus its benefits be realized by the prosecution"); People v. Mertz, 68 N.Y.2d 136, 506 N.Y.S.2d 290 (1986).

Crawford v. Washington

In addition, in criminal cases the Confrontation Clause of the 6th Amendment may bar the introduction into evidence of a document that would be admissible in a civil case. See Crawford v. Washington, 541 U.S. 36, 124 S.Ct. 1354 (2004). In Crawford, the Supreme Court held that the Confrontation Clause prohibits the use of "testimonial" evidence against the defendant at trial unless (a) the declarant is unavailable, *and* (b) the defendant had a prior opportunity to cross-examine him or her. Id. at 68, 124 S.Ct. at 1374.

Admission of the following documents at trial has been found to violate Crawford:

1. A blood test result. See Bullcoming v. New Mexico, ___ U.S. ___, 131 S.Ct. 2705 (2011); People v. Rogers, 8 A.D.3d 888, ___, 780 N.Y.S.2d 393, 397 (3d Dep't 2004);

2. A VTL § 214 "Affidavit of Regularity/Proof of Mailing" of a DMV employee. See People v. Pacer, 6 N.Y.3d 504, 814 N.Y.S.2d 575 (2006); People v. Darrisaw, 66 A.D.3d 1427, 886 N.Y.S.2d 315 (4th Dep't 2009); People v. Wolters, 41 A.D.3d 518, 838 N.Y.S.2d 117 (2d Dep't 2007); People v. Capellan, 6 Misc. 3d 809, ___, 791 N.Y.S.2d 315, 316 (N.Y. City Crim. Ct. 2004);

3. A "Latent Print Report." People v. Hernandez, 7 Misc. 3d 568, ___, 794 N.Y.S.2d 788, 789 (N.Y. County Supreme Ct. 2005); and

4. A lab report stating that a substance was cocaine. See Melendez-Diaz v. Massachusetts, 557 U.S. ___, 129 S.Ct. 2527 (2009).

Courts have reached differing conclusions as to whether the documents typically used to lay a foundation for the admission of a defendant's breath test results (e.g., Breath Test Instrument Record of Inspection/Maintenance/Calibration, Simulator Solution Certificate of Analysis) fall within the ambit of Crawford. However, the majority view is that such documents are *not* covered by Crawford. See, e.g., People v. Lebrecht, 13 Misc. 3d 45, 823 N.Y.S.2d 824 (App. Term, 9th & 10th Jud. Dist. 2006).

Notably, in footnote 1 of its decision in Melendez-Diaz, *supra*, the Supreme Court commented that:

> Contrary to the dissent's suggestion, we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, *or accuracy of the testing device*, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," this does not mean that everyone who laid hands on the evidence must be called. As stated in the dissent's own quotation from United States v. Lott, "gaps in the chain [of custody] normally go to the weight of the evidence rather than its admissibility." It is up to the prosecution to decide what steps in the chain of custody are so crucial as to require evidence; but what testimony is introduced must (if the defendant objects) be introduced live. *Additionally, documents prepared in the regular course of equipment maintenance may well qualify as nontestimonial records*.

557 U.S. at ___ n.1, 129 S.Ct. at 2532 n.1 (emphases added) (citations omitted).

In addition, Courts have made clear that the 6th Amendment right of confrontation is essentially a trial right, and thus that Crawford is inapplicable to various pre-trial and post-conviction proceedings. See, e.g., People v. Brink, 31 A.D.3d 1139, 818 N.Y.S.2d 374 (4th Dep't 2006) (Crawford inapplicable to pre-trial suppression hearing); People v. Williams, 30 A.D.3d 980, 818 N.Y.S.2d 694 (4th Dep't 2006) (6th Amendment right of confrontation inapplicable to sentencing proceedings).

(f) Records Made By Public Officers

Where records are made by public officers, CPLR § 4520 provides that:

> Where 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 Practice Commentaries to this statute provide, in pertinent part:

> Courts have been very strict in applying CPLR 4520. To fall within CPLR 4520, the public record must meet several requirements: (1) the record must be made by a public officer; (2) it must be in the form of a "certificate" or "affidavit"; (3) the record must be required or authorized "by special provision of law"; (4) it must be made in the course of the officer's official duty; (5) it must be a record of a fact ascertained or an act performed by the officer; and (6) it must be on file or deposit in a public office of the state. Only a few types of formal public records have been deemed to meet all of these criteria. [An example is] a certificate of conviction issued by a criminal court clerk.

Alexander, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR § 4520, at 664 (citation omitted).

Physician-Patient Privilege

As a general rule, the physician-patient privilege protects the confidentiality of various information obtained by medical personnel in the course of treating a patient. However, there are a variety of exceptions to the privilege, as well as information not covered by the privilege. In addition, the privilege can be waived. Furthermore, in light of People v. Greene, 9 N.Y.3d 277, 849 N.Y.S.2d 461 (2007), it appears that

evidence obtained as the fruit of a violation of the physician-patient privilege will no longer be suppressible in criminal cases.

The physician-patient privilege is codified in CPLR § 4504(a), which provides, in pertinent part:

> **Confidential information privileged.** Unless the patient waives the privilege, a person authorized to practice medicine, registered professional nursing, licensed practical nursing, dentistry, podiatry or chiropractic shall not be allowed to disclose 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.

The Court of Appeals has made clear both:

(a) That "we have frequently stated that the physician-patient privilege is to be given a '"broad and liberal construction to carry out its policy."'" People v. Sinski, 88 N.Y.2d 487, 492, 646 N.Y.S.2d 651, 653 (1996) (citations omitted); and

(b) That "we have narrowly construed statutes limiting the privilege and rejected claims that there is a general public interest exception to CPLR 4504." Id. at 492, 646 N.Y.S.2d at 653. See also Dillenbeck v. Hess, 73 N.Y.2d 278, 289, 539 N.Y.S.2d 707, 714 (1989); Matter of Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 136, 463 N.Y.S.2d 758, 761 (1983).

Although the physician-patient privilege is codified in the CPLR, it is made applicable to criminal proceedings by CPL § 60.10, which provides that "[u]nless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings." See People v. Al Kanani, 33 N.Y.2d 260, 264 n.*, 351 N.Y.S.2d 969, 971 n.* (1973).

The Court of Appeals has repeatedly made clear that "[t]he privilege applies not only to information communicated orally by the patient, but also to 'information obtained from observation of the patient's appearance and symptoms, unless the facts observed would be obvious to laymen.'" Dillenbeck, *supra*, 73

N.Y.2d at 284, 539 N.Y.S.2d at 711 (citation omitted). See also Matter of Grand Jury Investigation in N.Y. County, 98 N.Y.2d 525, 531, 749 N.Y.S.2d 462, 465-66 (2002); Matter of Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 135, 463 N.Y.S.2d 758, 760 (1983); People v. Decina, 2 N.Y.2d 133, 144-45, 157 N.Y.S.2d 558, 569 (1956).

The physician-patient privilege "does not apply to 'such ordinary incidents and facts as are plain to the observation of any one without expert or professional knowledge.'" People v. Greene, 9 N.Y.3d 277, 280, 849 N.Y.S.2d 461, 462 (2007) (citation omitted). See also Matter of Grand Jury Investigation in N.Y. County, 98 N.Y.2d 525, 530-31, 749 N.Y.S.2d 462, 465 (2002); Matter of Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 134, 463 N.Y.S.2d 758, 760 (1983); People v. Hedges, 98 A.D.2d 950, ___, 470 N.Y.S.2d 61, 62 (4th Dep't 1983) ("The physician's observations that there was a strong odor of alcohol on defendant's breath, that the defendant's speech was slurred and disjointed and that the defendant was 'extremely intoxicated' could have been made by a lay person and did not depend upon any confidential communication by the defendant. They thus were not privileged"); People v. Beneway, 148 Misc. 2d 177, ___, 560 N.Y.S.2d 96, 98 (Columbia County Ct. 1990) (same).

With regard to the issue of blood tests, the courts have drawn a distinction between blood test *results* -- which are covered by the privilege, see Dillenbeck, *supra*, 73 N.Y.2d at 284 n.4, 539 N.Y.S.2d at 711 n.4; People v. Petro, 122 A.D.2d 309, 504 N.Y.S.2d 67 (3d Dep't 1986); People v. Bashkatov, 13 Misc. 3d 1101, 827 N.Y.S.2d 594 (N.Y. City Crim. Ct. 2006), and the blood sample itself -- which apparently is not. See People v. Elysee, 49 A.D.3d 33, 847 N.Y.S.2d 654 (2d Dep't 2007), aff'd on other grounds, 12 N.Y.3d 100, 876 N.Y.S.2d 677 (2009); People v. Drayton, 56 A.D.3d 1278, ___, 867 N.Y.S.2d 825, 826 (4th Dep't 2008); People v. Bolson, 183 Misc. 2d 155, ___-___, 701 N.Y.S.2d 828, 832-33 (Queens County Supreme Ct. 1999).

There are many statutory exceptions to the physician-patient privilege. For example:

1. CPLR § 4504(b) (respecting disclosure of dental identification data and information concerning a victim of crime under age 16);

2. CPLR §§ 4504(b), (c) (respecting information as to the mental or physical condition of a deceased patient);

3. Family Court Act § 1046(a)(vii) (no privilege in proceedings for child abuse or neglect);

4. Social Services Law § 384-b(3)(h) (providing that the privilege affords no ground for exclusion of evidence in proceedings for guardianship and custody of destitute or dependent children);

5. Social Services Law §§ 384-b(3)(h), 413, 415 (providing that cases of suspected child abuse or maltreatment must be reported in writing and that such reports are admissible in any proceedings relating to child abuse or maltreatment);

6. Mental Hygiene Law § 81.09(d) (allowing for inspection of medical records of an alleged incapacitated person);

7. Public Health Law § 2101(1) (requiring disclosure of communicable disease);

8. Public Health Law §§ 2101(1), 2785(2) (providing that a court may grant an order for the disclosure of HIV-related information upon an application showing a "compelling need" in judicial proceedings);

9. Public Health Law § 3373 (abrogating the privilege as to controlled substances);

10. Penal Law § 265.25 (making it a misdemeanor for a doctor or hospital to fail to report a wound "caused by discharge of a gun or firearm" or "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 or pointed instrument"); and

11. Penal Law § 265.26 (requiring hospitals and medical professionals to report certain cases of serious burns).

See People v. Sinski, 88 N.Y.2d 487, 491-92, 646 N.Y.S.2d 651, 653 (1996). See also Matter of Grand Jury Investigation in N.Y. County, 98 N.Y.2d 525, 532, 749 N.Y.S.2d 462, 466 (2002); Matter of Grand Jury Investigation of Onondaga County, 59 N.Y.2d 130, 136, 463 N.Y.S.2d 758, 760 (1983).

Waiver Of Privilege

As a general rule, where a person affirmatively places his or her medical condition into issue in a case, the person waives the physician-patient privilege. See, e.g., People v. Al Kanani, 33 N.Y.2d 260, 264-65, 351 N.Y.S.2d 969, 971 (1973); Koump v. Smith, 25 N.Y.2d 287, 294, 303 N.Y.S.2d 858, 864 (1969).

Notably, however, in Dillenbeck v. Hess, 73 N.Y.2d 278, 287-88, 539 N.Y.S.2d 707, 713-14 (1989), the Court of Appeals held that:

> [A] party does not waive the privilege whenever forced to defend an action in which his or her mental or physical condition is in controversy. In order to effect a waiver, the party must do more than simply deny the allegations in the complaint -- he or she must affirmatively assert the condition "either by way of counterclaim or to excuse the conduct complained of by the plaintiff."

(Citation and footnote omitted). See also id. at 289, 539 N.Y.S.2d at 714; Lopez v. Oquendo, 262 A.D.2d 24, ___, 690 N.Y.S.2d 584, 585 (1st Dep't 1999).

In DWI cases, counsel must be careful to avoid waiving the privilege during cross-examination of the arresting officer(s). In this regard, in People v. Gonzalez, 239 A.D.2d 931, ___, 659 N.Y.S.2d 591, 592 (4th Dep't 1997), the Appellate Division, Fourth Department, held that:

> [D]efendant waived the privilege by placing his medical condition in issue during cross-examination of a police officer who observed defendant and spoke to him at the hospital. Defendant's reliance on People v. Osburn, 155 A.D.2d 926, 547 N.Y.S.2d 749, is misplaced. In that case, the cross-examination of a prosecution witness was undertaken only to show that defendant did not voluntarily consent to a blood test. Here, in contrast, defense counsel attempted to show through cross-examination that the appearance of defendant was the result of his injuries instead of intoxication.

(Citations omitted). See also People v. Centerbar, 80 A.D.3d 1008, ___, 914 N.Y.S.2d 784, 787 (3d Dep't 2011) ("while defendant's hospital medical records were privileged (see CPLR 4504[a]), he placed his physical and mental condition at the time of his consent -- as well as his condition before and after -- directly in issue by calling the emergency room treating physician to testify regarding his ability to consent, thereby waiving the privilege").

Similarly, in People v. Feldmann, 110 A.D.2d 906, ___, 488 N.Y.S.2d 455, 456 (2d Dep't 1985), the Appellate Division, Second Department, held that:

> [T]he trial court properly admitted the hospital records into evidence on the basis that defendant waived his physician-patient privilege through his attorney's cross-examination of Police Officers Smith and Graziose. On his cross-examination of Smith and Graziose, defense counsel questioned the officers about the defendant's subsequent treatment (i.e., the fact that a laceration of defendant's chin required over 200 stitches), in an apparent attempt to elicit evidence that defendant's condition at the scene was due to his injuries and not due to intoxication. Thus, defendant by affirmatively placing his physical condition at issue, waived his physician-patient privilege.

See also People v. O'Connor, 290 A.D.2d 519, ___, 738 N.Y.S.2d 55, 56 (2d Dep't 2002) ("Supreme Court correctly advised the defendant that he would waive the physician-patient privilege if he affirmatively placed his medical condition at issue"); People v. Bolson, 183 Misc. 2d 155, ___, 701 N.Y.S.2d 828, 833 (Queens County Supreme Ct. 1999) (same). See generally People v. Kral, 198 A.D.2d 670, ___, 603 N.Y.S.2d 1004, 1005 (3d Dep't 1993) (although People improperly subpoenaed defendant's hospital records, defendant ultimately waived physician-patient privilege, thereby rendering the violation harmless); People v. Conklin, 72 A.D.2d 607, 421 N.Y.S.2d 113 (2d Dep't 1979).

By contrast, in People v. Osburn, 155 A.D.2d 926, 547 N.Y.S.2d 749 (4th Dep't 1989), the Fourth Department held that:

> The court erred . . . in concluding that defendant waived the physician-patient

> privilege by cross-examining certain witnesses about her physical condition and in admitting the hospital's diagnostic test. "[A] party does not waive the privilege whenever forced to defend an action in which his or her mental or physical condition is in controversy." The cross-examination regarding defendant's condition at the hospital was undertaken to show that her consent to the blood test taken at the request of the police was involuntary, and not to excuse her conduct or to show that her appearance was the result of her injuries instead of intoxication.

(Citation omitted).

In addition, in People v. Carkner, 213 A.D.2d 735, ___-___, 623 N.Y.S.2d 350, 353-54 (3d Dep't 1995), the defendant:

> [R]aised the issue of whether he was the person from whom the blood sample was drawn by referring to certain discrepancies on a form from his hospital records by which the police requested that the blood sample be taken. The form contained no confidential information, and the question of whether defendant was the person from whom the blood sample was drawn has nothing to do with defendant's physical or mental condition. By raising the identity issue, defendant "opened the door" to permit introduction of evidence relevant to the identity issue. He did not, however, affirmatively put his physical or mental condition in issue so as to waive the physician-patient privilege with regard to all of the confidential information contained in the hospital records. The confidential information should not, therefore, have been admitted into evidence over defendant's objection. We also note that although defendant's medical condition was clearly at issue from the outset insofar as the injuries he sustained in the accident are relevant to his position in the vehicle, defendant's mere denial that he was driving is insufficient to constitute the type of affirmative conduct

> necessary to waive the physician-patient privilege.

(Citation omitted).

* * * * * * * * * *

In People v. Greene, 9 N.Y.3d 277, 279, 849 N.Y.S.2d 461, 461 (2007), 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." See also People v. Drayton, 56 A.D.3d 1278, ___, 867 N.Y.S.2d 825, 826 (4th Dep't 2008); People v. Bryant, 73 A.D.3d 1442, ___, 900 N.Y.S.2d 810, 811 (4th Dep't 2010).

By contrast, in Matter of Miguel M., 17 N.Y.3d 37, 45, 926 N.Y.S.2d 371, 376 (2011), the Court of Appeals held that:

> It is one thing to allow the use of evidence resulting from an improper disclosure of information in medical records to prove that a patient has committed a crime; it is another to use the records themselves, or their contents, in a proceeding to subject to unwanted medical treatment a patient who is not accused of any wrongdoing. Using the records in that way directly impairs, without adequate justification, the interest protected by HIPAA and the Privacy Rule: the interest in keeping one's own medical condition private. We therefore hold that medical records obtained in violation of HIPAA or the Privacy Rule, and the information contained in those records, are not admissible in a proceeding to compel [assisted outpatient treatment].

Pre-Trial Hearings

Local criminal courts are frequently required to conduct pre-trial hearings. While the purpose of a pre-trial hearing is most often to determine the admissibility of evidence, the hearing will also frequently result in the resolution of the entire case. There are many reasons for this. First of all, since lawyers -- particularly prosecutors and public defenders -- typically handle a high volume of cases, neither side tends to look closely at a particular case until it is required to do so.

The pre-trial hearing is just such an occasion. Consequently, immediately prior to the hearing the court is presented with two attorneys who are generally up to speed with regard to their case. As a result, this is perhaps the best opportunity for a Judge to conference the case with a view towards resolving it.

If the case is not resolved at a pre-hearing conference, the hearing will typically reveal various strengths and weaknesses in each party's position that were not previously apparent. Accordingly, it is not uncommon for cases to resolve in the middle of, or shortly following, the completion of a pre-trial hearing.

If the hearing is going forward, the Judge should start by announcing for the record the court, the parties, the date, the time and the nature of the hearing(s) to be conducted. Pre-trial hearings involving the same subject matter and the same witnesses should generally be conducted at the same time. Accordingly, it is common for Huntley, Dunaway and Mapp hearings to be held at the same time, and for Sandoval and Ventimiglia hearings to be held at the same time.

***Huntley/Dunaway/Mapp* Hearings**

One of the most common decisions issued by local criminal courts in response to pre-trial motions is to order the holding of a so-called Huntley/Dunaway/Mapp hearing.

***Huntley* Hearing**

A Huntley hearing derives from People v. Huntley, 15 N.Y.2d 72, 255 N.Y.S.2d 838 (1965), which itself derives from the Supreme Court's decision in Jackson v. Denno, 378 U.S. 368, 84 S.Ct. 1774 (1964). Pursuant to Huntley/Denno, where the People wish to use a defendant's statements against him or her at trial, and the defendant claims that the statements were involuntary, the court *must* hold a pre-trial hearing addressing this issue.

In this regard, the Court of Appeals has made clear that "there *must* be a hearing whenever defendant claims his statement was involuntary no matter what facts he puts forth in support of that claim." People v. Weaver, 49 N.Y.2d 1012, 1013, 429 N.Y.S.2d 399, 399 (1980). See also CPL § 710.60(3)(b); People v. Jones, 95 N.Y.2d 721, 725 n.2, 723 N.Y.S.2d 761, 764 n.2 (2001); People v. Mendoza, 82 N.Y.2d 415, 421-22, 604 N.Y.S.2d 922, 924 (1993).

At a Huntley hearing, the People bear the burden of proving the voluntariness of the defendant's alleged statements, and the issue of voluntariness must be proven beyond a reasonable doubt. Huntley, 15 N.Y.2d at 78, 255 N.Y.S.2d at 843-44.

In terms of the scope of the Huntley hearing, in People v. Misuis, 47 N.Y.2d 979, 981, 419 N.Y.S.2d 961, 962-63 (1979), the Court of Appeals held that:

> Clearly, statements obtained by exploitation of unlawful police conduct or detention must be suppressed, for their use in evidence under such circumstance violates the Fourth Amendment (Dunaway v. New York, ___ U.S. ___, 99 S.Ct. 2248, 60 L.Ed.2d 824). It is therefore "incumbent upon the suppression court to permit an inquiry into the propriety of the police conduct." Unless the People establish that the police had probable cause to arrest or detain a suspect, and unless the defendant is accorded an opportunity to delve fully into the circumstances attendant upon his arrest or detention, his motion to suppress should be granted.

(Quoting People v. Wise, 46 N.Y.2d 321, 329, 413 N.Y.S.2d 334, 339 (1978)) (footnote omitted). See also People v. Chaney, 253 A.D.2d 562, ___, 686 N.Y.S.2d 871, 873 (3d Dep't 1998); People v. Sanchez, 236 A.D.2d 243, ___, 653 N.Y.S.2d 563, 564-65 (1st Dep't 1997).

In other words, while a Huntley hearing is geared towards addressing the voluntariness of the defendant's statements, unless the defendant fails to challenge the lawfulness of his or her arrest, the hearing is also required to address this issue as well. In this regard, in Misuis the Court of Appeals reversed the Appellate Division and remitted the case for a probable cause hearing where:

> At the hearing on defendant's motion to suppress [various] admissions, his counsel repeatedly attempted to interrogate the two officers in an effort to discover whether the police had probable cause to make the arrest. His avowed intention was to show that the detention was unlawful and thus any statements made as a result of the claimed unlawful arrest and detention tainted any

> admissions. However, at the insistent urging of the prosecutor the court refused to permit that inquiry and permitted only questions concerning the voluntariness of the statements themselves.

47 N.Y.2d at 980, 419 N.Y.S.2d at 962.

The same conclusion was reached in People v. Whitaker, 79 A.D.2d 668, ___, 433 N.Y.S.2d 849, 850 (2d Dep't 1980):

> As the People concede, the suppression court erred in severely limiting the defendant's cross-examination of the sole arresting officer who testified, with respect to the issue of whether there was probable cause to arrest defendant. It is well-settled that on a motion to suppress a defendant's postarrest statements, the suppression court is required to permit the defendant to "delve fully into the circumstances attendant upon his arrest", for "[a] statement, voluntary under Fifth Amendment standards, will nevertheless be suppressed if it has been obtained through the exploitation of an illegal arrest."

(Citations omitted). See also People v. Lopez, 56 A.D.3d 280, 867 N.Y.S.2d 83 (1st Dep't 2008); People v. Roberts, 81 A.D.2d 674, 441 N.Y.S.2d 408 (2d Dep't 1981); People v. King, 79 A.D.2d 1033, 437 N.Y.S.2d 931 (2d Dep't 1981); People v. Specks, 77 A.D.2d 669, 430 N.Y.S.2d 157 (2d Dep't 1980). See generally People v. Gonzalez, 71 A.D.2d 775, ___, 419 N.Y.S.2d 322, 323-24 (3d Dep't 1979).

Ironically, although there is often a significant amount of time and energy spent litigating the issue of whether the defendant is entitled to a Dunaway (*i.e.*, probable cause) hearing, a Huntley hearing is in essence a probable cause hearing regardless of whether it is formally denominated as such (unless the defendant fails to challenge the lawfulness of his or her arrest). See, e.g., People v. Purcelle, 282 A.D.2d 824, ___, 725 N.Y.S.2d 106, 107 (3d Dep't 2001) ("defendant never requested a probable cause or Dunaway hearing as part of his omnibus motion or otherwise. While he moved for and obtained Wade, Huntley and Sandoval hearings and rulings, defendant's suppression motion did not allege or refer to the claimed illegality of his arrest and, accordingly, that issue did not arise and was not decided at the suppression hearing") (citation omitted).

***Dunaway* Hearing**

A Dunaway hearing derives from Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248 (1979), and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254 (1975). A Dunaway hearing is also known as a probable cause hearing.

Simply stated, an arrest is unlawful if it is not supported by probable cause. Probable cause means that it is more likely than not that the defendant committed the crime:

> In passing on whether there was probable cause for an arrest, . . . it must appear to be at least more probable than not that a crime has taken place and that the one arrested is its perpetrator, for conduct equally compatible with guilt or innocence will not suffice.

People v. Carrasquillo, 54 N.Y.2d 248, 254, 445 N.Y.S.2d 97, 100 (1981). See also CPL § 70.10(2). As an example, if the People's evidence was placed on a scale, the scale would have to tip in their favor in order to constitute probable cause.

***Mapp* Hearing**

A Mapp hearing derives from Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684 (1961). A Mapp hearing is also known as a suppression hearing. Mapp provides that "*all* evidence obtained by searches and seizures in violation of the Constitution is, by that same authority, inadmissible in a state court." 367 U.S. at 655, 81 S.Ct. at 1691 (emphasis added). "All evidence" means *all* evidence. See, e.g., People v. Thomas, 164 Misc. 2d 721, ___, 626 N.Y.S.2d 405, 407-08 (N.Y. City Crim. Ct. 1995) ("The doctrine of the 'fruit of the poisonous tree' . . . is not limited to suppression of physical tangible evidence but applies as well to evidence which flows from the illegal seizure and search, such as verbal statements, identifications, tests performed upon the defendant, and testimony at trial as to matters observed during the unlawful intrusion"); People v. Johnson, 134 Misc. 2d 474, ___, 511 N.Y.S.2d 773, 774-75 (N.Y. City Crim. Ct. 1987) ("the Court holds that a breathalyzer test result is evidence as contemplated by Mapp v. Ohio, (supra) and CPL Section 710.60. It is, in fact, significant evidence and may not be proferred [sic] if it is the result of an illegal search").

The burden of proof at a Mapp hearing is as follows:

> [W]here a defendant challenges the admissibility of physical evidence or makes a motion to suppress, he bears the ultimate burden of proving that the evidence should not be used against him . . . . The People must, of course, always show that police conduct was reasonable. Thus, though a defendant who challenges the legality of a search and seizure has the burden of proving illegality, the People are nevertheless put to "the burden of *going forward* to show the legality of the police conduct in the first instance." These considerations require that the People show that the search was made pursuant to a valid warrant, consent, incident to a lawful arrest, or, in cases such as those here, that no search at all occurred because the evidence was dropped by the defendant in the presence of the police officer.

People v. Berrios, 28 N.Y.2d 361, 367-68, 321 N.Y.S.2d 884, 888-89 (1971) (citations omitted).

***Rosario* Material**

In People v. Rosario, 9 N.Y.2d 286, 213 N.Y.S.2d 448 (1961), the Court of Appeals held that "a right sense of justice" requires "that the People are obligated to give to the defendant, for use during cross-examination, any nonconfidential written or recorded statements of a prosecution witness that relate to the subject matter of the witness' testimony." People v. Banch, 80 N.Y.2d 610, 615, 593 N.Y.S.2d 491, 493 (1992). This rule is called the Rosario rule, and material required to be turned over pursuant to the rule is referred to as Rosario material.

> The rule is simple and unequivocal: if the People are in possession of a statement of their own prospective witness relating to the subject matter of that witness' testimony, defense counsel must, in fairness, be given a copy because ordinarily counsel would have no knowledge of it and no other means of obtaining it.

People v. Jones, 70 N.Y.2d 547, 550, 523 N.Y.S.2d 53, 55 (1987).

To comply with its Rosario obligations, a party must actually "deliver a copy" of such material to the opposing party. People v. Caussade, 162 A.D.2d 4, ___, 560 N.Y.S.2d 648, 653 (2d Dep't 1990). See also Jones, *supra*, 70 N.Y.2d at 550, 523 N.Y.S.2d at 55 ("counsel must, in fairness, be given a copy" of Rosario material).

The Rosario rule applies to both prosecution and defense witnesses -- with the exception of the defendant.

At Trial

At trial, the parties are required to turn over Rosario material automatically (*i.e.*, no request is required). In a jury trial, the People must turn over all Rosario material prior to giving their opening statement. See CPL § 240.45(1)(a). In a bench trial, the People must turn over all Rosario material prior to the submission of evidence. Id.

The defense must turn over its Rosario material prior to the presentation of its direct case. See CPL § 240.45(2)(a). Thus, if the defendant chooses not to call any witnesses, he or she has no obligation under Rosario.

At A Pre-Trial Hearing

At a pre-trial hearing, the parties are only required to turn over Rosario material *upon request*, and then only "at the conclusion of the direct examination of each of its witnesses." See CPL § 240.44(1). See also People v. Malinsky, 15 N.Y.2d 86, 262 N.Y.S.2d 65 (1965).

What Is *Rosario* Material?

In order to constitute Rosario material, a "statement" must:

(a) be "written or recorded";

(b) be "made by a person whom the prosecutor intends to call as a witness"; and

(c) "relate[] to the subject matter of the witness's testimony."

CPL § 240.45(1)(a); CPL § 240.44(1).

In addition, the material must generally be in -- or subject to -- the "possession or control" of the prosecution. See People v. Kelly, 88 N.Y.2d 248, 251-52, 644 N.Y.S.2d 475, 476-77 (1996).

In this regard, material that is in the possession of the police is deemed to be in the *constructive* possession of the People. People v. Ranghelle, 69 N.Y.2d 56, 64, 511 N.Y.S.2d 580, 585 (1986). See also People v. Giordano, 274 A.D.2d 748, ___, 711 N.Y.S.2d 557, 559-60 (3d Dep't 2000) ("The burden of locating and producing prior statements is on the People; there is no obligation on defense counsel to discover and subpoena documents") (citation omitted).

Obviously, the written notes and reports of a police officer witness constitute Rosario material. See, e.g., People v. Washington, 86 N.Y.2d 189, 192, 630 N.Y.S.2d 693, 694 (1995); People v. Quinones, 73 N.Y.2d 988, 989, 540 N.Y.S.2d 993, 994 (1989); People v. Novoa, 70 N.Y.2d 490, 522 N.Y.S.2d 504 (1987); Ranghelle, 69 N.Y.2d at 62, 511 N.Y.S.2d at 584; People v. Gilligan, 39 N.Y.2d 769, 384 N.Y.S.2d 778 (1976); People v. Malinsky, 15 N.Y.2d 86, 90-91, 262 N.Y.S.2d 65, 69-70 (1965).

"[O]ral testimony by the officers concerning the contents of their memo books does not constitute production of the material. The books themselves ha[ve] to be delivered to defense counsel." Ranghelle, 69 N.Y.2d at 65, 511 N.Y.S.2d at 586.

"The character of a statement is not to be determined by the manner in which it is recorded, nor is it changed by the presence or absence of a signature." People v. Consolazio, 40 N.Y.2d 446, 453, 387 N.Y.S.2d 62, 65 (1976).

Thus, "a witness' statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is 'a record of a prior statement by a witness within the compass of the rule in People v. Rosario * * * and therefore not exempt from disclosure as a "work product" datum of the prosecutor.'" Id. at 453, 387 N.Y.S.2d at 65-66 (citation omitted).

Memo book notes taken by an investigating officer, consisting of statements made to the officer by a testifying witness, constitute Rosario material *regardless of whether the investigating officer testifies*. Ranghelle, 69 N.Y.2d at 64-65, 511 N.Y.S.2d at 585-86.

In other words, the critical issue in determining whether a statement constitutes Rosario material is whether the person who uttered the statement is called as a witness -- *not* whether the person who wrote down (or recorded or transcribed) the statement is called as a witness.

Police "blotter" entries are classic examples of Rosario material. See, e.g., People v. Giordano, 274 A.D.2d 748, ___, 711 N.Y.S.2d 557, 559 (3d Dep't 2000); People v. Bowers, 210 A.D.2d 795, 798, 621 N.Y.S.2d 145, 147 (3d Dep't 1994).

"The 'SPRINT' report and the audio tape of the arresting officer's radio communication with the police dispatcher as he followed and apprehended the appellant constitute Rosario material." Matter of Peter C., 220 A.D.2d 584, ___, 632 N.Y.S.2d 612, 613 (2d Dep't 1995).

A statement made to a private party can constitute Rosario material, especially where the statement is (a) prompted by the prosecutor, (b) recorded by law enforcement personnel, and (c) in the prosecution's possession and control. See People v. Perez, 65 N.Y.2d 154, 158, 490 N.Y.S.2d 747, 749-50 (1985). See also People v. Palmer, 137 A.D.2d 881, 524 N.Y.S.2d 564 (3d Dep't 1988).

Where a key prosecution witness has taken a polygraph examination which contains statements which exculpate the defendant, the polygraph transcript constitutes both Rosario and Brady material. People v. Rutter, 202 A.D.2d 123, ___, 616 N.Y.S.2d 598, 603 (1st Dep't 1994).

Prosecutors' Notes

In People v. Consolazio, 40 N.Y.2d 446, 453, 387 N.Y.S.2d 62, 65-66 (1976), the Court of Appeals held that "a witness' statement in narrative form made in preparation for trial by an Assistant District Attorney in his own hand is 'a record of a prior statement by a witness within the compass of the rule in People v. Rosario * * * and therefore not exempt from disclosure as a "work product" datum of the prosecutor.'" Id. at 453, 387 N.Y.S.2d at 65-66 (citation omitted).

Nonetheless, prosecutors' notes of conversations with witnesses are frequently improperly withheld from the defense, as ADAs incorrectly (and inexplicably) assert that such notes constitute privileged "attorneys' work product." See CPL § 240.10(2), (3).

In People v. Gourgue, 239 A.D.2d 357, ___, 657 N.Y.S.2d 737, 737 (2d Dep't 1997), the Appellate Division, Second Department, held that "a list of questions prepared by the prosecutor during a pretrial interview with the complaining witness constituted Rosario material which should have been disclosed to the defense." (Citation omitted). In so holding, the Court reasoned:

> Here, the prosecutor incorporated factual statements made by the complainant into a list of proposed questions with the admitted intent of circumventing the Rosario rule by recording the statements in question form. Since the material prepared by the prosecutor clearly included the complainant's statements and was not merely attorney work product, the court erred in denying the defendant's request for disclosure.

Id. at ___, 657 N.Y.S.2d at 738.

Similarly, the Appellate Division, First Department, has made clear that "[i]t has long been the law in this State that the People may not circumvent their disclosure obligations simply by altering the format of the information gleaned from a witness interview, or by recording it after the interview rather than contemporaneously." People v. Dowling, 266 A.D.2d 18, ___, 698 N.Y.S.2d 11, 13 (1st Dep't 1999).

"Where a question arises whether portions of the prosecutor's notes fall within the work product exception, the court should conduct an in camera examination of the material." People v. Barrigar, 233 A.D.2d 845, ___, 649 N.Y.S.2d 756, 757 (4th Dep't 1996).

* * * * * * * * * *

If there is a dispute as to the existence or relevance of certain Rosario material, the Court should conduct an *in camera* inspection of prosecutor's file. See, e.g., People v. Poole, 48 N.Y.2d 144, 149, 422 N.Y.S.2d 5, 8 (1979).

The People cannot be required to "create" Rosario material. See, e.g., Matter of Catterson v. Rohl, 202 A.D.2d 420, ___, 608 N.Y.S.2d 696, 699 (2d Dep't 1994); People v. Littles, 192 A.D.2d 314, 595 N.Y.S.2d 463 (1st Dep't 1993); People v. Steinberg, 170 A.D.2d 50, 573 N.Y.S.2d 965 (1st Dep't 1991), aff'd, 79 N.Y.2d

673, 584 N.Y.S.2d 770 (1992). In this regard, the Steinberg Court stated:

> There is no requirement that a prosecutor record in any fashion his interviews with a witness. If the prosecutor chooses to do so, Rosario and its progeny require that the recording be furnished to the defense. But nothing in the Rosario line of cases in any way imposes an obligation on the prosecutor to create Rosario material in interviewing witnesses.

170 A.D.2d at 76, 573 N.Y.S.2d at 981.

There is an exception to the Rosario rule where the People do not produce the actual Rosario material, but they do produce its "duplicative equivalent." In determining whether undisclosed Rosario material is the "duplicative equivalent" of disclosed material, the Court of Appeals has provided the following guidelines:

> Two documents cannot be "duplicative equivalents" if there are variations or inconsistencies between them. Further, "[s]tatements are not the 'duplicative equivalent' of previously produced statements * * * just because they are 'harmonious' or 'consistent' with them." Indeed, a statement that is consistent with other disclosed material but omits details or facts cannot be considered the "duplicative equivalent" of the disclosed material, since omissions often furnish important subjects for cross-examination. Finally, since the purpose of Rosario disclosure is to provide the defense with material for cross-examining specific prosecution witnesses, the fact that withheld information was available through another disclosed document embodying someone else's statements is irrelevant and cannot serve to remedy the harm caused by the prosecution's failure to disclose.

People v. Young, 79 N.Y.2d 365, 370, 582 N.Y.S.2d 977, 980 (1992) (citations omitted). See also People v. Joseph, 86 N.Y.2d 565, 569-70, 635 N.Y.S.2d 123, 125 (1995). The Young Court made clear that, in assessing whether undisclosed Rosario material is the

"duplicative equivalent" of disclosed material, "there continues to be a 'strong presumption of * * * discoverability' and, consequently, the 'exception' has been narrowly circumscribed." 79 N.Y.2d at 369, 582 N.Y.S.2d at 980 (citation omitted).

Critically, the Young definition of "duplicative equivalent" presumes that the undisclosed Rosario material is still in existence and can be compared to previously disclosed material. In this regard, in Joseph, *supra*, the Court of Appeals expressly held that "a document that has been lost or destroyed and is therefore no longer available for judicial inspection cannot be deemed the 'duplicative equivalent' of Rosario material that has previously been disclosed." 86 N.Y.2d at 569, 635 N.Y.S.2d at 125. See also id. at 567, 635 N.Y.S.2d at 124.

What Is *Not Rosario* Material?

A "statement" does not constitute Rosario material if, among other things, the statement:

(a) is confidential;

(b) is not written or recorded;

(c) is made by a person that is not called as a witness;

(d) does not relate to the subject matter of the witness' testimony; and/or

(e) is made by the defendant.

See, e.g., CPL § 240.45(1)(a); CPL § 240.45(2)(a); CPL § 240.44(1).

In addition, a statement which would otherwise constitute Rosario material will be exempt from disclosure if it is not in, or subject to, the possession or control of the prosecution. See, e.g., People v. Kelly, 88 N.Y.2d 248, 251-52, 644 N.Y.S.2d 475, 476-77 (1996).

Examples of items that the Court of Appeals has "removed" from Rosario disclosure on this ground are:

1. FBI interview reports pertaining to a *Federal* investigation. People v. Santorelli, 95 N.Y.2d 412, 420-22, 718 N.Y.S.2d 696, 700-01 (2000). See also People v. Marvin, 258 A.D.2d 964, 685 N.Y.S.2d 499 (4th

Dep't 1999); People v. Kronberg, 243 A.D.2d 132, ___, 672 N.Y.S.2d 63, 77 (1st Dep't 1998);

2. Interview notes and reports of the State Division of Parole. People v. Kelly, 88 N.Y.2d 248, 644 N.Y.S.2d 475 (1996), overruling People v. Fields, 146 A.D.2d 505, 537 N.Y.S.2d 157 (1st Dep't 1989);

3. Statements of witnesses, in the possession of the State Department of Correctional Services, made during a prison disciplinary proceeding. People v. Howard, 87 N.Y.2d 940, 641 N.Y.S.2d 222 (1996);

4. Audiotape made by Associate Medical Examiner subsequent to autopsy of victim. People v. Washington, 86 N.Y.2d 189, 630 N.Y.S.2d 693 (1995);

5. Motor vehicle accident report *filed by civilian complainant* with Department of Motor Vehicles. People v. Flynn, 79 N.Y.2d 879, 581 N.Y.S.2d 160 (1992);

6. Untranscribed plea minutes of potential prosecution witness (which had been ordered, but not received, by the prosecution). People v. Fishman, 72 N.Y.2d 884, 532 N.Y.S.2d 739 (1988);

7. Personal version of attack by victim, a free-lance writer. People v. Reedy, 70 N.Y.2d 826, 523 N.Y.S.2d 438 (1987);

8. Report of incident, made by privately employed security guard, to his employer. People v. Bailey, 73 N.Y.2d 812, 537 N.Y.S.2d 111 (1988); and

9. Statements of child victims made to a registered social worker during the course of that worker's employment. People v. Tissois, 72 N.Y.2d 75, 531 N.Y.S.2d 228 (1988) (in Tissois, the privilege against disclosure provided by CPLR § 4508 was invoked). Cf. People v. DeJesus, 69 N.Y.2d 855, 514 N.Y.S.2d 708 (1987) (different result where CPLR § 4508 *not* timely invoked). See also People v. Berkley, 157 A.D.2d 463, ___, 549 N.Y.S.2d 392, 394 (1st Dep't 1990) ("the rape counselor's notes were not Rosario material because they were not in the actual or constructive possession of the district attorney's office").

See also Matter of Gina C., 138 A.D.2d 77, 531 N.Y.S.2d 86 (1st Dep't 1988) (newspaper reporter's notes do not constitute Rosario material where they were neither gathered at the direction of, nor in possession of, any law enforcement agency).

Although a statement may be exempt from Rosario disclosure if it is not subject to the control of the People, the same statement constitutes discoverable Rosario material if it is in the *actual possession* of the People. See, e.g., People v. Campbell, 186 A.D.2d 212, 587 N.Y.S.2d 751 (2d Dep't 1992) (hospital records in possession of District Attorney, containing statements of victim, constituted Rosario material); People v. Wahad, 204 A.D.2d 156, ___, 612 N.Y.S.2d 14, 15 (1st Dep't 1994) (statements to FBI agent).

Remedy For *Rosario* Violations

Where the People commit a pre-trial hearing Rosario violation, the remedy depends on how serious the violation is and the potential prejudice to the defendant. Where the violation is discovered prior to the close of evidence at trial, the defendant is, at a minimum, is entitled to a re-opened hearing. See CPL § 240.75.

If the violation is sufficiently serious/prejudicial, the defendant is entitled to a new hearing. See, e.g., CPL § 240.75; People v. Feerick, 93 N.Y.2d 433, 692 N.Y.S.2d 638 (1999); People v. Banch, 80 N.Y.2d 610, 593 N.Y.S.2d 491 (1992).

Where the People commit a Rosario violation *at trial*, reversal is only required if "there is a reasonable possibility that the non-disclosure materially contributed to the result of the trial" or substantially prejudiced the defendant. See CPL § 240.75. See also People v. Banch, 80 N.Y.2d 610, 617, 593 N.Y.S.2d 491, 495 (1992); People v. Martinez, 71 N.Y.2d 937, 940, 528 N.Y.S.2d 813, 815 (1988); People v. Ranghelle, 69 N.Y.2d 56, 63, 511 N.Y.S.2d 580, 585 (1986); People v. Perez, 65 N.Y.2d 154, 159, 490 N.Y.S.2d 747, 750 (1985).

Where Rosario material is lost or destroyed, the general rule is that some form of sanction is *required* (unless it is clear that the defendant has not been prejudiced). In this regard, it is well settled that:

> [I]t is no answer to a demand to produce that the material has been lost or destroyed. If the People fail to exercise care to preserve

> it and defendant is prejudiced by their mistake, the court must impose an appropriate sanction. The determination of what is appropriate is committed to the trial court's sound discretion, and while the degree of prosecutorial fault may be considered, the court's attention should focus primarily on the overriding need to eliminate prejudice to the defendant.

People v. Martinez, 71 N.Y.2d 937, 940, 528 N.Y.S.2d 813, 815 (1988). Similarly, in People v. Wallace, 76 N.Y.2d 953, 955, 563 N.Y.S.2d 722, 723 (1990), the Court held that:

> Where the People fail to exercise due care in preserving Rosario material, and defendant is prejudiced thereby, "the [trial] court *must* impose an appropriate sanction." Although the trial court had discretion to determine the specific sanction to be imposed, it was an abuse of discretion to decline to impose any sanction where, as here, defendant was prejudiced.

(Citations omitted).

The failure to impose an appropriate sanction for a Rosario violation can lead to reversal. See, e.g., People v. Jackson, 271 A.D.2d 455, ___, 707 N.Y.S.2d 128, 129 (2d Dep't 2000) ("Where the tape of a 911 call is not preserved and the defendant is prejudiced thereby, the court must impose an appropriate sanction and the failure to do so requires reversal"); People v. Burch, 247 A.D.2d 546, ___, 669 N.Y.S.2d 299, 300 (2d Dep't 1998) (same); People v. Huynh, 232 A.D.2d 655, ___, 649 N.Y.S.2d 160, 161 (2d Dep't 1996) (same); People v. Parker, 157 A.D.2d 519, ___, 549 N.Y.S.2d 710, 711-12 (1st Dep't 1990) (same); People v. Nesbitt, 230 A.D.2d 755, 646 N.Y.S.2d 522 (2d Dep't 1996) (it was abuse of discretion, and prejudicial error, for trial court to deny defendant's request for adverse inference charge where audiotapes unavailable).

CPL § 710.30 Notice Issues

CPL § 710.30 provides, with certain exceptions, that whenever the People intend to offer evidence at trial of a statement made by the defendant to a public servant, they must, within 15 days after arraignment, serve the defendant with notice

of such intent, specifying the statement(s) intended to be offered. For purposes of these materials, such notice is referred to as a "710.30 notice."

CPL § 710.30 also requires that the People provide 710.30 notice of an intent to offer testimony at trial by a witness who has previously identified the defendant in connection with the offense (e.g., in a police-arranged identification procedure).

These materials focus on statements made by the defendant to a public servant.

CPL § 710.30 -- The Statute

CPL § 710.30 provides, in full, as follows:

> **§ 710.30. Motion to suppress evidence; notice to defendant of intention to offer evidence**
>
> 1. Whenever the people intend to offer at a trial (a) evidence of a statement made by a defendant to a public servant, which statement if involuntarily made would render the evidence thereof suppressible upon motion pursuant to [CPL § 710.20(3)], or (b) testimony regarding an observation of the defendant either at the time or place of the commission of the offense or upon some other occasion relevant to the case, to be given by a witness who has previously identified him as such, they must serve upon the defendant a notice of such intention, specifying the evidence intended to be offered.
>
> 2. Such notice must be served within [15] days after arraignment and before trial, and upon such service the defendant must be accorded reasonable opportunity to move before trial, pursuant to [CPL § 710.40(1)], to suppress the specified evidence. For good cause shown, however, the court may permit the people to serve such notice, thereafter and in such case it must accord the defendant reasonable opportunity thereafter to make a suppression motion.

> 3. In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in subdivision one may be received against him upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in [CPL § 710.70(2)].

CPL § 710.30 Notice Requirement Is Strictly Construed

It has been repeatedly held that the CPL § 710.30 notice requirement is to be strictly construed. See, e.g., People v. Showers, 200 A.D.2d 864, ___, 606 N.Y.S.2d 816, 817 (3d Dep't 1994); People v. Phillips, 183 A.D.2d 856, ___, 584 N.Y.S.2d 83, 85 (2d Dep't 1992); People v. Riley-James, 168 A.D.2d 740, ___, 563 N.Y.S.2d 894, 896 (3d Dep't 1990); People v. Centeno, 168 Misc. 2d 172, ___, 637 N.Y.S.2d 254, 257 (N.Y. County Supreme Ct. 1995).

In this regard, in People v. O'Doherty, 70 N.Y.2d 479, 486, 522 N.Y.S.2d 498, 502 (1987), the Court of Appeals expressly rejected the People's claim that since the penalty for failure to comply with the 15-day rule of CPL § 710.30 is preclusion, the standard for making a showing of "good cause" for late notice should be relaxed. See also People v. Briggs, 38 N.Y.2d 319, 323-24, 379 N.Y.S.2d 779, 783 (1975) (absent a showing of "good cause" for late notice, "a failure to give the required notice before trial mandates exclusion of those statements. To hold otherwise would be to condone and encourage noncompliance in the prosecutor's office and to undermine the salutary purposes of the statute") (citations omitted).

710.30 Notice Generally Must Be Served Within 15 Days of Arraignment

CPL § 710.30(2) provides that, absent good cause, "[s]uch notice must be served within [15] days after arraignment and before trial." See also People v. Chase, 85 N.Y.2d 493, 500, 626 N.Y.S.2d 721, 724 (1995); People v. Lopez, 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879, 881 (1994) ("the statute requires that whenever the People intend to offer evidence of defendant's statements to a public officer or testimony of observations of defendant, they must serve notice of such evidence on defendant within 15 days of arraignment and before trial").

In People v. Godoy, 180 Misc. 2d 771, 698 N.Y.S.2d 390 (N.Y. City Crim. Ct. 1999), the Court pointed out that "service" does not require "filing"; nor does it require actual "receipt" by the defendant. Thus, for example, where a 710.30 notice is mailed to a valid address, the People are not responsible for a Post Office error.

When Does the 15-Day Time Period Begin?

For purposes of CPL § 710.30(2), the date of arraignment is not counted. Thus, the 15-day time period for serving a 710.30 notice begins the day after the defendant's arraignment. See People v. Morales, 159 Misc. 2d 745, 610 N.Y.S.2d 720 (N.Y. City Crim. Ct. 1994).

In addition, where the defendant is arraigned on a new or superceding accusatory instrument, the 15-day time period starts over -- unless the new accusatory instrument is filed as a mere pretext for the filing of the 710.30 notice. See, e.g., People v. Littlejohn, 184 A.D.2d 790, ___, 585 N.Y.S.2d 495, 496 (2d Dep't 1992); People v. Davis, 163 Misc. 2d 947, ___, 623 N.Y.S.2d 92, 93-94 (N.Y. City Crim. Ct. 1995); People v. Lopez, 159 Misc. 2d 264, 603 N.Y.S.2d 948 (N.Y. City Crim. Ct. 1993); People v. Alcindor, 157 Misc. 2d 725, 598 N.Y.S.2d 449 (N.Y. City Crim. Ct. 1993); People v. Haines, 139 Misc. 2d 762, ___, 528 N.Y.S.2d 475, 477 (N.Y. City Crim. Ct. 1988) ("CPL 710.30 refers to notice being served 'within 15 days after arraignment'; not arraignment on a specific accusatory instrument nor arraignment on the accusatory instrument that commenced the criminal action").

Notably, however, when the defendant is arraigned on a new accusatory instrument his or her right to file pre-trial motions starts over as well. See Littlejohn, 184 A.D.2d at ___, 585 N.Y.S.2d at 496 ("It is clear that following arraignment on the second indictment the defendant is permitted to, and in this case did, file new pretrial motions pursuant to CPL 255.20"); Davis, 163 Misc. 2d at ___, 623 N.Y.S.2d at 94; Lopez, 159 Misc. 2d at ___, 603 N.Y.S.2d at 950; Alcindor, 157 Misc. 2d at ___, 598 N.Y.S.2d at 451.

710.30 Notice Can Be Served Prior to Arraignment

710.30 notice can be served prior to arraignment. See, e.g., People v. Berisha, 12 Misc. 3d 344, ___, 816 N.Y.S.2d 830, 831 (N.Y. City Crim. Ct. 2006); People v. Alcindor, 157 Misc. 2d 725, ___, 598 N.Y.S.2d 449, 452 (N.Y. City Crim. Ct. 1993);

People v. Hilton, 147 Misc. 2d 200, ___, 555 N.Y.S.2d 550, 553 (Queens County Supreme Ct. 1990). In this regard, in People v. Korang, 160 Misc. 2d 604, ___, 610 N.Y.S.2d 730, 731 (Queens County Supreme Ct. 1994), the Court held that:

> In the opinion of the court, the People have satisfied the mandates of CPL 710.30, which requires notice to "be served within fifteen days after arraignment and before trial". The court notes that while the *deadline* for service is fifteen days after the defendant's Supreme Court arraignment, there is no requirement that service be made *only* during that fifteen-day period, and not before. Such an interpretation of the statute would be strained and illogical, for service of the 710.30 notice at an earlier time, such as at the Criminal Court arraignment, is more advantageous to a defendant, who will be better equipped to make an informed and meaningful decision with respect to such matters as testifying before the Grand Jury or accepting a plea offer.

If The Defendant Is Represented By An Attorney, 710.30 Notice Should Be Served On The Attorney

If the defendant is represented by an attorney, the People's 710.30 notice should be served on the attorney. In this regard, in People v. Brown, 168 Misc. 2d 923, ___, 646 N.Y.S.2d 241, 243-44 (Rochester City Ct. 1996), the Court held that:

> There can be no question that when a party is represented by counsel in a pending action, papers to be served on the party must be served not upon the party directly, but upon the party's attorney, in the absence of a law, court order, or agreement providing otherwise (CPLR 2103[b]; Code of Professional Responsibility DR 7-104[A][1] [22 NYCRR 1200.35(a)(1)].
>
> It is equally clear that where a defendant in a criminal matter is represented, law enforcement officials may not communicate directly with the defendant relating to the

> subject of that representation in defense counsel's absence.
>
> Only where a party has not appeared by counsel or the party's attorney cannot be served is service of papers in a pending action on a party permitted (see, CPLR 2103[c]). In light of the above, once counsel has appeared for a defendant in a criminal proceeding, the requirement of CPL § 710.30(1) that the People serve their notice of intention to introduce evidence upon "the defendant" must be read to require that such service be made not on defendant personally, but on defense counsel. Any other construction would sanction a procedure which is contrary to clearly expressed legislative intent, well-settled case law, and the plain language of Disciplinary Rule 7-104 of the Code of Professional Responsibility (22 NYCRR 1200.35).
>
> In this case, defendant appeared with counsel at arraignment. Thereafter, the People were required to serve any notices, including their CPL § 710.30 notice, not on the defendant personally, but on defense counsel. The People concede that this was not done. Thus, service of the People's CPL § 710.30 notice on defendant personally did not satisfy the People's notice obligation under CPL Article 710.

(Citations omitted). See also People v. Sears, 195 Misc. 2d 266, ___, 757 N.Y.S.2d 836, 838 (Webster Justice Ct. 2003) ("It is certainly well established that once an attorney appears in a criminal matter on behalf of a defendant the prosecution cannot communicate directly with a defendant. Nor could the prosecution deal directly with a defendant, once they have been put on notice that the defendant is represented by an attorney"); People v. Godoy, 180 Misc. 2d 771, ___, 698 N.Y.S.2d 390, 392 (N.Y. City Crim. Ct. 1999).

When Can The People Serve Late 710.30 Notice?

Although 710.30 notice must generally be served within 15 days after arraignment, CPL § 710.30(2) provides that "[f]or good

cause shown, however, the court may permit the people to serve such notice, thereafter." See also People v. Chase, 85 N.Y.2d 493, 500, 626 N.Y.S.2d 721, 724 (1995) ("Late notice may be given only upon good cause"); People v. O'Doherty, 70 N.Y.2d 479, 487, 522 N.Y.S.2d 498, 503 (1987) ("the court may permit service of an untimely notice 'only upon a showing of good cause'") (citation omitted); People v. Greer, 42 N.Y.2d 170, 179, 397 N.Y.S.2d 613, 619 (1977) ("Only upon a showing of good cause may the court permit service of the notice during trial with a reasonable opportunity to make a suppression motion during trial (CPL 710.30[2]) and, if good cause is not shown, a failure to give the required notice of intention before trial mandates exclusion of the statement or statements"); People v. Briggs, 38 N.Y.2d 319, 322, 379 N.Y.S.2d 779, 781-82 (1975) (same).

What Constitutes "Good Cause" For Late Notice?

The Court of Appeals has made clear that "good cause" for late 710.30 notice should only be found in "unusual circumstances." See People v. O'Doherty, 70 N.Y.2d 479, 486, 522 N.Y.S.2d 498, 502 (1987); People v. Briggs, 38 N.Y.2d 319, 324, 379 N.Y.S.2d 779, 783 (1975). See also People v. Showers, 200 A.D.2d 864, ___, 606 N.Y.S.2d 816, 817 (3d Dep't 1994); People v. Riley-James, 168 A.D.2d 740, ___, 563 N.Y.S.2d 894, 896 (3d Dep't 1990); People v. Socia, 150 Misc. 2d 518, ___, 568 N.Y.S.2d 864, 866 (Bronx County Supreme Ct. 1991).

In People v. Michel, 56 N.Y.2d 1014, 453 N.Y.S.2d 639 (1982), the Court of Appeals found that "good cause" existed where the defendant had actual notice not only of the existence of the statement in question, but also of the People's intent to use the statement against him at trial. Specifically, the Michel Court held as follows:

> Defendant contends that the prosecution was required to serve statutory notice of its intention to introduce his written confession into evidence at trial (CPL 710.30). The statute, however, expressly permits the trial court to dispense with the notice requirement "[f]or good cause shown" (CPL 710.30[2]). Here the confession itself was negotiated, drafted, and signed by both the defendant and his attorney and specifically stated that it was "going to be used in court". Moreover it was clear to the defense that the confession was an integral part of the agreement

> ultimately concluded and that a default on defendant's part would result in prosecution and use of the confession. Under these circumstances we cannot say that the trial court erred as a matter of law in finding that the defense had actual notice of the prosecution's intent to introduce the confession at trial and, therefore, good cause for dispensing with the statutory notice requirement.

Id. at 1015, 453 N.Y.S.2d at 640.

It is critical to note that the "actual notice" rule of Michel only applies to situations where the defendant has actual notice of the People's intent to use the statement at issue -- *not* to situations where the defendant merely has actual notice that he or she made the statement. See, e.g., People v. Phillips, 183 A.D.2d 856, 584 N.Y.S.2d 83 (2d Dep't 1992); People v. Heller, 180 Misc. 2d 160, ___, 689 N.Y.S.2d 327, 334 (N.Y. City Crim. Ct. 1998); People v. Brown, 168 Misc. 2d 923, ___, 646 N.Y.S.2d 241, 244 (Rochester City Ct. 1996); People v. Calise, 167 Misc. 2d 277, ___, 639 N.Y.S.2d 671, 672 (N.Y. City Crim. Ct. 1996); People v. Centeno, 168 Misc. 2d 172, ___, 637 N.Y.S.2d 254, 258 (N.Y. County Supreme Ct. 1995) ("merely providing the defendant with a copy of a statement, without also stating the intent to utilize that particular statement at trial is not sufficient; the defendant must be informed of both the intent to utilize each statement at trial, the statement's substance, and information to identify when and where the statement was made"); People v. Holley, 157 Misc. 2d 402, ___, 596 N.Y.S.2d 1016, 1018 (N.Y. City Crim. Ct. 1993) ("The service of the IDE on defense counsel at the arraignment was not sufficient to comply with the notice requirements of CPL § 710.30"); id. at ___, 596 N.Y.S.2d at 1018 ("The crucial question is not whether defendant knew about the existence of the statement, but rather whether he knew that the People intended to introduce the statement on their direct case at trial. Since the People had not included the IDE statements in their 710.30 notice, defense counsel in the instant case had every right to assume that the People did not plan to use these statements on their direct case. Counsel therefore had no reason to include these statements in his pretrial motion to suppress"); People v. Wright, 127 Misc. 2d 885, ___ n.*, 487 N.Y.S.2d 688, 692 n.* (Nassau County Ct. 1985) ("The fact that the defendant may be aware of a number of other statements he made to public officials is irrelevant. It is for the People to tell defendant which statements they intend to offer at the trial. It is not every statement the defendant makes that the

People intend to offer at the trial. It is their obligation to be specific, so that when defendant requests a Huntley hearing, the request can be directed at those statements the People intend to offer at the trial, notice of which is the very essence of CPL 710.30").

If this were not the case, then the exception would swallow the rule (as the defendant theoretically has actual notice of every statement that he or she has ever made). See generally People v. Boyles, 210 A.D.2d 732, ___, 621 N.Y.S.2d 118, 120 (3d Dep't 1994) (defendant entitled to rely on contents of second, subsequent 710.30 notice that omitted statement contained in first notice); Holley, 157 Misc. 2d at ___, 596 N.Y.S.2d at 1018-19 ("If the People's argument in the instant case were adopted, they would have little incentive to see that their statement notice was complete. Rather, the People could simply provide defense counsel with copies of the police reports and memo books and then determine at a later date whether there were any statements in those documents that had not been included in the original notice").

The above-quoted language in Holley would appear to be directly applicable to a 710.30 notice that attaches a video thereto but makes no attempt to summarize the statements of the defendant allegedly contained in the video that the People intend to use at trial.

What Does *Not* Constitute "Good Cause" For Late Notice?

The Court of Appeals has made clear that there are two things that, as a matter of law, do not constitute "good cause" for late 710.30 notice: (1) office failure within the prosecutor's office, and (2) office failure between the police department and the prosecutor's office. In this regard, in People v. Briggs, 38 N.Y.2d 319, 324, 379 N.Y.S.2d 779, 783-84 (1975), the Court of Appeals held that:

> The People, alleging only a "lack of continuity" in the prosecutor's office, have not shown good cause for their failure to give defendant the required notice before trial. In fact, it is questionable whether the prosecutor has shown any cause, good or bad. The term "lack of continuity" evidently referred, as the trial court seemed to believe, to the trial prosecutor's lack of knowledge whether any pretrial notice had

> been served by his office. The record gives no further information, and the briefs do no better. Lack of continuity or other office failure does not constitute the "unusual circumstances" contemplated by the statute. Instead, the People's failure to give notice, because of lack of continuity in the prosecutor's office, is but another example of an absence of orderly office procedure. While this failure may be due, in some part, to a heavy workload in the prosecutor's office, a failure is not excusable. As the court stated in Santobello v. New York, a case involving a lack of continuity in the same prosecutor's office, "The staff lawyers in a prosecutor's office have the burden of 'letting the left hand know what the right hand is doing.'"
>
> The issue is not a trivial or merely technical one. Prior statements, especially oral ones, to a police officer, are accorded high credibility by fact finders, jury or Judges. Whether in fact they were made, whether they were voluntary, and the precise form which they took may be crucial to the determination of innocence or guilt. To deprive defendants in criminal matters unnecessarily of an advance opportunity to investigate the facts and circumstances is neither fair nor conducive to establishing the truth through the adversary process with the assistance of counsel. A cavalier treatment of the statute's requirements frustrates its ends.

(Citations omitted).

Similarly, in People v. Spruill, 47 N.Y.2d 869, 870-71, 419 N.Y.S.2d 69, 70 (1979), the Court of Appeals held that:

> The court erred in admitting the defendant's confession at trial. The People concededly had not given the defendant pretrial notice as required by statute (CPL 710.30) nor, in our view, did they establish "good cause" for filing a late notice. We have previously held that "[l]ack of continuity or other

> office failure" within the prosecutor's office does not provide an adequate excuse. The excuse offered in this case that the police officer had not informed the prosecutor of the confession prior to trial is no different in principle. Under similar circumstances we have noted that "[k]nowledge on the part of the police department would, of course, be imputed to the District Attorney's office. A defendant ought not be penalized because of any inadequacy of internal communication within the law enforcement establishment."

(Citations omitted).

In People v. O'Doherty, 70 N.Y.2d 479, 485-86, 522 N.Y.S.2d 498, 502 (1987), the Court of Appeals, comparing the facts of the case to those in Briggs and Spruill, held that:

> We agree with defendant that the People's excuse should fare no better in this case, where the police officer who had knowledge of the statement did not inform the prosecutor in time to comply with the requirements of the statute. * * *
>
> There may be instances where, given the time, place and context of the defendant's statement to a police officer and an attenuated connection between that officer and the prosecutor, the untimely disclosure of the statement to the prosecutor would present the "unusual circumstances" to which the good cause requirement is addressed. There are no such circumstances here.

What If The Statement Does Not Arise Until After Arraignment?

CPL § 710.30 fails to address the situation where a statement does not arise until after the defendant has been arraigned. The Court addressed this issue in People v. G., 158 Misc. 2d 893, ___, 602 N.Y.S.2d 512, 518 (Kings County Supreme Ct. 1993):

> [A]pplying the 15-day deadline to post-arraignment identifications or statements would add little to "the orderly, swift and efficient determination of pretrial motions" or fairness to the defendant. Weighed against that marginal gain is the enormous mandatory sanction of absolute preclusion of evidence when the notice is untimely. Here, that would have required preclusion of two identifications for serious alleged crimes, including A-I felonies, regardless of the absence of any suggestivity in the identification procedures, prejudice to the defendant, or delay in the proceedings. . . . But in the case of post-arraignment evidence, the loss would be an arbitrary price to pay for no significant benefit. Such a result would be "plainly at odds with the policy of the legislation as a whole."
>
> If the 15-day time limit for notice does not apply to post-arraignment identifications and statements, what is the time limit? The answer is in the normal discovery rules covering the prosecution's continuing duty to disclose newly discovered evidence "promptly." If those disclosures are not made within an appropriate time, the court may in its discretion impose sanctions. The same procedures and requirements apply for evidence obtained after arraignment but within the 15-day period as apply for evidence obtained after the 15 days. No special problem is presented in either case, and the court can readily apply the normal discovery rules.

(Citations omitted). See also People v. Coleman, 12 Misc. 3d 712, ___, 819 N.Y.S.2d 407, 412 (Bronx County Supreme Ct. 2006) ("It is this court's opinion that C.P.L. § 710.30 applies to this instant case . . . even where the identification procedure took place approximately a year after arrest and arraignment. Obviously, the fifteen day statutory notice provision is inapplicable, however, the purpose, reasons and intent of the legislature in enacting C.P.L. § 710.30 compels this court to conclude that section 710.30 imposes a *continuing obligation* upon the People to *promptly* notify the accused of any post-arraignment identification procedure and failure to comply with this

obligation mandates the court to preclude the in-court identification testimony of the potential witness").

Required Contents Of 710.30 Notice

To be sufficient, 710.30 notice must:

> [I]nform defendant of the time and place the oral or written statements were made and of the sum and substance of those statements. Full copies of the statements need not be supplied but they must be described sufficiently so that the defendant can intelligently identify them. Similarly, the People were also required to inform defendant of the time, place and manner in which the identification was made.

People v. Lopez, 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879, 881 (1994) (citations omitted). See also People v. Bennett, 56 N.Y.2d 837, 839, 453 N.Y.S.2d 164, 165 (1982); People v. Centeno, 168 Misc. 2d 172, ___, 637 N.Y.S.2d 254, 258 (N.Y. County Supreme Ct. 1995) ("merely providing the defendant with a copy of a statement, without also stating the intent to utilize that particular statement at trial is not sufficient; the defendant must be informed of both the intent to utilize each statement at trial, the statement's substance, and information to identify when and where the statement was made"); People v. Olds, 140 Misc. 2d 458, ___, 531 N.Y.S.2d 479, 481 (Bronx County Supreme Ct. 1988) ("Mere notice of the statement, without recitation of its sum and substance, is inadequate"); People v. Feliciano, 139 Misc. 2d 247, 527 N.Y.S.2d 964 (N.Y. City Crim. Ct. 1988) (same); People v. Utley, 77 Misc. 2d 86, ___, 353 N.Y.S.2d 301, 313 (Nassau County Ct. 1974).

In Lopez, *supra*, the 710.30 notice at issue:

> [W]as a printed form, listing various types of evidence and containing appropriate boxes before each so the prosecutor could indicate the type to be offered at trial. The prosecutor had placed an "x" within the boxes which appeared before "[a]n oral statement made to a public servant," "[a] written statement made to a public servant" and "[i]dentification of the defendant * * * by a witness who has previously identified the

> defendant" at a "[l]ineup." The form provided no further information about the evidence, and no documents were attached.

84 N.Y.2d at 427, 618 N.Y.S.2d at 881.

The Court of Appeals affirmed the Appellate Division's finding that "the notice required of the People by CPL 710.30(1) was inadequate, [and thus] the People should have been precluded from offering evidence of defendant's oral and written statements to police and of his pretrial identification." Id. at 426, 618 N.Y.S.2d at 880. In so holding, the Court reasoned that:

> Manifestly, a defendant cannot challenge that of which he lacks knowledge; thus the statute requires that the notice "[specify] the evidence intended to be offered" (CPL 710.30[1]). The notice served by the People in this case informed Lopez that the People intended to offer oral and written statements and identification evidence but failed to specify the evidence as the statute commands.

Id. at 428, 618 N.Y.S.2d at 881.

Inadequate 710.30 Notice Cannot Be Cured By Discovery

In People v. Lopez, 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879, 882 (1994), the Court of Appeals made clear that an inadequate 710.30 notice cannot be cured by discovery. In this regard, the Court reasoned as follows:

> The Legislature has enacted a statutory scheme that purposefully distinguishes between pretrial motion practice and discovery. The provisions of CPL 710.30 are clearly related to defendant's preparation of pretrial motions, not his subsequent ability to defend himself at trial. Although there will be some degree of overlap between the information provided by the 710.30 notice and the People's response to defendant's discovery demands, the timing provisions of the statutes are correlated to their underlying purposes. Thus, defendant must receive a 710.30 notice within 15 days of his arraignment (CPL 710.30[2]); he need not make

> his discovery demands until 30 days after his arraignment, and the People's response is not due until 15 days after service of defendant's demands (see, CPL 240.80).
>
> When CPL 710.30 was first enacted it contained no timeliness requirement and the courts experienced considerable delay by prosecutors. Accordingly, the Legislature amended the statute to establish a narrow 15-day time requirement to facilitate "the orderly, swift and efficient determination of pretrial motions." Permitting the People to rely on defendant's eventual receipt of the information through discovery would undermine the statutory scheme and negate the legislative directive embodied in the amended statute.

Id. at 428-29, 618 N.Y.S.2d at 882 (citations omitted). See also People v. Phillips, 183 A.D.2d 856, 584 N.Y.S.2d 83 (2d Dep't 1992); People v. Utria, 165 Misc. 2d 54, ___, 626 N.Y.S.2d 948, 950-51 (N.Y. City Crim. Ct. 1995).

Lack Of Prejudice To The Defendant Is Irrelevant

If the People fail to comply with the requirements of CPL § 710.30, the remedy is preclusion. See CPL § 710.30(3); People v. Lopez, 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879, 882 (1994). Lack of prejudice to the defendant is irrelevant. Id. at 428, 618 N.Y.S.2d at 881-82. In this regard, the Lopez Court held that "[i]t is irrelevant that the People's failure to satisfy the requirements of 710.30 did not prejudice defendant. The statutory remedy for the People's failure to comply with the statute is preclusion; prejudice plays no part in the analysis." Id. at 428, 618 N.Y.S.2d at 881-82. See also People v. O'Doherty, 70 N.Y.2d 479, 481, 522 N.Y.S.2d 498, 499 (1987) ("Lack of prejudice to the defendant resulting from the delay does not obviate the need for the People to meet the statutory requirement of good cause before they may be permitted to serve a late notice"); People v. McMullin, 70 N.Y.2d 855, 856, 523 N.Y.S.2d 455, 456 (1987); People v. Briggs, 38 N.Y.2d 319, 322, 379 N.Y.S.2d 779, 782 (1975); id. at 323-24, 379 N.Y.S.2d at 783 ("If . . . no good cause is shown, a failure to give the required notice before trial mandates exclusion of those statements. To hold otherwise would be to condone and encourage noncompliance in the prosecutor's office and to undermine the salutary purposes of

the statute") (citations omitted). See generally People v. Boughton, 70 N.Y.2d 854, 855, 523 N.Y.S.2d 454, 455 (1987) (where the People withdraw their 710.30 notice, they cannot change their mind after the 15-day time period has run).

Prejudice To The Defendant *Is* Relevant

The Court of Appeals has made clear that even where "good cause" for delay in serving 710.30 notice is demonstrated, late notice should nonetheless not be allowed where the defendant is prejudiced by the delay. In this regard, in People v. O'Doherty, 70 N.Y.2d 479, 487, 522 N.Y.S.2d 498, 503 (1987), the Court of Appeals held that:

> The language which triggers the People's opportunity to serve a late notice -- "[f]or good cause shown * * * the court may permit the people to serve such notice" -- was unaffected by the 1976 amendment and thus remains an "unqualifie[d] command" that the court may permit service of an untimely notice "only upon a showing of good cause." Such a showing is, therefore, indispensable. Only if that threshold is crossed may the court move on to considerations of prejudice to the defendant, and only then because the existence of prejudice may preclude granting the relief sought by the People, notwithstanding their showing of good cause.

(Citation omitted).

To What Statements Does CPL § 710.30 Apply?

In People v. Chase, 85 N.Y.2d 493, 499-500, 626 N.Y.S.2d 721, 724 (1995), the Court of Appeals stated that:

> CPL 710.30(1)(a) . . . provides that the People must give notice to the defendant whenever they "intend to offer at a trial * * * evidence of a statement made by a defendant to a public servant" which would be suppressible if involuntarily made. An involuntary statement includes one that has been physically or psychologically coerced, obtained by a promise or statement that

> creates a risk of falsely incriminating oneself or obtained by the failure to give Miranda warnings (CPL 60.45).

Thus, pursuant to the express terms of CPL § 710.30, 710.30 notice need only be given with regard to statements that would be suppressible if involuntarily made. This raises an interesting question: Do statements that are spontaneously made by the defendant have to be noticed pursuant to CPL § 710.30? The Chase Court made clear that such statements should nonetheless be noticed. The reason why is simple: "*It is for the court and not the parties to determine whether a statement is truly voluntary or is one in which the actions of the police are the functional equivalent of interrogation causing the statement to be made*." Id. at 500, 626 N.Y.S.2d at 724 (emphasis added). See also People v. Brown, 140 A.D.2d 266, ___, 528 N.Y.S.2d 565, 568 (1st Dep't 1988) ("Whether or not a particular statement is suppressible is a matter which must be resolved by the court, not the prosecution").

The only exception to this rule is "where 'there is no question of voluntariness.'" Chase, 85 N.Y.2d at 500, 626 N.Y.S.2d at 724 (citation omitted). See also People v. Greer, 42 N.Y.2d 170, 178, 397 N.Y.S.2d 613, 619 (1977) (same). In this regard, the Chase Court concluded that:

> Since the statement here was made to a law enforcement official and the defendant had the right to have a court review the circumstances under which the statement was given and to determine its voluntariness, including whether it was truly spontaneous or the functional equivalent of interrogation, defendant was entitled to notice under CPL 710.30(1)(a). Both prior courts determined that the first statement was voluntary and there is evidence in the record to support that determination. The first statement, made in the police car, should have been precluded because of the lack of CPL 710.30(1)(a) notice.

85 N.Y.2d at 500, 626 N.Y.S.2d at 724-25 (citations omitted).

Chase appears to call into question a line of lower court cases which have held that so-called *res gestae* statements of the defendant do not have to be noticed pursuant to CPL § 710.30 on the ground that they are voluntary *per se*. See, e.g., People v.

McCaskell, 217 A.D.2d 527, ___, 630 N.Y.S.2d 66, 68 (1st Dep't 1995); People v. Copes, 200 A.D.2d 680, ___, 606 N.Y.S.2d 751, 752 (2d Dep't 1994); People v. Wells, 133 A.D.2d 385, ___, 519 N.Y.S.2d 553, 554 (2d Dep't 1987); People v. McFadden, 126 A.D.2d 970, 511 N.Y.S.2d 745 (4th Dep't 1987). In this regard, the rationale of these cases is that there is no question as to the voluntariness of a *res gestae* statement; whereas Chase makes clear that such a determination is for the Court -- not the People -- to make.

710.30 Notice Only Applies to Statements Made to Public Servants and Their Agents

CPL § 710.30(1)(a) only applies to "statement[s] made by a defendant to a public servant."

"Public servant" is defined in PL § 10.00(15) as:

> (a) any public officer or employee of the state or of any political subdivision thereof or of any governmental instrumentality within the state, or (b) any person exercising the functions of any such public officer or employee. The term public servant includes a person who has been elected or designated to become a public servant.

Accordingly, "[a] defendant is not entitled to notice with respect to statements made to a prosecution witness where that witness was a civilian and was neither a public servant nor acting as an agent of law enforcement authorities." People v. Paredes, 166 A.D.2d 677, ___, 561 N.Y.S.2d 267, 268 (2d Dep't 1990). See also People v. Wilhelm, 34 A.D.3d 40, ___, 822 N.Y.S.2d 786, 790 (3d Dep't 2006); People v. Williams, 21 A.D.3d 1401, ___, 801 N.Y.S.2d 659, 661 (4th Dep't 2005); People v. Jones, 292 A.D.2d 792, 738 N.Y.S.2d 790 (4th Dep't 2002); People v. Abdul, 279 A.D.2d 298, ___, 720 N.Y.S.2d 5, 6 (1st Dep't 2001) ("The court properly denied defendant's motion for preclusion, made on the ground of lack of notice pursuant to CPL 710.30(1)(a), of his statement to Emergency Medical Services (EMS) personnel in which he declined medical treatment. There is no evidence that the EMS workers acted as police agents"); People v. Quinto, 245 A.D.2d 121, ___, 666 N.Y.S.2d 146, 147 (1st Dep't 1997) ("Since the security officers were private citizens, . . . the People were not obliged to provide defendant with notice of their intention to introduce such statements at trial (CPL 710.30[1][a]). The record establishes that these private

citizens, who had no Special Police Officer status, were not agents of law enforcement"); People v. Boswell, 193 A.D.2d 690, ___, 598 N.Y.S.2d 34, 35 (2d Dep't 1993); People v. Rivera, 173 A.D.2d 360, ___, 570 N.Y.S.2d 5, 6 (1st Dep't 1991); People v. Velez, 168 A.D.2d 207, ___, 562 N.Y.S.2d 91, 92 (1st Dep't 1990); People v. Bell, 161 A.D.2d 772, ___, 556 N.Y.S.2d 118, 119 (2d Dep't 1990); People v. Stewart, 160 A.D.2d 966, ___, 554 N.Y.S.2d 687, 688 (2d Dep't 1990); People v. Duffy, 124 A.D.2d 258, ___, 508 N.Y.S.2d 267, 269 (3d Dep't 1986); People v. Rodriquez, 114 A.D.2d 525, ___, 494 N.Y.S.2d 426, 427 (2d Dep't 1985). See generally People v. Mirenda, 23 N.Y.2d 439, 448, 297 N.Y.S.2d 532, 538 (1969) ("We do not . . . interpret the legislative intent [of the predecessor statute to CPL § 710.30] as requiring the District Attorney to notify defendants of admissions made to private parties who were not police agents").

Every Statement Made By The Defendant To A Public Servant Is Discoverable Regardless Of Whether The People Intend To Offer The Statement At Trial

There is a common misconception that the People are only required to advise the defense of statements made by the defendant that are subject to the 710.30 notice requirement. Such belief is clearly misplaced. In this regard, CPL § 240.20(1)(a) provides for the disclosure of:

> Any written, recorded or oral statement of the defendant, and of a co-defendant to be tried jointly, made, other than in the course of the criminal transaction, to a public servant engaged in law enforcement activity or to a person then acting under his direction or in cooperation with him.

In this regard, "[i]t is beyond dispute that a defendant's own statements to police are highly material and relevant to a criminal prosecution. It is for this reason that such statements are *always* discoverable, even when the People do not intend to offer them at trial." People v. Combest, 4 N.Y.3d 341, 347, 795 N.Y.S.2d 481, 485 (2005) (emphasis added). See also People v. Fields, 258 A.D.2d 809, ___, 687 N.Y.S.2d 184, 186 (3d Dep't 1999) ("CPL 240.20(1)(a) . . . is not limited to statements intended to be offered by the People 'at trial', i.e., statements offered as part of the People's direct case (see, CPL 240.10[4])"); People v. Crider, 301 A.D.2d 612, ___, 756 N.Y.S.2d 223, 225 (2d Dep't 2003) (pursuant to CPL § 240.20(1)(a), "the People shall provide the defendant with notice of *any* of his

statements they are aware of, whether or not they intend to use them for any purpose, including but not limited to rebuttal") (emphasis added); People v. Wyssling, 82 Misc. 2d 708, ___-___, 372 N.Y.S.2d 142, 145-46 (Suffolk County Ct. 1975); People v. Bennett, 75 Misc. 2d 1040, ___-___, 349 N.Y.S.2d 506, 519-20 (Erie County Supreme Ct. 1973).

Thus, any argument by the People that they need only disclose statements to which CPL § 710.30 applies is without merit. See Combest, 4 N.Y.3d at 347, 795 N.Y.S.2d at 485; Fields, 258 A.D.2d at ___, 687 N.Y.S.2d at 185; People v. Hall, 181 A.D.2d 1008, 581 N.Y.S.2d 951 (4th Dep't 1992).

Knowledge That Statement Exists Is Not The Same As Knowledge That The People Intend To Use It At Trial

In the field of CPL § 710.30 law, there is a critical distinction between providing the defendant with notice that a statement was made and providing the defendant with notice that the People intend to use the statement at trial. Thus, for example, 710.30 notice violations cannot be cured by discovery. See, e.g., People v. Lopez, 84 N.Y.2d 425, 428, 618 N.Y.S.2d 879, 882 (1994); People v. Phillips, 183 A.D.2d 856, 584 N.Y.S.2d 83 (2d Dep't 1992). In Phillips, the Appellate Division, Second Department, made clear that advising the defendant of the existence of a statement is not a substitute for 710.30 notice:

> On the date of the defendant's arraignment, he was served with a Voluntary Disclosure Form (hereinafter VDF) which contained the following declaration:
>
> > "*PLEASE TAKE NOTICE*, that, pursuant to CPL 240.20(1)(a), statements in the form noted below were made by the defendant" (emphasis in original).
>
> Thereafter, the VDF provided space to enter five different types of statements: "Written", "Stenographic", "Audio tape", "Video tape" and "Oral". Only the space for "Video tape" contained an entry. The substance of the videotaped statement was then summarized. There followed the additional declaration:

> "*PLEASE TAKE FURTHER NOTICE*, that, pursuant to CPL 710.30(1)(a), the People intend to offer evidence of the above statement(s) of the defendant(s) on the People's direct case at the trial of this action, except for the statements specified above in paragraph(s) ___" (emphasis in original).

Also annexed to the VDF were copies of several police reports, including a copy of a page from the arresting officer's memo book reporting that, prior to the videotape statement, the defendant made the oral statement, "I raped [the complainant], I'm guilty".

Over two months after the defendant's arraignment, the People served a second VDF in which they indicated that they intended to offer at trial both the videotape and the oral statement contained in the memo book. This second notice was apparently served in response to the defendant's omnibus motion in which he moved to suppress the videotape, but did not mention the memo book entry. At the Huntley hearing, the defendant moved to preclude the memo book statement solely on the ground that he had not been given timely notice pursuant to CPL 710.30. The hearing court denied the motion to preclude, holding that the initial VDF, which was served on the date of arraignment, contained the statement and thus constituted notice of the existence of the statement. The statement was subsequently admitted at the trial. That was error. * * *

A review of the first VDF demonstrates that the People only specified their intent to offer the videotape at trial. Although the memo book entry annexed to the VDF informed the defendant of the existence of the oral statement, the VDF did not notify him that the People intended to offer that statement on their direct case. Therefore, the notice contained in the initial VDF was ineffective with respect to the oral statement.

183 A.D.2d at ___-___, 584 N.Y.S.2d at 84-85.

In People v. Calise, 167 Misc. 2d 277, 639 N.Y.S.2d 671 (N.Y. City Crim. Ct. 1996), the Court rejected the People's claim that the inclusion of certain statements of the defendant in the accusatory instrument gave the defendant actual notice of the People's intent to use the statements at trial despite the lack of 710.30 notice. In so holding, the Court noted that "[t]he clear language of the statute imposes on the People the obligation not only to inform the defendant of the statements but also of their intent to use them at trial." Id. at ___, 639 N.Y.S.2d at 672. See also People v. Heller, 180 Misc. 2d 160, ___, 689 N.Y.S.2d 327, 334 (N.Y. City Crim. Ct. 1998) ("Inclusion of defendant's statements in the accusatory instrument affords defendant notice of the statements, but not notice of the People's intention to offer the statements at trial"); People v. Centeno, 168 Misc. 2d 172, ___, 637 N.Y.S.2d 254, 258 (N.Y. County Supreme Ct. 1995) ("merely providing the defendant with a copy of a statement, without also stating the intent to utilize that particular statement at trial is not sufficient; the defendant must be informed of both the intent to utilize each statement at trial, the statement's substance, and information to identify when and where the statement was made").

Responses To Pedigree Questions Are Exempt From CPL § 710.30

In People v. Rodney, 85 N.Y.2d 289, 624 N.Y.S.2d 95 (1995), the Court of Appeals held that the defendant's answers to so-called "routine booking" or "pedigree" questions do not have to be noticed pursuant to CPL § 710.30. The Court's rationale was that:

> Because responses to routine booking questions -- pedigree questions, as we have referred to them -- are not suppressible even when obtained in violation of Miranda, defendant lacks a constitutional basis upon which to challenge the voluntariness of his statement and where there is no question of voluntariness, the People are not required to serve defendant with notice. Because routine administrative questioning by the police presumptively avoids any grounds for challenging the voluntariness of statements given in response to those questions, notice of such statements is not required.

Id. at 293, 624 N.Y.S.2d at 97-98 (citations omitted). See also People v. Berkowitz, 50 N.Y.2d 333, 338 n.1, 428 N.Y.S.2d 927, 929 n.1 (1980).

Nonetheless, while not suppressible, pedigree statements appear to be discoverable pursuant to CPL § 240.20(1)(a). See § 26:21, *supra*. See also § 20:12, *supra*.

The question remains: What is a pedigree question? Pedigree questions are questions such as "what is your name, address, height, weight, eye color, date of birth, current age," etc. See Pennsylvania v. Muniz, 496 U.S. 582, 601, 110 S.Ct. 2638, 2650 (1990). To qualify as pedigree questions, questions must be "limited in scope to those necessary for processing a defendant or providing for his physical needs." People v. Hester, 161 A.D.2d 665, ___, 556 N.Y.S.2d 97, 98 (2d Dep't 1990). See also Rodney, 85 N.Y.2d at 292, 624 N.Y.S.2d at 97 (pedigree questions are questions "'reasonably related to the police's administrative concerns'") (quoting Muniz). See also Chapter 27, *infra*. In this regard, the Rodney Court made clear that:

> [T]he People may not rely on the pedigree exception if the questions, though facially appropriate, are likely to elicit incriminating admissions because of the circumstances of the particular case. Such questions fall outside the pedigree exceptions. Thus, the mere claim by the People that an admission was made in response to a question posed solely as an administrative concern does not automatically qualify that admission for the pedigree exception to Miranda or exempt the People from the necessity of supplying a CPL 710.30 notice.

85 N.Y.2d at 293, 624 N.Y.S.2d at 98 (citations omitted).

Applying these principles to the case before it, the Rodney Court held that:

> In this case, the inquiry about defendant's employment status comes within the exception. The arresting officer's question was part of a routine booking form and was reasonably related to such administrative concerns as assignment of counsel, setting of bail, and the arraigning court's determination whether

> to release defendant on his own recognizance. Accordingly, we find no error in the People's failure to give notice of their intent to offer evidence of defendant's statement that he was "in sales." Although the question about defendant's occupation is arguably related to the conduct for which defendant had been arrested, it was not a disguised attempt at investigatory interrogation, and was not reasonably likely to elicit an incriminating response from defendant. Indeed, the incriminating nature of defendant's response arose from his apparent attempt to be humorous, and though the answer was incriminating, preclusion of the evidence is not required because the pedigree exception excuses the absence of CPL 710.30 notice.

Id. at 294, 624 N.Y.S.2d at 98 (citation omitted).

Applicability Of CPL § 710.30 To Statements Overheard By The Police

Where the defendant utters a statement that is merely overheard by the police, 710.30 notice is not required (because the statement is not made to a public servant). See, e.g., People v. Umana, 76 A.D.3d 1111, ___, 908 N.Y.S.2d 244, 246 (2d Dep't 2010) ("Notice was not required because the defendant's statement in Spanish was made in response to a question posed by one of his coworkers at the time of arrest, and was merely overheard by a law enforcement official who, unbeknownst to the defendant, also spoke Spanish"); People v. Cole, 24 A.D.3d 1021, ___, 807 N.Y.S.2d 166, 171 (3d Dep't 2005); People v. Murphy, 163 A.D.2d 425, ___, 558 N.Y.S.2d 140, 141 (2d Dep't 1990); People v. Stewart, 160 A.D.2d 966, ___, 554 N.Y.S.2d 687, 688 (2d Dep't 1990).

Nonetheless, where the overheard statement was made to the defendant's attorney, the statement may be suppressible pursuant to the attorney-client privilege. In this regard, in People v. Boone, 51 A.D.2d 25, __, 379 N.Y.S.2d 181, 184 (3d Dep't 1976):

> Defendant . . . objected to the admission of a statement which was made to his attorney on the telephone and overheard by the police. While the statement is not within the

> technical notice provisions of CPL 710.30, since it was not made to a public servant, defendant contends that admission of the statement would be a violation of the attorney-client privilege. If defendant voluntarily made the statement with full knowledge of the officers' presence and no attempt to prevent them from hearing, no privilege would attach. However, if defendant sought and was deprived of the opportunity for a private conversation with his attorney, then a question as to deprivation of counsel is raised. In view of the necessity of a hearing on the voluntariness of defendant's third statement, the circumstances of the statement to his attorney should also be disclosed.

(Citations omitted).

Applicability Of CPL § 710.30 To Pre-Trial Hearings

In People v. Aldrich-O'Shea, 6 Misc. 3d 35, 789 N.Y.S.2d 804 (App. Term, 9th & 10th Jud. Dist. 2004), a DWI case, the People failed to provide the defendant with CPL § 710.30 notice with regard to the defendant's statements admitting that she had operated the vehicle. Following a probable cause hearing, the Village Court (a) held that such failure would result in the defendant's admissions being "suppressed," and (b) dismissed the accusatory instrument on the ground that without such admissions the People would be unable to prove the issue of operation. On appeal, the Appellate Term held as follows:

> While we leave undisturbed the court's determination to preclude the statements at trial, said determination provided no basis to exclude the evidence from its probable cause review or to dismiss the accusatory instrument. Because suppression hearings are not part of a trial, a court may consider precluded statements in a suppression motion determination, for example, whether the People had probable cause to arrest. Accordingly, we remand the matter to the court below for a determination de novo of the suppression motion.

> We also agree that the accusatory instrument should not have been dismissed. A preclusion order based on a CPL 710.30 violation affects only the evidence's use "upon trial." Whether, absent the precluded proof, there remains sufficient evidence to prosecute the charge is a matter for the People to determine.

Id. at ___, 789 N.Y.S.2d at 805-06 (citations omitted).

Subsequent 710.30 Notice Supercedes Prior Notice

In People v. Boyles, 210 A.D.2d 732, 621 N.Y.S.2d 118 (3d Dep't 1994), a DWI/AUO 1st case, the defendant was served with two 710.30 notices: the first at the time of his arrest; the second following his indictment and arraignment in County Court. The second 710.30 notice omitted a significant statement that was contained in the first. On appeal, the Appellate Division, Third Department, held as follows:

> Because we are remitting this case for a new trial, we also address defendant's contention that County Court erred when it admitted into evidence his statement that he was coming from Shoprite and was on his way to Fallsburg because he was not given proper notice pursuant to CPL 710.30. That statement is significant because the officers apparently knew that Shoprite closed some two hours earlier. The People served two CPL 710.30 notices on defendant; one personally at the time he was arrested and brought before the Monticello Justice Court and a second within 15 days of the arraignment in County Court. Only the earlier notice contained defendant's statement that he was coming from Shoprite. . . . Because the CPL 710.30 notice served at that arraignment in County Court failed to apprise defendant of the People's intention to use his statement that he was coming from Shoprite against him at the trial in that court, that statement should have been suppressed. Defendant was entitled to rely upon the contents of the subsequent CPL 710.30 notice to determine whether to move

> for suppression of any evidence specified therein before trial in County Court.

Id. at ___, 621 N.Y.S.2d at 120.

By contrast, "the People are not required under CPL 710.30 to re-serve a properly served statement notice after filing a superceding complaint." People v. Berisha, 12 Misc. 3d 344, ___, 816 N.Y.S.2d 830, 831 (N.Y. City Crim. Ct. 2006). In Berisha:

> Neither side denies that the People served and filed a statement notice pursuant to CPL 710.30 within 15-days of Defendant's arraignment on the initial complaint. The statement of Defendant appearing with the notice has not changed. Defendant's argument is based on the fact that the People did not re-serve such notice after filing a superceding complaint. The court finds this argument to be without merit.

Id. at ___, 816 N.Y.S.2d at 831.

Amendment Of 710.30 Notice

People v. Centeno, 168 Misc. 2d 172, ___, 637 N.Y.S.2d 254, 258 (N.Y. County Supreme Ct. 1995), nicely summarizes the law in this area:

> Where the notice is otherwise correct and not misleading, minor mistakes can be corrected by amending the notice, even after the notice period has run. (People v. Canute, 190 A.D.2d 745, 593 N.Y.S.2d 539 [2d Dep't 1993] [notice that identification was a showup could be amended to correctly state that it was a lineup]; People v. Ocasio, 183 A.D.2d 921, 922-23, 584 N.Y.S.2d 156 [2d Dep't 1992] [identification notice giving name of wrong witness could be amended to identify the correct witness].) It is only when the notice is so erroneous as to mislead the defendant into understanding that the noticed identification procedure or statement was an entirely different procedure or statement than the one that the People actually seek to utilize that the errors cannot be corrected

> by amendment. (See People v. Greene, 163 Misc. 2d 187, 620 N.Y.S.2d 232 [Sup. Ct. Kings Co. 1994] [notice that identification took place at wrong time and place could not be cured by amendment because it was so defective as to constitute notice of an entirely different identification procedure].)

Cases decided subsequent to Centeno follow the same reasoning. For example, in People v. Pannell, 287 A.D.2d 659, ___, 731 N.Y.S.2d 750, 751 (2d Dep't 2001), the Appellate Division, Second Department, held that:

> Contrary to the defendant's contention, the hearing court properly permitted the People to amend their CPL 710.30 notice to correct an error regarding the name of one of the witnesses who identified the defendant at a showup. The primary purpose of a CPL 710.30 notice is to alert the defendant "to the possibility that evidence identifying him as the person who committed the crime may be constitutionally tainted and subject to a motion to suppress." Here, the People gave the defense timely notice that the defendant had been identified at a showup by two witnesses, which enabled the defendant to move to suppress the prospective identification testimony. Moreover, the defendant was granted a Wade hearing which explored the issue of whether the showup identifications were impermissibly suggestive. Under these circumstances, the notice given to the defense satisfied the intent of the statute.

(Citations omitted).

In addition, in People v. Moore, 178 Misc. 2d 163, 682 N.Y.S.2d 798 (Westchester County Ct. 1998), a multi-defendant case, the People's 710.30 notice erroneously stated that a statement made by the defendant, Roosevelt Payne, was made by a woman named Juanita Jackson. The People served an amended 710.30 notice correcting this error. The Court held that:

> An amendment to a CPL 710.30 notice of statement is permissible where, as here, the amendment and the original timely served notice are identical, except to the extent that the amendment seeks to change that which is readily apparent to the defendant from a mere reading of the statement; here, that the statement is one alleged to have been made by him.

Id. at ___, 682 N.Y.S.2d at 800.

Consequence Of People's Failure To Attach Proper Statement To Their 710.30 Notice

In People v. Sian, 167 A.D.2d 435, ___, 561 N.Y.S.2d 791, 792 (2d Dep't 1990), the Appellate Division, Second Department, held that:

> Contrary to the People's contention, the defendant's motion to preclude his inculpatory statement was properly granted. While the defendant received a timely Huntley notice which provided that the prosecution would offer a statement taken from him on the date of his arrest, the People concede that a copy of another, unrelated confession taken from the defendant on the same date was appended thereto. Only after the 15-day period for giving notice (see, CPL 710.30[2]) had expired, was the defendant served with a copy of the statement pertaining to the indictment in this case. Inasmuch as the wrong inculpatory statement was attached to the Huntley notice, and that notice did not otherwise convey the sum and substance of the statement which the prosecution intended to use in this case, the People failed to comply with the requirements of CPL 710.30. Moreover, while the correct statement was eventually served upon the defendant, the People failed to demonstrate the existence of "good cause" (CPL 710.30[2]) for the untimely service, as their proffered explanation amounted to nothing more than office failure.

In contrast to the above situation (*i.e.*, where the People attached the wrong 710.30 notice), it has been held that where the People's 710.30 notice refers to an attachment, but the "attachment" is not attached, it is incumbent upon defense counsel to bring this issue to the People's attention. See, e.g., People v. Kelly, 200 A.D.2d 440, ___, 607 N.Y.S.2d 240, 241 (1st Dep't 1994); People v. Black, 177 A.D.2d 1040, ___, 578 N.Y.S.2d 53, 53-54 (4th Dep't 1991); People v. Manzi, 162 A.D.2d 955, ___, 558 N.Y.S.2d 337, 338 (4th Dep't 1990).

Defendant Waives 710.30 Notice Claim By Moving To Suppress Rather Than Preclude

Where the People fail to comply with the requirements of CPL § 710.30, the remedy is preclusion -- *unless* the defendant moves to suppress, rather than preclude, and the motion to suppress is denied. In this regard, CPL § 710.30(3) provides that:

> In the absence of service of notice upon a defendant as prescribed in this section, no evidence of a kind specified in [CPL § 710.30(1)] may be received against [the defendant] upon trial unless he has, despite the lack of such notice, moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible as prescribed in [CPL § 710.70(2)].

It is critical to note that the waiver provision contained in CPL § 710.30(3) applies even if the defendant had initially moved to preclude and the motion was improperly denied -- prompting the defendant to subsequently move to suppress. In this regard, in People v. Kirkland, 89 N.Y.2d 903, 904-05, 653 N.Y.S.2d 256, 257 (1996), the Court of Appeals held that:

> When the People intend to offer identification testimony from a witness, a notice of intent must be served upon the defendant specifying the evidence which the People intend to offer (CPL 710.30). The notice requirement is excused when a defendant moves for suppression of the identification testimony (CPL 710.30[3]). Since the defendant here moved to suppress the identification testimony and received a

> full hearing on the fairness of the identification procedure, any alleged deficiency in the notice provided by the People was irrelevant.

(Citations omitted). See also People v. Merrill, 87 N.Y.2d 948, 641 N.Y.S.2d 587 (1996); People v. Newball, 76 N.Y.2d 587, 590, 561 N.Y.S.2d 898, 900 (1990). Notably, the Appellate Division majority in Merrill, relying on People v. Bernier, 73 N.Y.2d 1006, 541 N.Y.S.2d 760 (1989), held that "[a] defendant who initially moves to preclude and loses does not waive his right to preclusion by later participating in a Wade hearing." 212 A.D.2d 987, ___, 624 N.Y.S.2d 702, 702 (4th Dep't 1995). This holding seems to be a correct application of Bernier. Nonetheless, the Court of Appeals reversed, with no opinion, for the reasons stated in the dissenting opinion at the Appellate Division.

Kirkland and Merrill are difficult to reconcile with Bernier. In Bernier:

> Defense counsel learned during trial jury selection that a person with respect to whom no CPL 710.30(1) pretrial notice had been given would be called as the prosecution's main identifying witness. He then made a motion to preclude the testimony based on lack of notice and surprise. Inasmuch as the People failed to present or establish any excuse for not giving the required notice, the court should have granted the preclusion motion and suppressed the identification testimony. Instead, it denied the motion on condition that the prosecution make available the officers who investigated the robberies. After speaking with an officer, defense counsel stated on the record that he had "no idea based on the information I have whether [Gedeon the unnoticed witness] made any kind of out-of-court identification and if he did *maybe* we need a Wade Hearing with respect to that. *I have no idea*." (Emphasis added.) When the prosecutor then acknowledged that an out-of-court identification had been made, the court ordered a Wade hearing.

73 N.Y.2d at 1007-08, 541 N.Y.S.2d at 761 (citations omitted).

The Court of Appeals held that the Appellate Division correctly reversed the defendant's conviction. In this regard, the Court rejected the People's claim that "defendant . . . waived the preclusion protection pursuant to the exception of CPL 710.30(3) by making a suppression motion or participating in a suppression hearing," holding that "[t]he waiver exception cannot become operative in a case such as this when the defendant clearly moved initially to preclude and lost." Id. at 1008, 541 N.Y.S.2d at 761. The Bernier Court further held that defense counsel, who merely acquiesced in the Wade hearing ordered by the trial court, "made no suppression motion qualifying under CPL 710.30(3)." Id. at 1008, 541 N.Y.S.2d at 761.

In light of Kirkland and Merrill, where the defendant believes that his or her motion to preclude has been improperly denied, a strategy decision has to be made as to whether to preserve this issue for appeal or rather to waive the issue by moving to suppress the evidence. See, e.g., People v. Lopez, 84 N.Y.2d 425, 427, 618 N.Y.S.2d 879, 881 (1994) ("Electing to preserve for appellate review his claim that the notice was insufficient, defendant did not seek suppression and no Huntley or Wade hearings were held"); People v. O'Doherty, 70 N.Y.2d 479, 483, 522 N.Y.S.2d 498, 500 (1987) ("Supreme Court . . ., over defendant's objection, held a Huntley hearing"); People v. Amparo, 73 N.Y.2d 728, 729, 535 N.Y.S.2d 588, 589 (1988) ("The exception contained in CPL 710.30(3) -- where a defendant has 'moved to suppress such evidence and such motion has been denied and the evidence thereby rendered admissible' -- is inapplicable here. Defense counsel did not make a motion for suppression of the oral statement on the ground that it was in substance inadmissible at trial . . . . Rather, defense counsel moved only for preclusion of the oral statement on account of late notice, which does not fall within the exception contained in CPL 710.30(3)").

In this regard, it is critical to note that a motion by the defendant to suppress "any and all" statements on the ground of involuntariness -- together with participation in a Huntley hearing -- constitutes a waiver of the preclusion issue. See, e.g., People v. Sturiale, 262 A.D.2d 1003, ___, 693 N.Y.S.2d 374, 375 (4th Dep't 1999) ("defendant sought suppression of 'any and all' statements made by him. Because the oral statements were the very subject of the suppression hearing, the sufficiency of the CPL 710.30 notice was irrelevant"). Cf. People v. St. Martine, 160 A.D.2d 35, ___, 559 N.Y.S.2d 697, 700-01 (1st Dep't 1990) ("Defendant, in the instant matter, did not, by seeking to suppress any and all statements, in effect waive his right to object to the admission of statements of which he was at the time

of the motion still unacquainted"); People v. Holley, 157 Misc. 2d 402, ___, 596 N.Y.S.2d 1016, 1018 (N.Y. City Crim. Ct. 1993) ("this court finds that the request to suppress 'any and all statements' covered only those statements for which notice had been given and not every statement contained in the police paperwork served at the arraignment"); People v. Utria, 165 Misc. 2d 54, ___, 626 N.Y.S.2d 948, 952 (N.Y. City Crim. Ct. 1995) ("the defendant does not waive the right to seek and obtain preclusion when he moves to suppress 'all statements', since he does not waive his right to object to the admission of statements of which he was unaware at the time of the motion"); People v. Wright, 127 Misc. 2d 885, ___ n.*, 487 N.Y.S.2d 688, 691-92 n.* (Nassau County Ct. 1985):

> When defendant moved for "a Huntley hearing," he must have been addressing the statement contained in the CPL 710.30 notice, for that is the only one of which he had formal notice the People intended to offer.
>
> The fact that the defendant may be aware of a number of other statements he made to public officials is irrelevant. It is for the People to tell defendant which statements they intend to offer at the trial. It is not every statement the defendant makes that the People intend to offer at the trial. It is their obligation to be specific, so that when defendant requests a Huntley hearing, the request can be directed at those statements the People intend to offer at the trial, notice of which is the very essence of CPL 710.30.

It should also be kept in mind that the 710.30 notice issue will be waived by a guilty plea. See § 26:40, *infra*.

Use Of Non-Noticed Statement To Impeach Defendant's Testimony

CPL § 710.30 notice only applies to statements that the People intend to use against the defendant during their case-in-chief. See, e.g., People v. Goodson, 57 N.Y.2d 828, 829-30, 455 N.Y.S.2d 757, 758 (1982). Accordingly, 710.30 notice does not apply to statements used to impeach the defendant if the defendant chooses to testify. See, e.g., People v. Ashley, 15 Misc. 3d 80, ___, 836 N.Y.S.2d 758, 759 (App. Term, 9th & 10th Jud. Dist. 2007).

Nonetheless, since the defendant is entitled to discovery of *every* statement he or she made to a public servant, regardless of whether the People intend to offer the statement(s) during their direct case, see, e.g., § 26:21, *supra*, CPL § 240.20(1)(a); People v. Fields, 258 A.D.2d 809, 687 N.Y.S.2d 184 (3d Dep't 1999), this rule should not lead to surprise. In Fields, *supra*, the Appellate Division, Third Department, reversed the defendant's conviction and remanded for a new trial where the trial court failed to preclude certain statements made by the defendant that were not disclosed by the People pursuant to either the defendant's demand to produce and/or the trial court's discovery order. In this regard, the Court held that discovery pursuant to CPL § 240.20(1)(a) "is not limited to statements intended to be offered by the People 'at trial', i.e., statements offered as part of the People's direct case (see, CPL 240.10[4])." 258 A.D.2d at ___, 687 N.Y.S.2d at 186. In so holding, the Court expressly rejected the People's claim that they need only disclose statements to which CPL § 710.30 applies. Id. at ___, 687 N.Y.S.2d at 185.