EVIDENTIARY ISSUES IN WILL CONTESTS

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INTRODUCTION

Courts presiding over will contests are faced not only with parties clamoring to tell their stories, but also with the task of guiding the storytellers through a maze of sometimes competing evidentiary principles, including the principles of relevance and admissibility. Set forth below is a discussion of what constitutes relevant evidence in a will contest and, equally important, how much of that evidence is competent to be heard by the trier of fact.

RELEVANCE GENERALLY

To be admissible into evidence in a contested probate proceeding, testimony and documents must first and foremost be relevant to the issues at hand. All relevant evidence can be admitted into evidence unless its admission violates one or more exclusionary rules. *People v. Lewis*, 69 N.Y.2d 321 (1987). The trial court may nevertheless exclude relevant evidence if its probative value is substantially outweighed

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by the danger of unfair prejudice or the danger that it will confuse the jury. *People v. Scarola*, 71 N.Y.2d 769 (1988).

Defining Relevance. Generally speaking, evidence is relevant if "it has any tendency in reason to prove the existence of a material fact; i.e., it makes determination of the action more probable or less probable than it would be without the evidence . . . ." Richard T. Farrell, Prince, Richardson on Evidence § 4-101 (11th ed. 1995), quoting *People v. Scarola*, 71 N.Y.2d 769, 777 (1988). *See also People v. Davis*, 43 N.Y.2d 17 (1977), *rearg. dismissed*, 61 N.Y.2d 670 (1983) (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence").

Relevance in a will contest is logically determined by the issues raised in the objections to probate, which may include allegations that the propounded instrument was not properly executed by decedent, that the decedent lacked capacity to execute the instrument, and/or that the instrument was the product of fraud or undue influence practiced by a third party.

Relevance as to Undue Execution. Where an objectant contends that a will has not been duly executed, proof of due execution in accordance with EPTL 3-2.1 will require the proponent to establish by a preponderance of the evidence that: the testator signed the will at the end or directed another person to sign his name to the will in his presence (and, in the latter case, that the other person also separately signed his own name to the will); the will was signed in the presence of at least two attesting witnesses or that the testator, having signed the will outside their presence, acknowledged his

signature to each of them; the testator declared to the witnesses that the signed instrument was his last will and testament; and the witnesses, at the testator's request, signed their names and affixed their addresses to the will within thirty days. See EPTL 3-2.1(a).

To meet proponent's burden, testimony relating to execution of the will, including testimony by the attesting witnesses and any attorney who supervised execution, will be relevant. *See, e.g.*, *Matter of Scalone*, 170 A.D.2d 507 (2d Dep't 1991); *Matter of Falk*, 47 A.D.3d 21 (1st Dep't 2007). Indeed, the testimony of the attesting witnesses is "entitled to great weight." *Matter of Collins*, 60 N.Y.2d 466, 473 (1983).

Relevance as to Testamentary Capacity. Where an objectant contends that the testator lacked testamentary capacity, the proponent is required to show, by a fair preponderance of the evidence, that the testator understood the nature and extent of his property, could identify the natural objects of his bounty, and understood the nature and consequences of executing his will. *Matter of Kumstar*, 66 N.Y.2d 691 (1985); *Matter of Paigo*, 53 A.D.3d 836 (3d Dep't 2008). Thus, testimony concerning the testator's mental condition at or near the time of execution will be relevant; particularly germane will be the testimony of the attorney-drafter (and any other attorney who supervised execution of the will) and the attesting witnesses. *See, e.g.*, *Matter of Nofal*, 35 A.D.3d 1132 (3d Dep't 2006); *Matter of Bush*, 85 A.D.2d 887 (4th Dep't 1981); *Matter of Halper*, 2019 NYLJ LEXIS 147 (Sur. Ct., New York Co.); *Matter of Rudolph*, NYLJ, Aug. 31, 2007, at 38, col. 4 (Sur. Ct., Westchester Co.); *Matter of Woode*, NYLJ, Nov. 6, 2001, at 18, col. 3 (Sur. Ct., New York Co.); *Matter of Frazita*, NYLJ, July 24, 1996, at 25, col. 6 (Sur. Ct., Nassau Co.). Relevant also will be the testimony of treating physicians or other medical professionals familiar with the testator's condition and decedent's medical records, as

well as the testimony of witnesses who can impart their own observations of the testator's statements and conduct at or around the time of execution of the will. *See Matter of Paigo*, 53 A.D.3d 836 (3d Dep't 2008); *Matter of Nofal*, 35 A.D.3d 1132 (3d Dep't 2006); *Matter of Scher*, 2008 WL 4149757 (Sur. Ct., Kings Co. 2008); *Matter of Rudolph*, NYLJ, Aug. 31, 2007, at 38, col. 4 (Sur. Ct., Westchester Co.); *Matter of Lyons*, NYLJ, May 16, 2002, at 24, co. 4 (Sur. Ct., Nassau Co.); *Matter of Frazita*, NYLJ, July 24, 1996, at 25, col. 6 (Sur. Ct., Nassau Co.).

Relevance as to Undue Influence. Where an objectant asserts that the testator was unduly influenced in the making of his will, the burden is upon him to show, by a fair preponderance of the evidence, that the alleged undue influencer had the motive and opportunity to influence the testator, and also actually did so "by a moral coercion which the testator was unable to resist and which constrained him to act against his free will." *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co. 2002). *See also Matter of Walther*, 6 N.Y.2d 49 (1959); *Children's Aid Soc. v. Loveridge*, 70 N.Y. 387 (1877); *Matter of Williams*, 172 A.D.3d 514 (1st Dep't 2019); *Matter of Bianco*, 195 A.D.2d 457 (2d Dep't 1993). Undue influence is rarely proven by direct evidence; rather, testimony concerning the testator's mental and physical state, family relations, dependency upon others, control exercised by the alleged influencer, and prior testamentary plans might all be relevant to prove the case. *Matter of Anna*, 248 N.Y. 421 (1928); *Rollwagen v. Rollwagen*, 63 N.Y. 504 (1876).

Relevance as to Fraud. Where an objectant alleges that a will was procured by fraud, he or she must prove, by clear and convincing evidence, that a false statement was made upon which the testator relied, and which caused her to execute a will disposing of

her assets differently than she would have done in the absence of the false statement. *Matter of Paigo*, 53 A.D.3d 836 (3d Dep't 2008); *Matter of Colverd*, 52 A.D.3d 971 (3d Dep't 2008); *Matter of Evanchuk*, 145 A.D.2d 559 (2d Dep't 1988); *Matter of Stein*, 2018 N.Y. Misc. LEXIS 103 (Sur. Ct., New York Co.). Thus, the actions of the third party alleged to have committed fraud or undue influence, as well as decedent's conduct and thoughts, will be relevant.

It is impossible to catalog all possible evidence that may be considered relevant to determining the above objections to probate; set forth below, therefore, are mere examples of evidence considered by New York courts in adjudicating will contests.

RELEVANCE: ACTS AND CONDUCT OF THE TESTATOR

The Testamentary Plan. The testamentary plan reflected in the propounded instrument is obviously highly relevant both to claims of lack of capacity and claims of undue influence. *See, e.g.*, *Matter of Donovan*, 47 A.D.2d 923 (2d Dep't 1975); *Miller v. Miller*, 150 A.D. 604 (1st Dep't 1912).

Testator's Relationships With Legatees and Disinherited Distributees. The testator's relationship with her various family members and other loved ones – and whether the provisions of the will are consistent therewith – may support or undermine any claim of undue influence. *Dobie v. Armstrong*, 160 N.Y. 584 (1899); *Matter of Panek*, 237 A.D.2d 82 (4th Dep't 1997); *Matter of Lamonica*, 199 A.D.2d 503 (2d Dep't 1993); *Matter of Elco*, 153 A.D.2d 860 (2d Dep't 1989); *Matter of Spitz*, 123 A.D.2d 322 (2d Dep't 1986); *Matter of Mahnken*, 92 A.D.2d 949 (3d Dep't 1983); *Matter of O'Donnell*, 91 A.D.2d 698 (3d Dep't 1982); *Matter of Bush*, 85 A.D.2d 887 (4th Dep't

1981); *Matter of Elmore*, 42 A.D.2d 240 (3d Dep't 1973); *Miller v. Miller*, 150 A.D. 604 (2d Dep't 1912); *Matter of Scher*, 2008 WL 4149757 (Sur. Ct., Kings Co. 2008); *Matter of Coviello*, 2007 WL 926343 (Sur. Ct., Orange Co. 2007); *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co.); *Matter of Engelhardt*, NYLJ, June 1, 1994, at 26, col. 6 (Sur. Ct., Westchester Co.). A bequest to the natural objects of the testator's bounty is consistent with a claim that the testator was not unduly influenced to make the gift. In contrast, a significant bequest to a relative stranger, *Matter of Hermann*, 87 Misc. 476 (Sur. Ct., New York Co. 1914), may support a claim of undue influence.

Prior Wills. A testator's previous testamentary plan may also be relevant to show undue influence, especially where the proffered instrument deviates substantially from prior testamentary dispositions. *Matter of Antoinette*, 238 A.D.2d 762 (3d Dep't 1997); *Matter of Mahnken*, 92 A.D.2d 949 (3d Dep't 1983); *Matter of Elmore*, 42 A.D.2d 240 (3d Dep't 1973); *Matter of Stacer*, 13 A.D.2d 164 (4th Dep't 1961), *aff'd*, 11 N.Y.2d 780 (1962); *Matter of Brush*, 1 A.D.2d 625 (1st Dep't 1956); *Matter of Scher*, 2008 WL 4149757 (Sur. Ct., Kings Co. 2008); *Matter of Lyons*, NYLJ, May 16, 2002, at 24 (Sur. Ct., Nassau County); *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.); *Matter of Lachat*, 184 Misc. 492 (Sur. Ct., New York Co. 1944), app. dismissed, 269 A.D. 1013 (1st Dep't 1945); *Matter of Van Ness*, 136 N.Y.S. 485 (Sur. Ct., New York Co. 1912). In particular, the sudden disinheritance of the natural objects of a testator's bounty and/or legatees under prior wills is relevant to determining whether undue influence has been practiced. *See Matter of Antoinette*, 238 A.D.2d 762 (3d Dep't 1997). *See also Matter of Fiumara*, 47 N.Y.2d 845 (1979); *Matter of Hollenbeck*, 65 Misc. 2d 796 (Sur. Ct., Jefferson Co. 1969), *aff'd*, 37 A.D.2d 922 (4th Dep't 1971);

Matter of Couloumbis, 2018 N.Y. Misc. LEXIS 4624 (Sur. Ct., New York Co.). In contrast, evidence that the current testamentary plan strays only slightly from prior plans may be used to rebut the charge of undue influence. *Matter of Hermann*, 87 Misc. 476, 489 (Sur. Ct., New York Co. 1914). However, prior wills have been held irrelevant where the sole ground for challenge is decedent's testamentary capacity. *Matter of Kemble*, 149 A.D.2d 899 (3d Dep't 1989).

Value of Estate. The value of the testator's probate estate is relevant in determining whether undue influence has been practiced. *E.g., Matter of Goldman*, 6 Misc. 2d 663 (Sur. Ct., Kings Co. 1956); *Matter of Mirsky*, NYLJ, May 9, 1984, at 13, col. 2 (Sur. Ct., Bronx Co.)

Testator's Mental State. The conduct and statements of a testator, made reasonably close in time to execution of the will, are always relevant to establishing his capacity to make a will. And the testator's mental, physical and emotional states are clearly relevant to a determination of whether his will was the result of undue influence. *Matter of Donovan*, 47 A.D.2d 923 (2d Dep't 1975); *Matter of Roche*, 244 A.D. 756 (2d Dep't 1935); *Matter of Katz*, 2007 WL 1674237 (Sur. Ct., Nassau Co.).

Testimony of the attorney-drafter and the attesting witnesses concerning the testator's mental condition at the time of execution of the will is obviously highly probative. *See, e.g., Matter of Nofal*, 35 A.D.3d 1132 (3d Dep't 2006); *Matter of Bush*, 85 A.D.2d 887 (4th Dep't 1981); *Matter of Woode*, NYLJ, Nov. 6, 2001, at 18, col. 3 (Sur. Ct., New York Co.); *Matter of Frazita*, NYLJ, July 24, 1996, at 25, col. 6 (Sur. Ct., Nassau Co.). Testimony by decedent's treating physician[2] and/or by disinterested

[2] *See, e.g., Matter of Fiumara*, 47 N.Y. 845 (1979). Note, however, that expert medical testimony has been found to be of little evidentiary value where the expert did not examine the decedent. *See, e.g.,*

witnesses that the decedent was alert and fully aware at or around the time of execution is likewise highly relevant. *Matter of Nofal*, 35 A.D.3d 1132 (3d Dep't 2006); *Matter of Scher*, 2008 WL 4149757 (Sur.Ct., Kings Co. 2008).

Testator's Ability to Conduct Business and Financial Affairs. A testator's ability to conduct business and financial matters at or around the time of execution of his will is considered strong evidence of testamentary capacity. *Matter of Graham*, 63 N.Y.S.2d 572 (Sur. Ct., Delaware Co. 1946). *See also Matter of Nofal*, 35 A.D.3d 1132 (3d Dep't 2006); *Matter of Bush*, 85 A.D.2d 887 (4th Dep't 1981); *Matter of Hollenbeck*, 65 Misc. 2d 796 (Sur. Ct., Jefferson Co. 1969), aff'd, 37 A.D.2d 922 (4th Dep't 1971); *Miller v. Miller*, 150 A.D. 604 (2d Dep't 1912).

Testator's Ability to Meet Personal Responsibilities. A testator's ability to manage her own personal affairs and remain active and social during the period in question also bears strongly on the issue of capacity. *Matter of Camac*, 300 A.D.2d 11 (1st Dep't 2002); *Matter of Elco*, 153 A.D.2d 860 (2d Dep't 1989); *Matter of Mahnken*, 92 A.D.2d 949 (3d Dep't 1983); *Matter of Cottone*, 49 A.D.2d 940 (2d Dep't 1975), aff'd, 40 N.Y.2d 1007 (1976); *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co. 2002); *Matter of Hollenbeck*, 65 Misc. 2d 796 (Sur. Ct., Jefferson Co. 1969), *aff'd*, 37 A.D.2d 922 (4th Dep't 1971); *Matter of Van Ness*, 136 N.Y.S. 485 (Sur. Ct., New York Co. 1912).

Conversely, a decline in mental acuity and in the ability to conduct financial and other personal matters is obviously relevant to proving incapacity. *Matter of Rosen*, 296

Matter of Eshaghian, 2008 WL 4260790 (2d Dept. 2008); *Matter of Chiurazzi*, 744 N.Y.S.2d 507 (2d Dep't 2002); *Matter of Swain*, 125 A.D.2d 574 (2d Dep't 1986), *leave denied*, 69 N.Y.2d 611 (1987); *Matter of Slade*, 106 A.D.2d 914 (4th Dep't 1984); *Matter of Vukich*, 53 A.D.2d 1029 (4th Dep't 1976), *aff'd*, 43 N.Y.2d 668 (1977); *Matter of Barbaro*, NYLJ, April 10, 1990, at 28, col, 5 (Sur. Ct., Kings. Co.).

A.D.2d 504 (2d Dep't 2002); *Matter of Slade*, 106 A.D.2d 914 (4th Dept 1984). Testimony to the effect that decedent's memory, decision-making ability, comprehension, alertness etc. were failing at or around the time of execution is highly probative. *Matter of Paigo*, 2008 WL 2682513 (3d Dep't 2008); *Matter of Podolak*, 10 A.D.2d 794 (4th Dep't 1960); *Matter of Woode*, NYLJ, Nov. 6, 2001, at 18, col. 3 (Sur. Ct., New York Co.).

Testator's Physical Condition. Decedent's physical condition is a relevant consideration too, as a person in a weakened state may be more susceptible to undue influence. *Matter of Panek*, 237 A.D.2d 82 (4th Dep't 1997); *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.); *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co. 2002). Testimony as to the effect of a given disease upon decedent's brain is clearly relevant. *Matter of Roche*, 244 A.D. 756 (2d Dep't 1935). Medication taken by a decedent at or around the time of execution also bears on the issue. *Matter of Elmore*, 42 A.D.2d 240 (3d Dep't 1973). But old age, physical weakness, and poor health, in and of themselves, are not evidence of lack of capacity. *Matter of Fiumara*, 47 N.Y.2d 845 (1979); *Matter of Haggart*, 33 A.D.2d 124 (4th Dep't 1969*), aff'd*, 27 N.Y.2d 900 (1970); *Matter of Villani*, 28 A.D.2d 76 (1st Dep't 1967); *Matter of Rudolph*, NYLJ, Aug. 31, 2007, at 38, col. 4 (Sur. Ct., Westchester Co.).

Testator's Participation in Estate Planning. The decedent's level of participation in the creation and execution of the propounded will may be critically relevant. *See, e.g.*, *Matter of Roche*, 244 A.D. 756 (2d Dep't 1935). Courts will look to such things as:

> Whether the decedent located and contacted the drafting attorney herself or whether she was referred to the drafter by the alleged undue influencer. *Matter of Neenan*, 35 A.D.3d 475 (2d Dep't 2006); *Matter of Buchanan*, 245 A.D.2d 642

(3d Dep't 1997), *app. dismissed*, 91 N.Y.2d 957 (1998); *Matter of Elmore*, 42 A.D.2d 240 (3d Dep't 1973); *Matter of Stein*, 2018 N.Y. Misc. LEXIS 103 (Sur. Ct., New York Co.); *Matter of Coviello*, 2007 WL 926343 (Sur. Ct. Orange Co. 2007); *Matter of Silverman*, NYLJ, March 16, 2004, at 25, col. 2 (Sur. Ct., Westchester Co.); *Matter of Warych*, NYLJ, April 9, 2004, at 34, col. 3 (Sur. Ct., Kings Co.); *Matter of Schneider*, NYLJ, July 16, 2003, at 20, col. 5 (Sur. Ct., Bronx Co.); *Matter of Hermann*, 87 Misc. 476 (1914).

Whether she relayed her testamentary desires directly to the drafter and whether the drafter met with her alone or with others to discuss the terms of the will. *Matter of Buchanan*, 245 A.D.2d 642 (3d Dep't 1997), *app. dismissed*, 91 N.Y.2d 957 (1998); *Matter of Bush*, 85 A.D.2d 887 (4th Dep't 1981); *Matter of Hollenbeck*, 65 Misc. 2d 796 (Sur. Ct., Jefferson Co. 1969).

Whether she reviewed a draft of the will prior to signing. *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.); *Matter of Buchanan*, 245 A.D.2d 642 (3d Dep't 1997), *app. dismissed*, 91 N.Y.2d 957 (1998); *Matter of Coviello*, 2007 WL 926343 (Sur. Ct., Orange Co. 2007).

Whether she attended the execution of the will alone or was accompanied by interested persons. *Matter of Mahnken*, 92 A.D.2d 949 (3d Dep't 1983); *Matter of Roth*, NYLJ, Oct. 16, 2006, at 46, col. 5 (Sur. Ct., Suffolk Co.); *Matter of Silverman*, NYLJ, March 16, 2004, at 25, col. 2 (Sur. Ct., Westchester Co.); *Matter of Schneider*, NYLJ, July 16, 2003, at 20, col. 5 (Sur. Ct., Bronx Co.); *Matter of James*, NYLJ, July 23, 2001, at 30, col. 3 (Sur. Ct., Bronx Co.); *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.).

Confidential Relationships. The nature of decedent's relationship with an alleged undue influencer is also highly relevant. Where there is a "confidential" relationship between the decedent and a beneficiary (such as the relationship between a testator and his attorney, his doctor, his spiritual advisor, or his accountant/financial advisor), an inference of undue influence may be drawn and the beneficiary will then be required to satisfactorily explain the circumstances of the bequest. *See e.g., Matter of Putnam*, 257 N.Y. 140 (1931); *Matter of Henderson*, 80 N.Y.2d 388 (1992); *Matter of Smith*, 95 N.Y. 516 (1884); *Matter of Neenan*, 35 A.D.3d 475 (2d Dep't 2006); *Matter of Bach*, 133 A.D.2d 455 (2d Dep't 1987); *Matter of Collins*, 124 A.D.2d 48 (4th Dep't 1987) *Matter of*

Burke, 82 A.D.2d 260 (2d Dep't 1981); *Matter of Satterlee*, 281 A.D. 251 (1st Dep't 1953); *Matter of Bureiesci*, NYLJ, Dec. 27, 2005, at 31, col. 5 (Sur. Ct., Suffolk Co.); *Matter of Bartel*, 161 Misc. 2d 455 (Sur. Ct., New York Co. 1994), aff'd, 214 A.D.2d 476 (1st Dep't 1995). Note, however, that the relationship between a decedent and a close family member is not considered to be "confidential" for the purpose of triggering the inference. *Matter of Walther*, 6 N.Y.2d 49 (1959); *Matter of Scher*, 2008 WL 4149757 (Sur. Ct., Kings Co. 2008).

Mental Defects and Diseases. While evidence of a decedent's progressive dementia, disorientation, irrationality, confusion, alcoholism or delusions is, of course, highly relevant in a will contest, none of these facts is guaranteed to carry the day for the objectant. *See e.g. Matter of McClosky*, 307 A.D.2d 737 (4th Dep't 2003); *Matter of Chiurazzi*, 296 A.D.2d 406 (2d Dep't 2002); *Matter of Buchanan*, 245 A.D.2d 642 (3d Dep't 1997), *app. dismissed*, 91 N.Y.2d 957 (1998); *Matter of Morris*, 208 A.D.2d 733 (2d Dep't 1994); *Matter of Buckten*, 178 A.D.2d 981 (4th Dep't 1991), *leave denied*, 80 N.Y.2d 752 (1992); *Matter of Elco*, 153 A.D.2d 860 (2d Dep't 1989); *Matter of Hedges*, 100 A.D.2d 586 (2d Dep't 1984); *Matter of Betz*, 63 A.D.2d 769 (3d Dep't 1978); *Matter of Kaplan*, 50 A.D.2d 429 (3d Dep't 1976), *aff'd*, 41 N.Y.2d 870 (1977); *Matter of Brush*, 1 A.D.2d 625 (1st Dep't 1956); *Miller v. Miller*, 150 A.D. 604 (2d Dep't 1912); *Matter of Scher*, 2008 WL 4149757 (Sur.Ct., Kings Co.); *Matter of Waldman*, NYLJ, Oct. 2, 2007, at 37, col. 5 (Sur. Ct., Kings Co.); *Matter of Petrix*, 2007 WL 1532288 (Sur. Ct., Monroe Co.); *Matter of Woode*, NYLJ, Nov. 6, 2001, at 18, col. 3 (Sur. Ct., New York Co.); *Matter of Waltemade*, NYLJ, June 29, 1998, at 35 (Sur. Ct., Westchester Co.); *Matter of Rowehl*, NYLJ, May 31, 1995, at 33, col. 1 (Sur. Ct., Nassau Co.); *Matter of*

Engelhardt, NYLJ, June 1, 1994, at 26, col. 6 (Sur. Ct., Westchester Co.); *Matter of Campbell*, 136 N.Y.S. 1086 (Sur. Ct., New York Co. 1912).

Insane Delusions. Proof that decedent suffered from an insane delusion that controlled his or her testamentary wishes can work to invalidate a will even if the testator is found to have had general testamentary capacity at the time of execution. *Matter of Honigman*, 8 N.Y.2d 244 (1960); *Matter of Zielinski*, 208 A.D.2d 275 (3d Dep't 1995), *app. dismissed*, 86 N.Y.2d 861 (1995). Delusions that do not appear to have affected the testamentary outcome do not have the same effect. *Matter of Heaton*, 224 N.Y. 22 (1918); *Matter of Elco*, 153 A.D.2d 860 (2d Dep't 1989); *Matter of Campbell*, 136 N.Y.S. 1086 (Sur. Ct., New York Co. 1912). The provisions of the will itself may reveal whether the delusions affected a testator's capacity. Whether or not such delusions effected the decedent's testamentary plan is a question best left to the jury. *Matter of Honigman*, 8 N.Y.2d 244 (1960).

Appointment of Guardian. The appointment of an Article 81 guardian for the decedent prior to or shortly after execution of the will, while relevant, does not provide conclusive evidence of incapacity for the purposes of making a will, as such a guardian may be appointed merely upon a finding that decedent was unable to manage his property. See Mental Hygiene Law § 81.01 et seq.; *Matter of Gallagher*, NYLJ, Oct. 29, 2007, at 19, col. 1 (Sur. Ct., Kings Co.); *Matter of Rowehl*, NYLJ, May 31, 1995, at 33, col. 1 (Sur. Ct., Nassau Co.).

Proximity in Time to Execution. The most important evidence of capacity is that which is closest in time to execution; "evidence relating to the condition of the testatrix before or after the execution is only significant insofar as it bears upon the strength or

weakness of mind at the exact hour of the day of execution." *Matter of Hedges*, 100 A.D.2d 586 (2d Dep't 1984). *See also Matter of Margolis*, 218 A.D.2d (2d Dep't 1995) (will of decedent who exhibited disorientation and confusion admitted to probate where evidence established she was alert and comprehending at time of execution); *Matter of Morris*, 208 A.D.2d 733 (2d Dep't 1994) (will of decedent who suffered from disorientation and confusion admitted to probate where evidence showed she was alert and oriented at time of execution)*; Matter of Buckten*, 178 A.D.2d 981 (4th Dep't 1991) (will of decedent found to be confused in period prior to execution admitted to probate upon testimony that decedent had lucid intervals and was alert and comprehending at time of execution); *Matter of Johnson*, 2018 N.Y. Misc. LEXIS 6273 (Sur. Ct., Nassau Co.) ("the relevant inquiry is whether the decedent was lucid and rational at the time the will was made and executed"); *Matter of Katz*, 2007 WL 1674237 (Sur. Ct., Nassau Co. 2007) (medical records from testator's hospitalization for depression that pre-dated execution of the will had no bearing on testamentary capacity); *Matter of Woode*, NYLJ, Nov. 6, 2001, at 18, col. 3 (Sur. Ct., New York Co.) (test of capacity is "whether the testator was lucid and rational at the time the will was executed").

RELEVANCE: ACTS AND CONDUCT OF ALLEGED UNDUE INFLUENCER

As stated above, to establish undue influence, the objectant must not only establish motive and opportunity, but also the actual practice of undue influence. Thus, evidence bearing upon the relationship between the decedent and the alleged undue influencer at or around the time of execution is critical.

Control over Decedent's Affairs. Control by the alleged undue influencer over the general affairs of the decedent is relevant in determining whether undue influence was practiced. *Matter of Malone*, 46 A.D.3d 975 (3d Dep't 2007); *Matter of Buchanan*, 245 A.D.2d 642 (3d Dep't 1997), *leave dismissed*, 91 N.Y.2d 957 (1998). In particular, the extent to which decedent relied and was dependent upon the undue influencer bears upon the issue. *Matter of Panek*, 237 A.D.2d 82 (4th Dep't 1997); *Matter of Brush*, 1 A.D.2d 625 (1st Dep't 1956); *Matter of Coviello*, 2007 WL 926343 (Sur. Ct. Orange Co. 2007); *Matter of Banner*, NYLJ, Feb. 26, 2003, at 23, col. 6 (Sur. Ct., Bronx Co.); *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co.).

Control over or participation in decedent's financial affairs is a significant fact in determining whether undue influence was practiced. *Matter of Rosen*, 296 A.D.2d 504 (2d Dep't 2002); *Matter of Bach*, 133 A.D.2d 455 (2d Dep't 1987); *Matter of Buchanan*, 245 A.D.2d 642 (3d Dep't 1997); *Matter of Panek*, 237 A.D.2d 82 (4th Dep't 1997); *Matter of MacLeman*, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005); *Matter of Lagomarsino*, NYLJ, Aug. 15, 2003. at 20, col. 2 (Sur. Ct., Queens Co. 2003).

Isolation of Decedent. The extent to which the alleged undue influencer sought to isolate decedent from her family and friends and/or control access to decedent is also relevant. *Matter of Delyanis*, 252 A.D.2d 585 (2d Dep't 1998); *Matter of Panek*, 237 A.D.2d 82 (4th Dep't 1997); *Matter of Burke*, 82 A.D.2d 260 (2d Dep't 1981); *Matter of Roche*, 244 A.D. 756 (2d Dep't 1935); *Matter of Isaacs*, 2018 N.Y. Misc. LEXIS 6794 (Sur. Ct., Nassau Co.); *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co.); *Matter of Bonavero*, NYLJ, Jan. 11, 2001, at 30 (Sur. Ct., Kings Co.); *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.).

Participation in Decedent's Estate Planning. The extent to which the alleged undue influencer participated in or sought to orchestrate the drafting and signing of the will is highly probative. *See, e.g.*, *Matter of Paigo*, 53 A.D.3d 8363 (3d Dep't 2008); *Matter of Malone*, 46 A.D.3d 975 (3d Dep't 2007); *Matter of Neenan*, 35 A.D.3d 475 (2d Dep't 2006); *Matter of Camac*, 300 A.D.2d 11 (1st Dep't 2002); *Matter of Rosen*, 296 A.D.2d 504 (2d Dep't 2002); *Matter of Elmore*, 42 A.D.2d 240 (3d Dep't 1973); *Matter of Rosenwasser*, NYLJ, Sept. 29, 2006, at 30, col. 3 (Sur. Ct., Kings Co.); *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.). Where the alleged undue influencer did not have any significant contact with decedent until after the will was executed, courts are likely to dismiss a claim of undue influence. *See, e.g.*, *Matter of Engelhardt*, NYLJ, June 1, 1994, at 26, col. 6 (Sur. Ct., Westchester Co.). In contrast, the drafting of a will in secrecy has been characterized as "striking proof" of undue influence. *Matter of Collins*, 124 A.D.2d 48 (4th Dep't 1987). *See also Matter of Rowehl*, NYLJ, May 31, 1995, at 33, col. 1 (Sur. Ct., Nassau Co.) Similarly, threats by the alleged undue influencer in the event a new will was not made were considered significant evidence of undue influence. *Matter of Piscani*, NYLJ, Nov. 19, 1998, at 37, col. 5 (Sur. Ct., Nassau Co.)

Prior Transfers Made by Decedent. The extent of prior transfers made to the alleged undue influencer is also considered. *Matter of Rosen*, 296 A.D.2d 504 (2d Dep't 2002); *Matter of Driscoll*, NYLJ, July 22, 1998, at 32, col. 3 (Sur. Ct., Westchester Co.); *Matter of Freilich*, NYLJ, March 27, 2002, at 20, col. 2 (Sur. Ct., Bronx Co.); *Matter of Rowehl*, NYLJ, May 31, 1995, at 33, col. 1 (Sur. Ct., Nassau Co.).

Proximity in Time to Will Execution. Inasmuch as the constraint upon the testator's free will must be present at the time of execution, *Matter of Kaufmann*, 14 A.D.2d 601 (1st Dep't 1961), evidence offered to support a claim of undue influence that is remote in time may be determined to be irrelevant.

Prior Bad Acts. Generally speaking, proof that a person acted in a particular manner may not be established by a showing that he committed a similar act in the past. *People v. Molineux*, 168 N.Y. 264 (1901). However, proof of other similar acts *is* admissible to establish, *inter alia*, motive, intent, or a common scheme or plan. *Matter of Brandon*, 55 N.Y.2d 206 (1982).

Procedural Points

Exclusion of Prejudicial Evidence. The trial judge has discretion to exclude otherwise relevant evidence if its probative value is substantially outweighed by undue prejudice. *People v. Scarola*, 71 N.Y.2d 769, 777 (1988).

Exclusion of Cumulative or Remote Evidence. The trial judge also has discretion to exclude otherwise relevant evidence if it is cumulative, remote, or too time consuming. *Berry v. Jewish Board of Family and Child Services*, 173 A.D.2d 670 (2d Dep't 1991).

Pre-Trial Motions to Exclude Evidence. A motion in limine may be made prior to trial to exclude irrelevant evidence or even relevant evidence that may be prejudicial or is otherwise objectionable. However, the trial court will rarely make such decisions outside the context of the trial itself. *See, e.g.*, *Matter of Steinberg*, NYLJ, April 10, 1998, at 27, col. 2 (Sur. Ct., New York Co.); *Matter of Sheen*, NYLJ, Dec. 20, 1989, at 29, col. 2 (Sur. Ct., Bronx Co.).

No Appeal. A trial court's evidentiary rulings are not separately appealable; they are reviewable by an appellate court only after a post-trial judgment has been rendered. *Kopstein v. City of New York*, 87 A.D.2d 547 (1st Dep't 1982); *Matter of Sheen*, NYLJ, Dec. 20, 1989, at 29, col. 2 (Sur. Ct., Bronx Co.).

Admissibility for Limited Purpose. There are many times when evidence is admissible for one purpose but inadmissible for another. For example, as discussed below, the declarations of a testator may be admissible to show his or her state of mind but not to show the truth of the facts asserted.

DEAD MAN'S STATUTE

Historical Background. Relevant evidence is admissible and may be considered by the trier of fact unless it is otherwise subject to an exclusionary rule. CPLR 4519 – known as the Dead Man's Statute – is such a rule. The Dead Man's Statute is derived from the old common law rule prohibiting the testimony of parties and other interested persons. Although the general rule was long ago abolished, CPLR 4519 – enacted in 1869 – preserves the rule with respect to the testimony of interested persons regarding prior transactions or communications with decedents.

The rule is founded upon concern that, inasmuch as the decedent cannot speak for himself, allowing testimony by the surviving party to the transaction may result in perjured testimony and fraudulent claims. The rule has been criticized for its sometimes unfair results, with some courts (and commentators) suggesting that the self-interest of the witness should go to the weight of his testimony, rather than its admissibility. *See, e.g., Matter of Wood*, 52 N.Y.2d 139 (1981); *Brezinski v. Brezinski*, 84 A.D.2d 464 (4th

Dep't 1982); *Matter of Hamburg*, NYLJ, Sept. 11, 1991, at 26, col. 2 (Sur. Ct., Bronx Co.) Nevertheless, the rule lives on, and its application can provide one of the most onerous impediments to proving one's case in a contested probate proceeding.

Statutory Text. Generally speaking, CPLR 4519 prohibits persons with an interest in the outcome of a probate proceeding (or their predecessors in interest) from offering testimony in support of their interest against an executor or administrator concerning a transaction or communication with the decedent.

CPLR 4519 provides, in pertinent part:

> Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his interest or title by assignment or otherwise, shall not be examined as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest against the executor, administrator or survivor of a deceased person . . . or a person deriving his title or interest from, through or under a deceased person . . . concerning a personal transaction or communication between the witness and the deceased person . . . except where the executor, administrator, survivor . . . or person so deriving title or interest is examined in his own behalf, or the testimony of the . . . deceased person is given in evidence, concerning the same transaction or communication.

Persons Who May Invoke Protections of the Statute. CPLR 4519 offers protection to a circumscribed class, which includes the executor or administrator of the estate and any person deriving his or her interest from, through or under the decedent. The statute protects nominated fiduciaries as well as those already appointed by the court.

Persons Disqualified. The Dead Man's Statute seeks to disqualify three categories of witnesses: parties interested in the event, non-parties interested in the event, and persons from, through, or under whom such a party or other interested person derived his or her interest by assignment or otherwise. A witness is deemed to be

"interested" in the event if he or she will "either gain or lose by the direct legal operation and effect of the judgment" or "the record will be legal evidence for or against him in some other action." *Hobart v. Hobart*, 62 N.Y. 80 (1875). In other words, a witness is interested if he or she has a financial stake in the outcome. The size of a witness's interest is irrelevant so long as he or she has something to gain or lose. *Matter of Rose*, 185 Misc. 39 (Sur. Ct., New York Co. 1945), *aff'd*, 269 A.D. 933 (1st Dep't 1946), *leave denied*, 260 A.D. 979 (1st Dep't 1946). The interest must, at any rate, be present, certain and vested, as opposed to remote or contingent. *Hobart v. Hobart*, 62 N.Y. 80 (1875); *Laka v. Krystek*, 261 N.Y. 126 (1933); *Matter of Sheehan*, 51 A.D.2d 645 (4th Dep't 1976).

The category of witnesses disqualified under the statute includes beneficiaries under the proferred instrument. *Matter of Sheehan*, 51 A.D.2d 645 (4th Dep't 1976); *Matter of Katz*, 2007 WL 1674237 (Sur. Ct., Nassau Co. 2007). However, if their interest under a penultimate will is identical to or less than under the proferred will, they are not disqualified because they would derive no benefit in the event the proferred will failed. *Harrington v. Schiller*, 231 N.Y. 278 (1921); *Matter of Saxl*, 32 Misc.2d 481 (Sur. Ct., New York Co. 1961). For the same reason, beneficiaries who would receive more in intestacy than under the proferred will are not disqualified from rendering testimony in support of the will. *E.g.*, *Matter of Malan*, NYLJ, Sept. 14, 2007, at 38, col. 6 (Sur. Ct., Westchester Co.). Intestate distributees with no interest under the will are, however, disqualified from giving testimony challenging admission of the will to probate. *Matter of Aievoli*, 272 A.D. 544 (2d Dep't 1947). Similarly, beneficiaries under a penultimate

will but not under the proferred will are disqualified from testifying against the propounded instrument. *Matter of Murtlow*, 258 A.D.2d 686 (3d Dep't 1999).

Nominated executors, in contrast, are free to testify in support of the will to transactions or communications with the decedent, provided they are not also beneficiaries. *Matter of Wilson*, 103 N.Y. 374 (1886); *Matter of Johnson*, 7 A.D.3d 959 (3d Dep't 2004), *leave to app. denied*, 3 N.Y.3d 606 (2004); *Matter of Stacer*, 13 A.D.2d 164 (4th Dep't 1961), *aff'd*, 11 N.Y.2d 780 (1962). However, an executor who is accused of undue influence in procuring the will may be precluded from testifying. *Matter of Schrutt*, 206 A.D.2d 851 (4th Dep't 1994), *leave denied*, 84 N.Y.2d 810 (1994).

Spouses and other family members of interested persons are not disqualified by virtue of the familial relationship from rendering testimony concerning transactions/communications with the decedent. *Matter of Mead*, 129 A.D.2d 1008 (4th Dep't 1987).

Timing of Interest. A witness is disqualified from offering testimony only if he holds an interest at the time the testimony is offered into evidence. Thus, a witness's transfer of his or her interest prior to testifying will restore his competency to testify. So, for example, a legatee or devisee who renounces his bequest has divested himself of his interest and may testify as to transactions or communications with the decedent. *Matter of Wilson*, 103 N.Y. 374 (1886). (Note, however, that at least one court has held that distributees cannot be divested of their status as interested witnesses simply by renouncing their distributive share, *Matter of Aievoli*, 272 A.D. 544 [2d Dep't 1947]).

Personal Transaction or Communication Defined. Interested witnesses are precluded from testifying "concerning a personal transaction or communication between

the witness and the deceased person . . . ." CPLR 4519. The term "personal transaction or communication" has been interpreted broadly by the courts. According to the Court of Appeals, the statute excludes an interested witness's testimony concerning "any knowledge which he has gained by the use of his senses from the personal presence of the deceased." *Griswold v Hart*, 205 N.Y. 384, 395 (1912). Put another way, the Court precluded any testimony "which the deceased person if living could contradict or explain." *Id*. at 397. *See also Holcomb v. Holcomb*, 95 NY 316 (1884) (the terms transaction and communication "embrace every variety of affairs which can form the subject of negotiation, interviews, or actions between two persons, and include every method by which one person can derive impressions or information from the conduct, condition, or language of another"); *Matter of Hamburg*, 151 Misc. 2d 1034 (Sur. Ct., Bronx Co. 1991) ("a person who is disqualified under CPLR 4519 cannot testify about anything that was gleaned by any of [the] witness's senses in the presence of the decedent"). In sum, the term "personal transaction or communication" appears to encompass "every method by which a person can derive impressions or information from the conduct, condition, or language of another." 9 Warren's Heaton on Surrogate's Court Practice §116.04 (7th ed. 2008).

This includes not only verbal interactions and statements made by decedent, but also the witness's observations of decedent's conduct and condition. *See, e.g., Hadley v. Clabeau*, 140 Misc. 2d 994 (Sup. Ct., Cattaraugus Co. 1988), aff'd, 161 A.D.2d 1141 (4th Dep't 1990). In fact, the term transaction/communication has been defined to include what the decedent did not say. *Endervelt v. Slade*, NYLJ, Nov. 28, 1994, at 26, col. 3

(Sup. Ct., New York Co.), *aff'd*, 214 A.D.2d 456 (1st Dep't 1995) (court precluded witness from testifying that decedent failed to inform her of certain facts).

Courts have also excluded indirect testimony that seeks to prove a transaction/communication with the decedent. Testimony that the witness received property has therefore been barred when such receipt would stand as evidence of a transfer from decedent himself. *Clift v. Moses*, 112 N.Y. 426 (1889). *But see Matter of Tremaine*, 156 A.D.2d 862 (3d Dep't 1989) (court permitted testimony about witness's storage and disposal of furniture alleged to be a gift from decedent, reasoning that such testimony did not reflect a transaction or communication with decedent).

Communications With Decedent's Representative. Testimony concerning communications/transactions with a decedent's representative, however, is permitted under the statute. *Matter of Herman*, NYLJ, May 21, 1993, at 26, col. 6 (Sur. Ct., Nassau Co.). This is true even if decedent is present, so long as decedent does not participate in the communication. *Matter of Ryder*, 279 A.D. 1131 (4th Dep't 1952); *Matter of French*, 8 A.D.2d 660 (3d Dep't 1959).

Communications/Transactions Do Not Include Independent Facts. Finally, an interested witness is always permitted to testify to "independent" facts that do not involve a communication or transaction with decedent. *Brezinski v. Brezinski*, 84 A.D.2d 464 (4th Dep't 1982), *appeal after remand*, 94 A.D.2d 969 (4th Dep't 1983) (interested witness was permitted to testify that account she opened in joint name with decedent was intended by her to be a convenience account); *Matter of Hammerman*, NYLJ, May 21, 1993, at 26, col. 6 (Sur. Ct., New York Co.) (in action to recover funds from decedent's brother, brother was permitted to testify that he paid salaries of decedent's caretakers).

Nature of Testimony. An interested witness is precluded from offering testimony only if it is offered "in his own behalf or interest" or on behalf of a successor in interest. CPLR 4519. Testimony offered by an interested witness that is antithetical to his interest is not barred. *Harrington v Schiller*, 231 NY 278 (1921); *Matter of Rizzo*, 15 A.D.2d 550 (2d Dep't 1961); *Matter of Tremaine*, 156 A.D.2d 863 (3d Dep't 1989). Moreover, an interested witness who is called to testify by a party with an adverse interest is not considered to be testifying "in his own behalf" and his testimony will therefore be allowed. *Matter of Anna*, 248 N.Y. 421 (1928); *Matter of Balado*, 84 A.D.2d 564 (2d Dep't 1981); *Matter of Hauck*, NYLJ, Dec. 23, 1992, at 25, col. 3 (Sur. Ct., New York Co.), aff'd, 200 A.D.2d 405 (1st Dep't 1994).

Documentary Evidence. CPLR 4519 prohibits only the introduction of testimonial evidence. It does not apply to the introduction of documents written by the decedent, which are admissible if properly authenticated. *Matter of Callister*, 153 N.Y. 294 (1897); *Matter of Press*, 30 A.D.3d 154 (1st Dep't 2006); *Acevedo v Audubon Mgmt., Inc.*, 280 A.D.2d 91 (1st Dep't 2001); *Trotti v. Estate of Buchanan*, 272 A.D.2d 660 (3d Dep't 2000). As a practical matter, it may be difficult to authenticate such documents, as testimony by an interested witness necessary to authenticate the decedent's handwriting may be barred under the statute. *See Acevedo v. Audobon Mgmt, Inc*., 280 A.D.2d 91 (1st Dep't 2001) (Dead Man's Statute would bar interested witnesses from testifying as to the genuineness of decedent's handwriting); *Matter of Warsaski*, 258 A.D.2d 379 (1st Dep't 1999) (same). Thus, a disinterested witness or an expert witness may be necessary. On the other hand, a document written by the decedent may be admitted into evidence if the parties concede its authenticity. *Matter of Reisman*, NYLJ,

Feb. 8, 2000, at 31, col.3 (Sur. Ct., Nassau Co.) (portions of decedent's diary admitted upon stipulation as to its authenticity).

Because CPLR 4519 does not apply to documentary evidence, admission of such a document into evidence does not "open the door" to allow an interested witness to testify to the events referred to in the document. *Matter of Edelstein*, NYLJ, May 26, 1990, at 30, col. 3 (Sur. Ct., Nassau Co.); *Kiser v. Bailey*, 92 Misc. 2d 435 (Civil Ct., New York Co., 1977).

Waiver of Incompetency. The incompetency of an interested witness can be waived in at least four ways. First, a failure to object to the admission of incompetent evidence waives the protections of the statute. Once such testimony has been admitted without objection, it will not be stricken. *Matter of Maijgren*, 193 Misc. 814 (Sur. Ct., Monroe Co. 1948). However, inasmuch as the objection may be raised at any time, failure to object to testimony regarding a particular transaction does not waive the right to object to testimony regarding any other transaction. *Matter of Honigman*, 8 N.Y.2d 244 (1960).

In a probate contest where there are a number of persons with standing to raise the objection, the decision to waive objection to the testimony must be unanimous. The executor's willingness to waive the protections of the statute by allowing a beneficiary to render testimony in support of the will does not prevent a distributee from raising the objection. CPRL C4519:6(a).

Second, if a protected party testifies concerning a transaction or communication with decedent, such testimony "opens the door" to testimony by an interested witness concerning the same event. CPLR 4519; *Matter of Wood*, 52 N.Y.2d 139 (1981).

However, testimony elicited by the protected party's adversary on cross-examination does not open the door to testimony by the interested witness because the protected party is not considered to be testifying in his own behalf. *Corning v. Walker*, 10 N.Y. 547 (1885); *Sepulveda v. Aviles*, 308 A.D.2d 1 (1st Dep't 2003); *Sklaire v. Eldridge*, 12 A.D.2d 386 (3d Dep't 1961).

Be advised that courts have tended to interpret narrowly the scope of this form of waiver. *See, e.g.*, *Matter of Wood*, 52 N.Y.2d 139 (1981), which held that the executor's introduction of bank statements and the testimony of a disinterested witness to prove that respondents withdrew money from decedent's accounts, as well as the executor's own testimony that the funds were not among decedent's possessions, did not open the door to testimony by respondents that they returned the funds to decedent. In so holding, the Court of Appeals reasoned that the executor himself did not testify to a transaction or communication with decedent.

Third, if a protected party examines or cross-examines an interested witness concerning a transaction or communication with decedent, the witness is not considered to be testifying "in his own behalf" and the testimony will be allowed. *Matter of Wood*, 52 N.Y.2d 139 (1981); *Brezinski v, Brezinski*, 84 A.D.2d 464 (4th Dep't 1982), *appeal after remand*, 94 A.D.2d 969 (4th Dep't 1983); *Matter of Balado*, 84 A.D.2d 564 (2d Dep't 1981); *Matter of Hauck*, NYLJ, Dec. 23, 1992, at 25, col. 3 (Sur. Ct., New York Co.), *aff'd*, 200 A.D.2d 405 (1st Dep't 1994); *Matter of Dunbar*, 139 Misc. 2d 955 (Sur. Ct., Bronx Co. 1988). Moreover, if a protected party elicits from a disqualified witness a portion of a transaction or communication with the decedent, the witness will be

permitted to testify as to the balance of the transaction. *Nay v. Curley*, 113 N.Y. 575 (1889).

Furthermore, if during a trial a protected party introduces the deposition testimony of a disqualified witness, he will be deemed to have opened the door to the witness's testimony on the same transaction. *Matter of Lamparelli*, 6 A.D.3d 1218 (4th Dep't 2004); *Matter of Radus*, 149 A.D.2d 348 (2d Dep't 1988); *Matter of Reisman*, NYLJ, Feb. 8, 2000, at 31, col. 3 (Sur. Ct., Nassau Co.). This rule does not apply, however, when the testimony of the interested witness was derived from an unrelated proceeding in which the protected party played no role in eliciting the testimony. In such a case, the door is not opened to allow the interested witness's further testimony. *Matter of Sternberg*, 81 A.D.2d 1010 (4th Dep't 1981).

Fourth, if former testimony of the decedent concerning the event is admitted into evidence at trial, the disqualified witness will be permitted to testify as to the same transaction or communication. *Tepper v. Tannenbaum*, 65 A.D.2d 359 (1st Dep't 1978); *Matter of Cheney*, NYLJ, Oct. 21, 2008, at 35, col. 2 (Sur. Ct., New York Co.). See Former Testimony discussion, *infra*.

Procedural Points

Burden of Proof. The burden of proving that a witness is incompetent to testify under CPLR 4519 rests with the party asserting the position. *Stay v. Horvath*, 576 N.Y.S.2d 908 (3d Dep't 1991); *Matter of Mead*, 129 A.D.2d 1008 (4th Dep't 1987).

Hearsay Exception Does Not Save Barred Testimony. In the event the testimony of an interested witness is barred by CPLR 4519, the fact that the precluded testimony may fall within an exception to the hearsay rule is of no moment. The testimony is

inadmissible. *Wall Street Associates v. Brodsky*, 295 A.D.2d 262 (1st Dep't 2002). When testimony is objectionable under both CPRL 4519 and the hearsay rule, counsel is advised to raise both objections on the record.

Challenge is to Witness, Not Evidence. Inasmuch as CPLR 4519 works to disqualify the witness, rather than the evidence, in raising an objection under CPLR 4519, the challenge should be to the competency of the witness, as opposed to the admissibility of the testimony itself. Such objection must identify the relevant transaction or communication with the decedent. *Hoag v. Wright*, 174 NY 36 (1903).

CPLR 4519 Applies Only At Trial. The statute, by its terms, applies only "upon the trial of an action or the hearing upon the merits of a special proceeding." CPLR 4519. Thus, interested witnesses are permitted to testify to transactions/communications with the decedent during SCPA 1404 examinations and all other pre-trial examinations. If a protected party either testifies or elicits testimony from interested witnesses during this phase of the litigation, such testimony will not result in a waiver of the statute at the trial stage. *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307 (1972); *Matter of Van Volkenberg*, 254 N.Y. 139 (1930).

Barred Testimony Applies to Defeat, but not Support, Summary Judgment. While testimony barred by the statute generally cannot be used to support a motion for summary judgment, it can be used to defeat such a motion. *Phillips v. Joseph Kantor & Co.*, 31 N.Y.2d 307 (1972). *See also Tancredi v. Mannino*, 75 A.D.2d 579 (2d Dep't 1980); *Matter of Sheehan*, 51 A.D.2d 645 (4th Dep't 1976); *Matter of Katz*, 2007 WL 1674237 (Sur. Ct., Nassau Co. 2007). *But see Albany Savings Bank FSB v. Seventy-Nine Columbia Street, Inc.*, 197 A.D.2d 816 (3d Dep't 1993) (court granted summary

judgment where only evidence in opposition was testimony of disqualified witness); *Matter of Casessa*, NYLJ, June 22, 2001, at 24 (Sur. Ct., Kings Co.) (same).

HEARSAY

Hearsay Defined. Hearsay is an out-of-court statement made by a declarant which is offered in court to prove the truth of the matter asserted therein. *Hasbrouck v. Caedo*, 296 A.D.2d 740 (3d Dep't 2002); *Stern v. Waldbaum*, 234 A.D.2d 534 (2d Dep't 1996). The common-law hearsay rule precludes the admission into evidence of such statements on the ground that they are inherently unreliable because the party against whom they are offered does not have the opportunity to cross-examine the declarant to test his or her memory, perception, veracity, etc.

Rule Bars Out-of-Court Statements Offered for Their Truth. The hearsay rule bars admission into evidence of oral statements, as well as written statements, made outside the courtroom and thereafter offered at trial to prove the truth of their content. *See Lindt v. Henshel*, 25 N.Y.2d 357 (1969) (letter by decedent to his attorney claiming ownership of property, and testimony by decedent's sister that decedent told her he wished to give property to a museum, held inadmissible as hearsay); *Matter of Brownstone*, 289 A.D.2d 97 (1st Dep't 2001) (in contested probate proceeding, testimony that witness was informed of decedent's diagnosis of Alzheimer's while at a clinic held inadmissible to prove the truth of the matter asserted); *Matter of Neenan*, 35 A.D.3d 475 (2d Dep't 2006) (in contested probate proceeding, decedent's guardianship file was properly deemed inadmissible hearsay); *Matter of Katz*, 2007 WL 1674237 (Sur. Ct., Nassau Co. 2007) (in contested probate proceeding, decedent's out-of-court statements that he had disinherited daughter due to credit card spending and wanted nothing to do with her held inadmissible hearsay). *See also*, *Wagman v. Bradshaw*, 292 A.D.2d 84 (2d Dep't 2002) (admission of report of non-testifying healthcare professional would violate

hearsay rule). The hearsay rule also bars admission of non-verbal conduct when it is intended by the declarant as an assertion of fact. 9 Warren's Heaton on Surrogate's Court Practice § 118.02[3][a] (7th ed. 2008); Helen E. Freedman, New York Objections § 5:10 (2007). Finally, the rule bars out-of-court statements made under oath (unless a hearsay exception applies). *Bookman v. Stegman*, 105 N.Y. 621 (1887); *Matter of Abbate*, NYLJ, June 25, 2003, at 18, col. 2 (Sur. Ct., New York Co.) (affidavit by objectant in will contest stating that decedent was suffering from Alzheimer's Disease is inadmissible hearsay).

Statements Offered for Purposes Other Than Their Truth. If an out-of-court statement is not offered to establish the truth of the assertions made by the declarant, it is not hearsay and will not be barred from admission into evidence. *Provenzo v. Sam*, 23 N.Y.2d 256 (1968). Thus, in ascertaining whether an out-of-court statement is subject to the hearsay rule, the determinative inquiry is whether the statement is being offered for the truth of its content. If it is, then the credibility of the declarant himself is of primary importance and the declarant must be subjected to cross-examination.

An out-of-court statement offered for the sole purpose of establishing that the statement was made – without regard to its underlying truth – is not considered hearsay. *Giordino v. Berenbaum*, 279 A.D.2d 282 (1st Dep't 2001); *DeLuca v. Ricci*, 194 A.D.2d 457 (1st Dep't 1993). If a statement is not being offered for its truth, then cross-examination of an in-court witness who heard the statement provides sufficient protection, because such an examination will create an opportunity to test the witness's assertions as to when and where and by whom the statement was made.

When faced with a hearsay objection to which none of the possible hearsay exceptions apply, a party's only available course of action is to argue that the testimony sought to be admitted is being offered for a purpose other than to prove the truth of the matter asserted therein. For example, an out-of-court statement may be important to establish a decedent's intentions or state of mind, such as a belief that a family member was devoted and deserving of a bequest, or instead was thankless and undeserving, regardless of whether the statements made by decedent are true. The fact that a statement was made, regardless of its truth or falsity, may also be relevant to showing, for example, that a party had previously been notified of a dangerous condition. *Dawson v. Raimon Realty Corp.*, 303 A.D.2d 708 (2d Dep't 2003). Finally, an out-of-court statement offered for the specific purpose of attacking the credibility of a trial witness by showing that he or she made a prior inconsistent statement is not hearsay. *Campbell v. City of Elmira*, 198 A.D.2d 736 (3d Dep't 1993), *aff'd*, 84 N.Y.2d 505 (1994).

Double Hearsay. It is possible that a statement made by an out-of-court declarant will contain not only the declarant's hearsay statement, but also out-of-court statements of other persons, all of which are being offered for the truth of the assertions made therein. This is referred to as "double hearsay." *Guerrero v. Commander Elec., In.* 170 A.D.3d 675 (2d Dep't 2019); *Quinn v. 1649 Restaurant Corp*., 18 A.D.3d 281 (1st Dep't 2005); *Griggs v. Children's Hospital of Buffalo*, 193 A.D.2d 1060 (4th Dep't 1993) (witness barred from testifying that decedent told her that a doctor at defendant hospital advised decedent not to seek further treatment).

The fact that the declarant's statements are themselves admissible under a hearsay exception does not mean that other persons' statements repeated by the declarant are also

admissible. In order for such statements to be admissible in their entirety, each level of hearsay must be subject to an applicable hearsay exception. *Liberto v. Worcester Mutual Insurance Co.*, 87 A.D.2d 477 (2d Dep't 1982). Where some out-of-court declarations qualify for admission and others are barred by the hearsay rule, only those portions that qualify will be admitted into evidence. See *Matter of McKanic*, 50 A.D.3d 1145 (2d Dep't 2008).

Procedural Points

Burden of Proof. The proponent who seeks to admit an out-of-court statement has the burden of proving that a hearsay exception applies. *Tyrell v. Wal-Mart Stores, Inc.*, 97 N.Y.2d 650 (2001).

Objection is Necessary. To invoke the hearsay rule, a proper objection to admission of the out-of-court statement must be made. Failure to object constitutes a waiver of the protection offered by the rule. *Forrester v. Port Authority of NY and NJ*, 166 A.D.2d 181 (1st Dep't 1990). *See also Kaiser v. Orange County Dept. of Social Services*, 34 A.D.3d 586 (2d Dep't 2006).

Admission if no Objection is Made. In the event hearsay is admitted at trial without objection, the trier of fact may consider it and give it such weight as is appropriate under the circumstances. *Matter of Findley*, 253 NY 1 (1930). However, hearsay alone is not sufficient to support a judgment. Richard T. Farrell, Prince, Richardson on Evidence § 8-108 (11th ed. 1995).

TESTATOR'S DECLARATIONS

Generally speaking, a testator's declarations offered to establish the truth of the matter asserted constitute inadmissible hearsay. *Matter of Limberg*, 277 N.Y. 129 (1938).

State of Mind Exception. While a testator's written and oral statements are inadmissible for the truth of the matter asserted therein (e.g., to prove that undue influence was, in fact, practiced), they are admissible to show the testator's state of mind and her susceptibility to undue influence at the time they were made. *Matter of Limberg*, 277 N.Y. 129 (1938); *Smith v. Keller*, 205 N.Y. 39 (1912); *Matter of Frank*, 253 A.D. 707 (1st Dep't 1937); *Lesster v. Lesster*, 178 A.D. 438 (1st Dep't 1917). Statements by the testator revealing her mental capacity, her attitude and feelings towards family members, her motivation for making testamentary dispositions, her ability to resist the influence of others, etc., are all admissible under the state of mind exception to the hearsay rule. *Matter of Putnam*, 257 N.Y. 140 (1931); *Matter of Ryan*, NYLJ, March 8, 2005, at 23, col. 1 (Sur. Ct. New York Co.) (letters written by decedent to various children offered to show decedent was not mentally incapacitated and not subject to influence); *Matter of Pinkney*, 117 Misc. 262 (Sur. Ct., New York Co. 1921) ("[e]vidence of testator's conduct, manner of doing business, correspondence, declarations, etc., is received, not for the purpose of showing the truth or falsity of such statements, but to disclose state of mind, strength or weakness of will, capacity, or incapacity or susceptibility to undue influence"); *Matter of Reisman*, NYLJ, Feb. 8, 2000, at 31, col.3 (Sur. Ct., Nassau County).

Such declarations are admissible, however, only when made close in time to execution of the will. *Matter of Putnam*, 257 N.Y. 140 (1931); *Matter of Frank*, 165 Misc. 411 (Sur. Ct., New York Co. 1937).

Res Gestae. A testator's statements made immediately before, during or after execution of the will are admissible as part of the res gestae, as they are viewed as an integral part of the signing process. *Matter of Athanasiou*, 24 Misc. 2d 12 (Sur. Ct., Nassau Co. 1960). Such statements may be admitted to reveal the testator's capacity to execute the will and his or her feelings about persons alleged to have unduly influenced the testator.

Declarations Challenging Validity of Will. A testator's declarations made either before or after execution of the will, offered for their truth to show the will was the product of fraud or duress, are inadmissible. *Smith v. Keller*, 205 N.Y. 39 (1912); *Waterman v. Whitney*, 11 N.Y. 157 (1854). This rule is grounded in concern that a testator may re-write history for the benefit of the listener. (However, if such declarations were made at the time of execution of the will, they are considered to be part of the res gestae and are admissible on that basis. *Waterman v. Whitney*, 11 N.Y. 157 [1854].)

Statements of Testamentary Intentions. A testator's statements with respect to his testamentary intentions, made prior to execution of the will, are admissible to show that the will has carried out those intentions and thus to rebut an inference of undue influence. 39 NY JUR. 2d, Decedent's Estates, § 541 (2002); *Matter of Miller*, 134 Misc. 671 (Sur. Ct., Columbia Co. 1929); *Matter of Hermann*, 87 Misc. 476 (Sur. Ct., New York Co. 1914). A testator's prior statements showing testamentary intentions that conflict with

the provisions of the will, if made close in time to the will's execution, are also admissible, but only if there exists independent evidence of undue influence. *Matter of Hermann*, 87 Misc. 476 (Sur. Ct., New York Co. 1914); *Matter of Johnson*, 7 Misc. 220 (Sur. Ct., New York Co. 1894). *See also* 39 NY JUR. 2d, Decedent's Estates, § 541 (2002).

Declarations as to Physical State. A testator's declarations as to her present physical state or condition are admissible if made to a doctor for the purpose of receiving medical treatment. *Roche v. Brooklyn City & Newtown Railroad*, 105 N.Y. 294 (1887); 58 NY JUR. 2d, Evidence and Witnesses § 339 (2000). The Court of Appeals has also held admissible a decedent's declaration of existing physical pain made to his daughter. *Tromblee v. North American Accident Insurance Co*., 173 A.D. 174 (3d Dept. 1916), *aff'd*, 226 N.Y. 615. Involuntary expressions of pain – including screams and moans – are also admissible. 58 NY JUR. Evidence and Witnesses § 338 (2000). But statements of past pain, even if made to a doctor, are inadmissible. *Davidson v. Cornell*, 132 N.Y. 228 (1892).

Statements as to Existence or Non-Existence of Will. In the context of a lost will proceeding, a testator's declarations are not admissible either to prove revocation of her will or to prove its continued existence unless such admissions are part of the res gestae. *Matter of Bonner*, 17 N.Y.2d 9 (1966); *Matter of Kennedy*, 167 N.Y. 163 (1901); *Matter of Muller*, NYLJ, March 19, 1992, at 23, col. 1 (Sur. Ct., Westchester Co.); *Matter of Gelken*, 103 Misc. 2d 772 (Sur. Ct., Nassau Co. 1980); *Matter of Flynn*, 174 Misc. 565 (Sur. Ct., New York Co. 1940). If such declarations do accompany the act of revocation, they are admitted only for the purpose of showing the testator's intentions with respect to

the act. *Waterman v. Whitney*, 11 N.Y. 157 (1854). While a decedent's declarations themselves may be inadmissible, his actions tending to show the continued existence of a will – such as an exhaustive search of his home and business – have been admitted into evidence. *Matter of Rush*, 38 Misc. 2d 45 (Sur. Ct., New York Co. 1962).

ADMISSIONS OF BENEFICIARIES AND UNDUE INFLUENCER

Admissions Exception. Under the admissions exception to the hearsay rule, a party's out-of-court act or statement, contrary to the position taken by him at trial, may be introduced into evidence against the party as proof of the matter asserted. *People v. Chico*, 90 N.Y.2d 585 (1997); *Reed v. McCord*, 160 N.Y. 330 (1899); *Amann v. Edmonds*, 306 A.D.2d 362 (2d Dep't 2003); *Matter of Hermann*, 87 Misc. 476, 496 (Sur. Ct., New York Co. 1914). This is true even if the statement was not contrary to the party's interest at the time it was made. Helen E. Freedman, New York Objections § 5:150 (2007).

Exception Generally Does Not Apply to Probate. Generally speaking, however, the admissions exception to the hearsay rule does not apply in probate contests. *Matter of Ryan*, NYLJ, Mar. 8, 2005, at 23, col. 1 (Sur. Ct., New York Co.) (admissions exception to hearsay rule did not apply to declaration by decedent's son that he influenced decedent to disinherit other children). Where two or more beneficiaries are named in a will, an out-of-court declaration by any one of them that would serve to support an attack on the validity of the will is not admissible, as proof of the matter asserted, if such statement would redound to the detriment of the other legatees. *Matter of Hayden*, 261 A.D. 103 (4th Dep't 1941); *Lesster v. Lesster*, 178 A.D. 438 (1st Dep't. 1917); *Matter of Dawalker*,

63 A.D. 550 (4th Dep't 1901); *Matter of Kupfer*, 138 Misc. 821 (Sur. Ct., New York Co. 1930); *Matter of Hermann*, 87 Misc. 476 (Sur. Ct., New York Co. 1914). For example, if one legatee declared the testator to be incompetent at the time the will was executed, such an admission would be excluded from evidence -- even as against the declarant -- so as to protect the interests of the other legatees. *Matter of Kennedy*, 167 N.Y. 163 (1901); *Matter of Naul*, 75 A.D.292 (2d Dep't 1902). This rule is necessitated by the reality that if the will falls as to one beneficiary, it falls as to all of them.

The fact that the declarant is the *primary* beneficiary of the will does not impact this analysis, so long as the interests of other beneficiaries would be affected by the admission of his declaration into evidence. *Matter of Seagrist*, 11 Misc. 199, aff'd, 1 A.D. 615 (1st Dept. 1896), *aff'd*, 153 N.Y. 682 (1897).

Exception Applies if Declarant is Sole Legatee. But in the event the declarant is the *sole* legatee under the will, admissions made by him will be deemed competent evidence. *Matter of Myer*, 184 N.Y. 54 (1906); *Matter of Campbell*, 67 A.D. 418 (3d Dep't 1901); *Matter of Esterheld*, 173 Misc. 1056 (Sur. Ct., Monroe Co. 1940). *See also Matter of O'Donnell*, 91 A.D.2d 698 (3d Dep't 1982) (statements by sole residuary beneficiary admitted into evidence).

Exception May Apply if Declarant's Interest Alone Would be Excised. Where an objection is made solely on the ground of undue influence or fraud and the objectant seeks to deny probate only with respect to the specific provision in the propounded instrument that benefits the alleged wrongdoer,[3] or where a successful motion for summary judgment leaves to be tried only a claim of undue influence/fraud in obtaining a

[3] See, e.g., *Matter of Crissy*, 35 A.D.3d 462 (2d Dep't 2006) (objectant sought to have invalidated portion of will making bequest to attorney-drafter); *Matter of Wharton*, 114 Misc. 2d 1017 (Sur. Ct., Westchester Co. 1982)(objectant sought to have invalidated portion of will making bequest to attorney-drafter's wife).

specific provision in the instrument, the admissions of the alleged wrongdoer might be deemed competent evidence under the rationale of the authorities listed above. Indeed, in such a case, the only question is whether the bequest to the undue influencer – as opposed to the will as a whole – will be invalidated. Thus, any admission by him will not affect the interests of the other beneficiaries. However, in the event it would be difficult, prior to trial, to determine whether the alleged wrongdoing affected the making of the entire will or only a severable portion of it, see e.g., *Matter of Korchmar*, NYLJ, July 2, 1993, at 27, col. 6 (Sur. Ct., Westchester Co.), the admissions of the wrongdoer would presumably be excluded from evidence so as to avoid jeopardizing the other legacies. To date, there are no reported cases concerning whether the out-of-court admission of an alleged undue influencer or perpetrator of fraud may be admitted into evidence where the objectant seeks only to challenge the bequest to the alleged perpetrator.

Admission as Res Gestae. Even where a will names multiple beneficiaries, a declaration by one beneficiary may be admissible as part of the res gestae where the statement is made close in time to the execution of the will, particularly where the declarant is charged with unduly influencing the testator. *Matter of Wheeler*, 5 Misc. 279. *See also*, *Matter of Kupfer*, 138 Misc. 821 (Sur. Ct., New York Co. 1930); *Matter of Hermann*, 87 Misc. 476 (Sur. Ct., New York Co. 1914).

Admission as Evidence of State of Mind. A declaration by a beneficiary who is alleged to have engaged in undue influence may also, where appropriate, be admitted under the state of mind exception to the hearsay rule for the limited purpose of establishing the beneficiary's intention in committing the acts alleged. *Matter of Budlong*, 7 N.Y.S. 289, *aff'd* 126 N.Y. 423 (1891).

Facts Underlying Admission. Regardless of whether an admission is excludible from evidence under the above guidelines, a legatee is nevertheless competent to testify at trial regarding the facts underlying his admission. *Matter of Hayden*, 261 A.D. 103 (4th Dep't 1941). Only the admission itself is excludible from evidence.

Impeachment by Admission. Finally, even where an admission is excludible as evidence-in-chief, it can nevertheless be used to impeach the testimony of a witness who, contrary to her admission, renders testimony that the testator had sufficient capacity to execute the will. 38 N.Y. JUR.2d, Decedent's Estates § 379 (2002); *Lesster v. Lesster*, 178 A.D. 438, 448 (1st Dep't 1917).

ATTORNEY-CLIENT PRIVILEGE

CPLR 4503 governs the disclosure of confidential communications between attorney and client. There is no counterpart in the SCPA; by virtue of SCPA 102, CPLR 4503 applies to proceedings in the Surrogate's Court.

Statutory Text. CPLR §4503 provides in pertinent part as follows:

> (a) 1. Confidential Communication Privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing . . . .
>
> 2. Personal representatives. (A) For the purposes of the attorney-client privilege, if the client is a personal representative and the attorney represents the personal representative in that capacity, in the absence of an agreement between the attorney and the personal representative to the contrary:
>
> (i) No beneficiary of the estate is, or shall be treated as, the client of the attorney solely by reason of his or her status as beneficiary; and

(ii) The existence of a fiduciary relationship between the personal representative and a beneficiary of the estate does not by itself constitute or give rise to any waiver of the privilege for confidential communications made in the course of professional employment between the attorney or his or her employee and the personal representative who is the client.

(B) For purposes of this paragraph, "personal representative" shall mean (i) the administrator, administrator c.t.a., ancillary administrator, executor, preliminary executor, temporary administrator or trustee to whom letters have been issued within the meaning of [SCPA 103(34)] . . . .; "beneficiary" shall have the meaning set forth in [SCPA 103(8)][;] and "estate" shall have the meaning set forth in [SCPA 103(19)].

(b) In any action involving the probate, validity or construction of a will, an attorney or his employee shall be required to disclose information as to the preparation, execution or revocation of any will or other relevant instrument, but he shall not be allowed to disclose any communication privileged under subdivision (a) which would tend to disgrace the memory of the decedent.

Statute Codifies Common Law. CPLR 4503 is a re-enactment of the common law privilege; thus, the scope of the privilege is determined by common law principles. *Spectrum Systems Intl. Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Mayorga v. Tate*, 302 A.D.2d 11 (2d Dep't 2002).

Elements of the Attorney-Client Privilege. The elements of the attorney-client privilege have been stated succinctly as follows: "Where (1) legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by his legal advisor, (8) except the protection be waived." CPLR C4503:1, *quoting* 8 J. Wigmore, Evidence § 2292, at 554 (1961).

For the attorney-client privilege to apply, the communication must be made in the course of an established attorney-client relationship for the purpose of obtaining legal

advice. Richard T. Farrell, Prince, Richardson on Evidence § 5-203 (11th ed. 1995); 9 Warren's Heaton on the Surrogate's Court § 118.01[2][b] (7th ed. 2008). If the attorney is not representing the client at the time the communication is made, the privilege does not apply. *Matter of Tremaine*, 156 A.D.2d 862 (3d Dep't 1989).

If an attorney-client relationship exists, communications made by and to the client for the purpose of obtaining legal advice, if intended to be confidential, are subject to the privilege. *In re Bekins Record Storage Co.*, 62 N.Y.2d 324 (1984). Both written and oral communications enjoy the privilege.

Privilege Applies to Communications Between Attorney and Personal Representative. CPLR 4503(a)(2) – enacted in 2002 – extends the attorney-client privilege to clients acting as personal representatives.[4] As a result, beneficiaries of an estate are not entitled to disclosure of communications between an executor (or preliminary executor) and his counsel simply because the executor owes a fiduciary duty to them. Rather, confidential communications between a personal representative and his counsel made for the purpose of obtaining legal advice are cloaked with the privilege.

The attorney-client privilege permanently protects such communications from disclosure, and they are not subject to disclosure even in the event the fiduciary is removed from office. *Matter of Darretta*, July 23, 2007, at 37, col. 5 (Sur. Ct., Suffolk Co.)

[4] Prior to enactment of CPLR 4503(a), communications between a fiduciary and his counsel were discoverable by beneficiaries of an estate upon a showing of good cause under the so-called "fiduciary exception" to the attorney-client privilege. *Hoopes v. Carota*, 74 N.Y.2d 716 (1989). However, where the fiduciary had consulted counsel with an eye toward litigation with the beneficiaries, courts were unlikely to find that the good cause requirement had been met. *See Matter of Baker*, 139 Misc. 2d 573 (Sur. Ct., Nassau Co. 1988).

Communications to Third Parties Not Privileged. Only communications between the client and the attorney or a member of the attorney's staff are privileged. CPLR 4503(a); *Hudson Valley Mar., Inc. v. Town of Cortlandt*, 816 N.Y.S.2d 183 (2d Dep't 2006). Oral communications between the attorney and client made in the presence of third parties, as well as written communications copied to third parties, are, generally speaking, not subject to a claim of privilege. *People v. Harris*, 57 N.Y.2d 335 (1982); *Morgan v. New York State Dept. of Environmental Conservation*, 9 A.D.3d 586 (3d Dep't 2004); *Bauman v. Steingester*, 213 N.Y. 329 (1915); *Matter of Kotick*, NYLJ, April 25, 2008, at 36, col. 3 (Sur. Ct., New York Co.). Furthermore, if the attorney speaks with third persons such as the client's accountant or broker concerning the matter, those communications are not privileged. *See, e.g., Central Buffalo Project Corp. v. Rainbow Salads*, 140 A.D.2d 943 (4th Dep't 1988).

Communications Concerning Preparation, Execution and Revocation of Decedent's Will Not Privileged. Under the so-called "probate exception" to the attorney-client privilege, communications between an attorney (or the attorney's employee) and a deceased client concerning the preparation, execution or revocation of the client's will are not privileged in probate proceedings. Rather, the communications are subject to disclosure except to the extent they would tend to disgrace the memory of the decedent. CPLR 4503(b).

To be admissible under the probate exception, the confidential communications between an attorney and testator must relate to "the preparation or execution of any will or instrument relevant to the validity or construction of the will being offered for probate." 9 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 4503.28 (2d

ed. 2008). *See Warsaski v. Spiegel*, 258 A.D.2d 379 (1st Dep't 1999) (attorney-drafter permitted to testify concerning will's preparation). Both the testimony of the attorney-drafter of the proferred will and the testimony of attorney-drafters of any prior wills of the testator may be admitted under the probate exception. *Matter of Stacer*, 13 A.D.2d 164 (4th Dep't 1961), *aff'd*, 11 N.Y.2d 780 (1962).

The probate exception has been held to permit disclosure of attorney-client communications even if the will drafted by counsel remains *unexecuted* at the time of decedent's death. *Matter of Posner*, NYLJ, May 4, 1994, at 30, col. 2 (Sur Ct., New York Co.); *Matter of Rabinowitz*, NYLJ, Jan. 21, 1982, at 11, col. 3.

The probate exception also applies to permit disclosure of communications between an attorney and client concerning the revocation of any will. *Matter of Stacer*, 13 A.D.2d 164 (4th Dep't 1961), *aff'd*, 11 N.Y.2d 780 (1962); *Matter of Be Gar*, 110 Misc. 2d 562 (Sur. Ct., Nassau Co. 1981) (attorney who did not draft instruments permitted to disclose conversations with decedent concerning revocation of will and codicil offered for probate).

The probate exception has been held *not* to apply, however, to allow disclosure of communications between a decedent and an attorney who neither drafted the will nor supervised its execution. *Matter of Matheson*, 283 N.Y. 44 (1940) (construing earlier version of statute);[5] *Matter of Delano*, 38 A.D.2d 769 (3d Dep't 1972); *Matter of Bronner*, 801 N.Y.S.2d 230 (Sur. Ct., Nassau Co. 2005) (dicta); 2 Harris 5th Edition New York Estates: Probate, Administration and Litigation §19:71 (1996). *But see Matter of*

[5] Inasmuch as *Matheson* was construing an earlier, more restrictive version of CPLR 4503(b), it has been argued that *Matheson's* holding should be "confined to its interpretation of the former and not the present statute." *Matter of Be Gar*, 110 Misc. 2d 562, 563 (Sur. Ct., Nassau Co. 1981).

Be Gar, 110 Misc. 2d 562, 563 (Sur. Ct., Nassau Co. 1981) (arguing, in dicta, that communications between attorney and testator should be disclosed under CPLR 4503[b] even if attorney was not directly involved in preparation or execution of any will).

The probate exception requires disclosure only of communications between attorney and deceased client.[6] Communications between third parties and their counsel do not fall within the exception even if they concern preparation of decedent's will. *Matter of Seelig*, 302 A.D.2d 721 (3d Dep't 2003) (communications between charitable beneficiary and its counsel not subject to disclosure under CPLR 4503[b]). See also, *Matter of Osgood*, NYLJ, Dec. 2, 1992, at 26, col. 4 (Sur. Ct., Nassau Co. 1992) (communications between decedent's husband and attorney not subject to disclosure under CPLR 4503[b]).

The probate exception applies only to probate and construction proceedings, and has not been extended to accounting, discovery or other proceedings. *Matter of Matheson*, 283 N.Y. 44 (1940); *Matter of Fishman*, 32 A.D.2d 1063 (2d Dep't 1969), *aff'd*, 27 N.Y.2d 809 (1970); *Matter of Swantee*, 90 Misc. 2d 519 (Sur. Ct., New York Co. 1977).

Underlying Facts Not Privileged. Even where the privilege applies, only the communications themselves are privileged; the underlying facts are not. Facts cannot be made subject to privilege simply by conveying them from client to attorney. *Upjohn v. United States*, 449 U.S. 383 (1981); *Matter of Johnson*, NYLJ, April 11, 1984, at 12, col.

[6] Courts have differed on the issue of whether contents of the will of a *living* person are subject to the attorney-client privilege. *Compare, Matter of Johnson*, 127 Misc 2d 1048 (Sur. Ct., New York Co. 1985) (privilege applies) *with Matter of Freilich*, 179 Misc. 2d 884 (Sur. Ct., Bronx Co. 1999) and *Matter of MacLeman*, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005) (wills not protected by privilege). Nevertheless, disclosure of the terms of a living person's will should generally not be required absent a "strong showing of necessity." *Matter of Freilich*, 179 Misc. 2d 884 (Sur. Ct., Bronx Co. 1999); 9 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 4503.25 (2d ed. 2008).

3 (Sur. Ct., New York Co.). Likewise, documents previously sent to third parties cannot be made subject to the privilege simply by delivering them to the attorney. *Matter of Krup*, 173 Misc. 578 (Sur. Ct., Kings Co. 1940).

Mixed Legal and Business Communications. If a communication between lawyer and client consists of both legal matters and business matters, the privilege applies if the communication is predominantly a legal one. *Rossi v. Blue Cross Blue Shield*, 73 N.Y.2d 588 (1989).

Routine Information Not Subject to Privilege. A retainer or other fee agreement between attorney and client is not privileged. *Hoopes v. Carota*, 74 N.Y.2d 716 (1989); *Priest v. Hennessy*, 51 N.Y.2d 62 (1980). However, invoices describing legal services rendered may be subject to a claim of privilege. *Matter of Gildersleeve*, NYLJ, Aug. 1, 2002, at 23, col. 3 (Sur. Ct., Westchester Co.). The name and address or location of a client is not privileged. *Priest v. Hennessy*, 51 N.Y.2d 62 (1980); *Matter of Jacqueline F.*, 94 Misc. 2d 96 (Sur. Ct., Bronx Co. 1978). Accounting and other records necessary to determine the value of a deceased client's estate may also be subject to disclosure. *Matter of Hall*, 204 A.D.2d 785 (3d Dep't 1994).

Waiver of the Privilege. As stated above, the privilege may be waived by the client, either through disclosure to third parties or by the client's testimony revealing confidential communications. *See, e.g., People v. Patrick*, 182 N.Y. 131 (1905), app. dismissed, 203 U.S. 602 (1906); *Jacobleff v. Cerrato, Sweeney & Cohn*, 97 A.D.2d 834 (2d Dep't 1983); *Pye v. Hoehn*, 31 Misc. 2d 712 (Sup. Ct., Nassau Co. 1961). If the client shares information with third persons concerning the communications, such

communications lose their protected status. *Matter of Kerekach*, NYLJ, Aug. 30, 1989, at 26, col. 1 (Sur. Ct., Nassau Co.).

The privilege belongs to the client alone, and may not be waived by the attorney without the client's consent. *People v. Cassas*, 84 N.Y.2d 718 (1995); *Mead v. Cavanagh*, 161 A.D. 177 (3d Dep't 1914). Even where a client has elected to disclose privileged communications, his actions do not release the attorney to make disclosure of other privileged information. *Matter of Eno*, 196 A.D. 131 (1st Dep't 1921); *Matter of Topliffe*, 191 Misc. 466, *aff'd*, 274 A.D. 760 (1st Dep't 1948).

A party may be found to have waived the privilege by failing to object to submission by another party of privileged documents in a pending proceeding. *Matter of Arrathoon*, NYLJ, Oct. 22, 2007, at 31, col. 5 (Sur. Ct., New York Co.) Where such documents have been submitted by the opposing party, the party seeking to assert the privilege is well advised to seek a protective order immediately.

Where a client has consented to *extrajudicial* disclosure of confidential communications by his attorney, he will be found to have waived the privilege only as to those portions of the communications that were disclosed. See *Von Bulow v. Von Bulow*, 828 F.2d 94 (2d Cir. 1987). *See also Brown & Williamson Tobacco Corp. v. Wigand*, 228 A.D.2d 187 (1st Dep't 1996), *leave to app. granted*, 89 N.Y.2d 808, app. withdrawn, 90 N.Y.2d 901 (1997) (limited waiver of attorney-client privilege only to extent of public disclosure made).

Waiver of the Privilege on Behalf of Estate. Supplementing the probate exception under CPLR 4503(b) are several important case law exceptions allowing waiver of the attorney-client privilege after the client's death. The personal representative of

decedent's estate is authorized to waive the attorney-client privilege between decedent and her attorney in the interests of the estate. *Matter of Bassin*, 28 A.D.3d 549 (2d Dep't 2006); *Matter of Johnson*, 7 A.D.3d 959 (3d Dep't 2004), *leave to app. denied*, 3 N.Y.3d 606 (2004); *Mayorga v. Tate*, 302 A.D.2d 11 (2d Dep't 2002); *Matter of Colby*, 187 Misc. 2d 695 (Sur. Ct., New York Co. 2001). In addition, an objectant in a probate contest has been permitted to waive the privilege where such waiver was found to be in the best interests of the estate. *Matter of MacLeman*, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005); *Matter of Bronner*, 801 N.Y.S.2d 230 (Sur. Ct., New York Co. 2005). *See also* Ilene S. Cooper & Joseph T. La Ferlita, *A New Weapon for Objectants? Probate Contests and Waiver of the Attorney-Client Privilege*, 78 N.Y.S.B.J. 46 (Oct. 2006). These cases are founded upon the assumption that the testator would have wanted his confidential communications revealed to effect his testamentary intentions.

"At Issue" Waiver. A waiver of the attorney-client privilege may also be found to occur where confidential communications with counsel bear directly on the issue before the court or application of the privilege would deprive the opponent of information vital to his case. Where, for example, the fiduciary of an estate sought to void an inter vivos transfer made pursuant to a power of attorney, his contention that the decedent did not intend to make a gift was found to have waived the privilege with respect to communications between decedent and his attorney concerning the scope of the power of attorney. *Matter of Kislak*, 24 A.D.3d 258 (1st Dep't 2005).[7] *See also Matter of Puckett*, 2005 WL 2428364 (Sur. Ct., Nassau Co. 2005) (where administrator challenged validity of inter vivos transfer on grounds of undue influence and lack of intention to make gift,

[7] *Kislak* has been criticized. See Michael M. Martin, *Attorney Communications With Since-Deceased Clients*, NYLJ, Dec. 14, 2007, at 3, col. 1.

privilege was waived as to communications between decedent and his attorney on that subject); *Matter of Seelig*, 302 A.D.2d 721 (3d Dep't 2003) (finding no waiver where communications were not "vital" to claim of undue influence); *Matter of Slavin*, NYLJ, Sept. 10, 2003, at 21, col. 6 (Sur. Ct., Queens Co.) (where personal representative commenced discovery proceeding placing in issue ownership of joint accounts, the privilege was deemed waived with respect to communications between decedent and her attorney concerning accounts).

Inadvertent Disclosure. Inadvertent disclosure of privileged documents does not necessarily constitute a waiver of the privilege. In determining whether the mistaken production of documents containing privileged attorney-client communications waives the privilege, courts consider such factors as whether the client intended the communication to be confidential; whether reasonable steps were taken to prevent inadvertent disclosure; the extent of the disclosure; whether the disclosing party took prompt steps to correct the error; and whether the party to whom disclosure was made will suffer any undue prejudice if the error is rectified. *AFA Protective Systems v. City of New York*, 13 A.D.3d 564 (2d Dep't 2004); *New York Times v. Lehrer McGovern Bovis*, 300 A.D.2d 169 (1st Dep't 2002).

Use of Agents. Where a person is acting as agent either for the client or the attorney during the course of a privileged communication, the presence of the agent does not jeopardize the privilege. *Matter of Sosnow*, NYLJ, July 19, 2007, at 34, col. 3 (Sur. Ct., Nassau Co. 2007); *Stroh v. General Motors Corp.*, 213 A.D.2d 267 (1st Dep't 1995). To employ the agency exception, two requirements must be met: the party invoking the privilege must have had a reasonable expectation of confidentiality, and the agent's

presence must have been necessary to facilitate the giving of legal advice. *National Education Training Group, Inc. v. Skillsoft Corp.*, NYLJ, July 8, 1999, at 37 (2d Cir.); *Stroh v. General Motors Corp.*, 213 A.D.2d 267 (1st Dep't 1995); *Matter of Beiny*, 129 A.D.2d 126 (1st Dep't 1987); *Matter of Nigro*, NYLJ, Oct. 5, 2004, at 20, col. 1 (Sur. Ct., Nassau Co.).

Procedural Points

Burden of Proof. The burden of proving the privilege is upon the party asserting it. *Spectrum Systems International Corp. v. Chemical Bank*, 78 N.Y.2d 371 (1991); *Priest v. Hennesy*, 51 N.Y.2d 62 (1980); *Matter of Kotick*, NYLJ, April 25, 2008, at 36, col. 3 (Sur. Ct., New York Co.)

How and When Invoked. The privilege can and should be invoked at any stage in the probate proceeding during which confidential communications are sought to be disclosed, including during pre-trial disclosure. CPLR 3101. Typically, the privilege is invoked via objection to inquiries that call for disclosure of confidential communications, followed by a refusal to answer those questions on the ground of privilege.

In Camera Review. The court is not bound by claims of privilege, and may require that documents be submitted for *in camera* review. 9 Weinstein, Korn & Miller, New York Civil Practice: CPLR ¶ 4503.22 (2d ed. 2008). *See also Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 N.Y.2d 588 (1989); *Matter of Aylin Radomisli-Cates*, NYLJ, Dec. 14, 1995, at 31, col. 6 (Sur. Ct., Westchester Co.); *Wynard v. Beiny*, NYLJ, July 5, 1994, at 32, col. 4 (Sur. Ct., New York Co.).

PHYSICIAN-PATIENT PRIVILEGE

The physician-patient privilege is embodied in CPLR 4504, which prohibits certain medical personnel from disclosing information obtained in the course of treating a patient if such information is necessary to treatment, unless the patient waives the privilege. See CPLR 4504(a).

Policy and Construction. The confidential treatment afforded doctor-patient communications is meant to "promote uninhibited communication between patient and physician for the purpose of obtaining appropriate medical treatment." *People v. Sinski*, 88 N.Y.2d 487, 491 (1996). The privilege is to be construed broadly to carry out this policy, and statutory exceptions to the privilege are to be construed narrowly. *Id*. at 493. *See also Matter of Grand Jury Investigation of Onondaga County*, 59 N.Y.2d 130 (1983).

Foundational Requirements. To assert the physician-patient privilege, it must be shown that: (i) a statutorily-recognized relationship exists between a patient and a medical professional; (ii) the medical professional obtained information about the patient in the course of the professional relationship; (iii) the information obtained was necessary for treatment or diagnosis of the patient; and (iv) the patient intended the information to be confidential. CPLR C4504:2, citing *State v. General Electric Co.*, 201 A.D.2d 802 (3d Dep't 1994). *See also Mayer v. Albany Medical Center Hospital*, 56 Misc. 2d 239 (Sup. Ct., Albany Co. 1968). If the foundational requirements are met, the privilege applies to exclude both the medical professional's testimony and the patient's medical/hospital files revealing confidential communications. *Dillenbeck v. Hess*, 73 N.Y.2d 278 (1989); *Williams v. Roosevelt Hospital*, 66 N.Y.2d 391 (1985). Non-medical

data contained in those files is not protected, however. *Matter of Waller*, NYLJ, Dec. 30, 1981, at 7, col. 1 (Sur. Ct., New York Co.)

Recognized Professional Relationships. CPLR 4504(a) limits the protections of the statute to relationships between patients, one the one hand, and doctors, registered professional or licensed practical nurses, dentists, podiatrists and chiropractors, on the other. It does not apply to communications between a pharmacists and a decedent (including medications provided by the pharmacist). *Matter of Miner*, 206 Misc. 234 (Sur. Ct., Kings Co. 1954). *But see Hobbs v. Hullman*, 183 A.D. 743 (3d Dep't 1910) (applying privilege to communications with unregistered nurse); *People v. Mirque*, 195 Misc. 2d 375 (Crim. Ct. 2003) (applying privilege to EMTs who treat patients at the scene and transmit information to treating physicians).

Intention of Confidentiality. To determine whether a patient intended his or her communication with a medical professional to be confidential, courts look to the patient's subjective intent. Thus, the presence of third parties (such as family members or even police guards) does not, in and of itself, vitiate the privilege. *See People v. Decina*, 2 N.Y.2d 133 (1956).

Privilege Applies to Observations as Well as Communications. The doctor-patient privilege applies to protect from disclosure not only direct communications between doctor and patient, but also the doctor's observations concerning the patient's condition unless the facts observed do not require professional training and would be obvious to a layperson. *Dillenbeck v. Hess*, 73 N.Y.2d 278 (1989); 2 Harris 5th Edition New York Estates: Probate, Administration and Litigation § 19:79 (1996).

Waiver of the Privilege. Waiver of the physician-patient privilege can occur in several ways: an express waiver of the privilege (such as the introduction of testimony or documents revealing the patient's medical condition/treatment); a failure to object when privileged information is elicited during discovery or at trial; or affirmatively raising the issue of the medical condition of the patient. 2 Harris 5th Edition New York Estates: Probate, Administration and Litigation § 19:84 (1996); CPLR 4504(a). Indeed, the privilege may be waived simply by calling the physician to the witness stand.

Statutory Exception for Deceased Patients. Where the patient has died, an exception to the general privilege rules exists under CPLR 4504(c):

> (c) Mental or physical condition of deceased patient. A physician or nurse shall be required to disclose any information as to the mental or physical condition of a deceased patient privileged under subdivision (a), except information which would tend to disgrace the memory of the decedent, either in the absence of an objection by a party to the litigation or when the privilege has been waived:
>
> 1. by the personal representative, or the surviving spouse, or the next of kin of the decedent; or
>
> 2. in any litigation where the interests of the personal representative are deemed by the trial judge to be adverse to those of the estate of the decedent, by any party in interest; or
>
> 3. if the validity of the will of the decedent is in question, by the executor named in the will, or the surviving spouse or any heir-at-law or any of the next of kin or any other party in interest.

Decedent's Treating Physician Subject to Examination. Under CPLR 4504(c)(3), the decedent's treating physician is subject to examination in a probate contest. *Matter of Podalak*, 10 A.D.2d 794 (4th Dep't 1960). The fact that decedent's treating physician has also been engaged as an expert witness in the probate contest does not insulate him from examination concerning his observations, treatment, and conclusions concerning

decedent's mental and physical condition. *Matter of Braman*, NYLJ, May 1, 1990, at 25, col. 5 (Sur.Ct., Nassau Co.); *Matter of DeFilippo*, 149 Misc. 2d 598 (Sur. Ct., Chemung Co. 1990).

Privilege May Be Waived by Authorized Persons. As CPLR 4504(c) indicates, in a probate contest, the doctor-patient privilege may be waived by a broad class of persons consisting of the nominated executor, decedent's distributees, or any other party in interest. *See Matter of Cincotta*, NYLJ, Mar. 31, 2005, at 31, col. 6 (Sur. Ct., Kings Co.) (distributees may waive privilege); *Matter of Adamopoulos*, NYLJ, May 3, 2004, at 28, col. 2 (Sur. Ct., Queens Co.) (surviving spouse may waive privilege); *Matter of Lagomarsino*, NYLJ, Aug. 15, 2003, at 20, col. 2 (Sur. Ct., Queens Co.) (distributees may waive privilege); *Matter of Allalemdjian*, NYLJ, Dec. 9, 1999, at 36, col. 5 (Sur. Ct., Nassau Co.) (fiduciary of deceased next of kin may waive privilege); *Matter of Cesario*, NYLJ, July 22, 1992, at 27, col. 1 (Sur. Ct., Westchester Co.) (any person interested in decedent's estate may waive privilege); *Matter of Johnson*, NYLJ, June 7, 1984, at 6, col. 1 (Sur. Ct., New York Co.) (heirs at law may waive privilege).

To Which Communications Does Exception Apply? While the statutory text suggests that only a doctor or nurse will be required to disclose privileged information concerning the mental or physical condition of a deceased patient, in fact disclosure must be made – upon waiver of the privilege – by a hospital as well. *See, e.g., Matter of Allalemdjian*, NYLJ, Dec. 9, 1999, at 36, col. 5 (Sur. Ct., Nassau Co.).

Disclosure that Disgraces Decedent's Memory. It is within the purview of the court to decide whether disclosure of a communication would disgrace the memory of the decedent. *Compare Tinney v. Neilson's Flowers, Inc.*, 61 Misc. 2d 717, *aff'd*, 35 A.D.2d

532 (2d Dep't 1970) (privilege cannot be waived as to records showing decedent was a chronic alcoholic) *with Matter of Postley*, 125 Misc. 2d 417 (Sur. Ct., Nassau Co. 1984) (disclosure of decedent's alcoholism would not disgrace his memory in light of current medical consensus that alcoholism is a disease) and *Matter of Podolak*, 10 A.D.2d 794 (4th Dep't 1960) (doctor's testimony in probate contest as to decedent's failing mental acuity would not disgrace his memory).

HIPAA. Effective April 2003, the Health Insurance Portability and Accountability Act (HIPAA) governs medical information maintained by health care professionals. Disclosure may be made only upon the consent of the patient or, where the patient has died, the personal representative of his estate. An executor may be compelled, however, to authorize disclosure of a decedent's medical records in the course of discovery. *Matter of Ettinger*, 7 Misc. 3d 316 (Sur. Ct., Nassau Co. 2005). The Ettinger court directed proponent in a will contest to provide objectants with HIPAA-compliant authorizations for the release of decedent's medical records. *See also Matter of MacLeman*, 808 N.Y.S.2d 918 (Sur. Ct., Westchester Co. 2005) (objectants directed to prepare HIPAA-compliant authorizations for release of medical records for temporary administrator's signature).

Procedural Points

Burden of Proof. The burden of proving all of the foundation elements of the doctor-patient privilege have been met is upon the party asserting it. *Koump v. Smith*, 25 N.Y.2d 287 (1969); *People v. Hedges*, 98 A.D.2d 950 (4th Dep't 1983).

Assert Privilege At Earliest Possible Moment. The privilege should be asserted at any stage in the probate proceeding during which confidential communications are

sought to be disclosed, including during pre-trial disclosure. 9 Warren's Heaton on the Surrogate's Court § 118.01[5][c] (7th ed. 2008).

No Showing of Unavailability Necessary for Physicians. CPLR 3117 authorizes admission at trial of prior deposition testimony rendered by a physician without any requirement that the physician appear and testify. *See* CPLR 3117(a)(4). *See Matter of Adamopoulos*, NYLJ, May 3, 2004, at 28, col. 2 (Sur. Ct., Queeens Co.) (in will contest, court admitted deposition testimony of neurological surgeon who treated decedent). To the extent that any party objects to admission of a physician's deposition testimony, the burden is upon such party to establish that they would be prejudiced by use of the transcript rather than in-court testimony. *Id*.

OPINION EVIDENCE: LAY OPINION

It is settled that a lay witness cannot give her opinion concerning the mental capacity of a testator. *Matter of Coddington*, 307 N.Y. 181, 185 (1954); *Matter of Vickery*, 167 A.D.2d 828 (4th Dep't 1990); *Matter of Robins*, 2018 N.Y. Misc. LEXIS 4675 (Sur. Ct., Queens Co.). However, an ordinary witness "may describe the acts of a person whose sanity is in question and state whether those acts impressed her as rational or irrational." *Matter of Vickery*, 167 A.D.2d at 828; *Matter of Coddington, supra* (lay witnesses "may only state their contemporary impressions as to the rationality or irrationality of the conversations or conduct testified to by them"); *Matter of Brower*, 112 App. Div. 370 (2d Dep't 1906).[8] An ordinary witness can also express an opinion on

[8] *Matter of Nogueira*, 32 Misc.2d 446 (Sur. Ct. Westchester Co. 1961), provides an interesting twist in the application of the foregoing principles. In that case, the Surrogate overruled objections to the testimony of a Portuguese notary (and two attesting witnesses) as to the mental capacity of the decedent who executed his will before them, upon expert testimony that, under the applicable Portuguese law, the notary was

whether or not the decedent was intoxicated. *See Ryan v. Big Z Corp*., 210 A.D.2d 649 (3d Dep't 1994); *Allan v. Keystone Nineties,* Inc., 74 A.D.2d 992 (4th Dep't 1980), a*ppeal dismissed*, 52 N.Y.2d 899 (1981). A lay witness can also testify to "the apparent physical condition of a person, which is open to ordinary observation," including a person's "general strength, vigor, feebleness, illness and comparative condition from day to day." Richard T. Farrell, Prince, Richardson on Evidence § 7-202(d) (11th ed. 1995).

Attesting Witnesses. Exception to the general rule prohibiting testimony on the ultimate issue of capacity is made for attesting witnesses, who are permitted to render their opinions as to the testator's soundness of mind. *Matter of Vickery, supra*; *Matter of Robins, supra; Matter of Ward*, NYLJ, Oct. 27, 2005, at 31, col. 5 (Sur. Ct., Suffolk Co.). Such witnesses are deemed to have been chosen by the decedent for that very purpose. Richard T. Farrell, Prince, Richardson on Evidence § 7-202(m) (11th ed. 1995).

Decedent's Handwriting. Unlike the issue of testamentary capacity, the opinion of a lay person who is familiar with a decedent's handwriting is admissible on the question of the genuineness of his signature on a will. *Matter of Fertig*, 184 A.D.2d 1015 (4th Dep't 1992); *Matter of Marlowe*, NYLJ, Sept. 8, 2000, at 32, col. 1 (Sur. Ct. Nassau Co.); Richard T. Farrell, Prince, Richardson on Evidence §§ 7-203, 7-318(a) (11th ed. 1995). Of course, those who are most familiar with a decedent's handwriting may be barred from testifying by the Dead Man's Statute.

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required to appraise the mental capacity of the testator, ascertain his intentions and reduce them to entries in his will book, and cause the entries to be verified by each of the witnesses.

OPINION EVIDENCE: EXPERT OPINION

The use of expert opinions in Surrogate's Court practice centers primarily on the issue of testamentary capacity. Expert testimony as to a decedent's handwriting is also useful where forgery is claimed.

Qualification. The qualification of a psychiatrist or other expert called to testify as to a decedent's mental capacity generally does not present a substantial hurdle in a probate proceeding. As in the case of any expert, it must be shown that she is "possessed of the requisite skill, training, education, knowledge or experience from which it can be assumed that the information imparted or the opinion rendered is reliable." *Matott v. Ward*, 48 N.Y.2d 455, 459 (1979); *Hofmann v. Toys "R" Us-N.Y. Limited Partnership*, 272 A.D.2d 296 (2d Dep't 2000).

A treating physician, although not a psychiatrist or psychologist, has been held qualified to testify to his patient's competence where he had treated the patient, a proposed conservatee, for seven years and was an expert in geriatric medicine. *Matter of Steinberg*, 121 A.D. 872 (1st Dep't 1986).

Occasionally, the standard for qualification has been held not to have been met. In *Matter of Beecham*, NYLJ, Dec. 1, 2003, at 28, col. 2 (Sur. Ct., New York Co.), the objectant, who claimed that a will had been altered, submitted an affidavit by the chief operating officer of a company operating retail photocopying and stationary stores opining that a page claimed to have been substituted in decedent's will was printed at a different time than the remainder of the will. The court held that the expert's affidavit should be given no probative value on the proponent's summary judgment motion because it failed to include any information concerning his educational background or

specific qualifications and expertise concerning the technical issues on which he based his opinion.

Another interesting issue the Courts have considered is whether the testimony of a handwriting expert may be admitted on the question of a decedent's testamentary capacity. Relying on the supposed science of "graphology," such "experts" contend that they can determine an individual's mental capacity and other characteristics from an analysis of their handwriting. Such arguments have received a chilly reception. *See Matter of Palmentiere*, 171 A.D.2d 871 (2d Dep't 1991) (handwriting expert was not competent to testify as to decedent's mental capacity); *Cameron v. Knapp*, 137 Misc.2d 373 (Sup. Ct., New York Co. 1987) (noting that "courts across this country have uniformly disapproved attempts to have a handwriting 'expert' testify as to an individual's mental or physical condition based on a handwriting sample"); *Daniels v. Cummins*, 66 Misc.2d 575 (Sur. Ct., Westchester Co. 1971), *aff'd*, 44 A.D.2d 775 (2d Dep't 1974) (observing that when a document examiner opined that the decedent was "only present in body but not mind, that she did not know what she [was] doing and she was not of sound mind," she had "leaped into the occult, esoteric, pseudo-scientific pursuit known as graphology, venturing far beyond the province of a handwriting expert"). The opinion of a "graphologist" has been held sufficient to defeat summary judgment, however, when confined to the issue of the genuineness of a decedent's signature. *Greengard v. Edelstein*, NYLJ, Sept. 26, 1989, at. 22, col. 2 (Sup. Ct., New York Co.).

Standard of Review on Determination of Expert's Qualification. The qualification of an expert witness is within the discretion of the trial judge, and "is not

open to review unless in deciding the question the trial court has made a serious mistake or committed an error of law or has abused his discretion." *Meiselman v. Crown Heights Hospital, Inc.*, 285 N.Y. 389, 398-99 (1941); *Werner v. Sun Oil Co.*, 65 N.Y.2d 839, 840 (1985); *Oboler v. City of New York*, 31 A.D.3d 308 (1st Dep't 2006), *aff'd*, 8 N.Y.3d 888, (2007).

Basis For Expert Opinion. An expert's opinion "must be based on facts in the record or personally known to the witness." *Cassano v. Hagstrom*, 5 N.Y.2d 643, 646 (1959); *accord Hambsch v. New York City Transit Authority*, 63 N.Y.2d 723, 725 (1984); *Erosa v. Rinaldi*, 270 A.D.2d 384 (2d Dep't 2000). An expert may rely on out-of-court material only if it "is of a kind accepted in the profession as reliable in forming a professional opinion" or "comes from a witness subject to full cross-examination on the trial." *People v. Sugden*, 35 N.Y.2d 453, 460-61 (1974); *Hambsch v. New York City Transit Authority, supra*.

Before a medical expert may testify as to matters contained in medical records, but not personally known to the expert, such records must be admitted into evidence. *Homsey v. Castellana*, 289 A.D.2d 201 (2d Dep't 2001); *Nuzzo v. Castellano*, 254 A.D.2d 265 (2d Dep't 1998); *see also Matter of Warsaski*, NYLJ, Jan. 22, 2002, at 20, col. 4 (Sur. Ct., New York Co.) (psychiatrist who had not examined decedent or his medical records could not opine as to decedent's mental state where copies of documents alleged to have been typed by decedent or in his handwriting, on which psychiatrist's opinion was purportedly based, were not properly authenticated); *but see People v. DiPiazza*, 24 N.Y.2d 342 (1969) (psychiatrists could rely on certain hospital records and

tests and examinations which "played a comparatively small role in the process by which the . . . experts arrived at their opinions").

Expert witnesses generally may not base their conclusions on the opinions of physicians who did not testify at trial. *Erosa v. Rinaldi*, *supra*, 270 A.D.2d at 384; *O'Shea v. Sarro*, 106 A.D.2d 435 (2d Dep't 1984); *Borden v. Brady*, 92 A.D.2d 983 (3d Dep't 1983).

A hypothetical question may be used to elicit the expert's opinion where it is based on evidence in the record, *Matter of Callahan*, 155 A.D.2d 454 (2d Dep't 1989), although the opinion need not take that form. *See* CPLR 4515.

Expert Need Not Reveal Basis of Opinion on Direct Examination. When an expert's opinion is offered at trial "the technical or scientific basis for [his] conclusions ordinarily need not be adduced as part of the proponent's direct case." *Romano v. Stanley*, 90 N.Y.2d 444, 451 (1997). Rather "it falls to the opponent of the testimony to bring out weaknesses in the expert's qualifications and foundational support on cross-examination . . . ." *Adamy v. Ziriakus*, 92 N.Y.2d 396, 402 (1998). See also CPLR 4515 ("[u]nless the court orders otherwise . . . the witness may state his opinion and reasons without first specifying the data upon which it is based . . . . [and] [u]pon cross-examination, he may be required to specify the data and other criteria supporting the opinion").

However, where an expert relies on facts within his personal knowledge that have not previously been admitted into evidence, the common law rule that he must first testify to those facts before rendering his opinion, appears to have survived the enactment of CPLR 4515. *See People v. Jones*, 73 N.Y.2d 427, 430 (1989); *Mandel v. Geloso*, 206

A.D.2d 699 (3d Dep't 1994); Richard T. Farrell, Prince, Richardson on Evidence § 7-309 (11th ed. 1995). Medical experts "testifying as to the medical condition of a party" whom they have personally examined are not subject to this rule, however, and "the particular facts upon which [their] opinion is based need not be disclosed in the first instance." *Weibert v. Hanan*, 202 N.Y. 328, 331 (1911); *accord Matter of Martin*, 82 Misc. 574, 593-594 (Sur. Ct., New York Co. 1913) ("In this state…. physicians who have examined one whose competency is *sub judice* may state their opinion of his sanity directly, without detailing the facts on which the conclusion is based, leaving such facts to be brought out by the cross-examiner."); Richard T. Farrell, Prince, Richardson on Evidence § 7-309 (11th ed. 1995).

The court is always free to require the expert to disclose the basis of his opinion on direct examination or even before such opinion is given. *See, e.g., Super v. Abdelazim*, 139 A.D.2d 863 (3d Dep't 1988).

Handwriting Experts. The handwriting expert bases his opinion on a comparison of the disputed writing with genuine and undisputed writings. The writing offered as a standard of comparison must be conceded to be genuine or "proved to the satisfaction of the Court" to be the handwriting of the person claimed to have made the disputed writing. CPLR 4536; *People v. Molineux*, 168 N.Y. 246 (1901). Such proof may be made:

> "(1) by the concession of the person sought to be charged with the disputed writing made at or for the purposes of the trial, or by his testimony; (2) . . . by witnesses who saw the standards written, or to whom, or in whose hearing, the person sought to be charged acknowledged the writing thereof; (3) . . . by witnesses whose familiarity with the handwriting of the person who is claimed to have written the standard enables them to testify to a belief as to its genuineness; (4) or by evidence showing that the reputed writer of the standard has acquiesced in or recognized the same, or that it has been adopted and acted upon by him in his business transactions or other concerns."

People v. Molineux, 168 N.Y. at 328. Only an expert can express an opinion as to genuineness of handwriting by comparing the disputed writing to these exemplars. *Heller v. Murray*, 112 Misc.2d 745 (N.Y. City Civ. Ct. 1981). A lay witness is not competent to make the comparison. *Id*.; Richard T. Farrell, Prince Richardson on Evidence § 7-318 (11th ed. 1995).

Limitations on Effectiveness of Expert Testimony. A considerable body of case law has developed concerning the weight to be accorded an expert's testimony where testamentary capacity is at issue. The majority of cases hold that an expert's testimony based solely on his or her review of a decedent's medical records is insufficient to withstand a motion for summary judgment or directed verdict where the attesting witnesses have testified to the decedent's capacity. *See, e.g.*, *Matter of Tracy*, 221 A.D.2d 643 (2d Dep't 1995), *leave denied, 87 N.Y.2d 811 (1996)*; *Matter of Swain*, 125 A.D.2d 574 (2d Dep't 1986), *appeal denied*, 69 N.Y.2d 611 (1987); *Matter of Weisman*, NYLJ, June 14, 2000, at 30, col. 4 (Sur. Ct., New York Co. 2000); *see also Matter of Carver*, 2007 WL 3407748 (Sur. Ct., Essex Co. 2007); *Matter of Fogel*, NYLJ, Sept. 28, 2007, at 41, col. 3 (Sur. Ct., Kings Co.); *Matter of Monahan*, NYLJ, July 13, 2004, at 32, col. 6 (Sur. Ct., Suffolk Co.). The leading case describes such testimony as "the weakest and most unreliable kind of evidence." *Matter of Van Patten, 215 A.D.2d 947, 949* (3d Dep't), *leave to app. denied*, 87 N.Y.2d 802 (1995). An expert's opinion is particularly likely to be held insufficient to raise a factual issue when it is also contradicted by the testimony of decedent's treating physician or other medical personnel attending him. *See, e.g., Matter of Van Patten, supra; Matter of Swain, supra; Matter of Vukich*, 53

A.D.2d 1029 (4th Dep't 1976), *aff'd, 43 N.Y.2d 668 (1977)*; *Matter of Burnham*, 201 App. Div. 621 (2d Dep't 1922), *aff'd*, 234 N.Y. 475 (1923).

The question has been raised, however, whether the Court of Appeals' decision in *Matter of Sylvestri*, 44 N.Y.2d 260 (1978), a case involving a handwriting expert, supports such a view. In *Sylvestri*, the Court upheld a jury's verdict that the testatrix's signature on the propounded will was not genuine based solely on the adverse testimony of an expert, notwithstanding contrary testimony by three disinterested, attesting witnesses that she had signed the will in their presence. The Court of Appeals declined to adopt a blanket rule – at least in handwriting cases – that the opinion of an expert, standing alone, is "insufficient to sustain a finding of forgery in the face of direct and credible evidence of disinterested subscribing witnesses who testified that they saw the testator sign his name." 44 N.Y.2d at 265. Rather, the Court held that an "adverse opinion of a handwriting expert" is "to be weighed by the jury along with other credible evidence and need not necessarily be regarded as inadequate to rebut the testimony of subscribing witnesses . . . ." *Id.* at 266.

In two subsequent cases – *Matter of Warsaski*, NYLJ, Jan. 4, 1996, at 27, col. 2 (Sur. Ct., New York Co.), *aff'd*, 228 A.D.2d 275 (1st Dep't 1996) and *Matter of Lewis*, NYLJ, Jan. 13, 1998, at 26, col. 3 (Sur. Ct., New York Co.) – Surrogate Roth applied the principles set forth in *Matter of Sylvestri* to the issue of testamentary capacity and held that expert psychiatric opinions in those cases were sufficient to raise fact issues as to the decedent's testamentary capacity, notwithstanding that neither expert had examined or had any personal knowledge of decedent and, in *Warsaski*, had not even examined decedent's medical records. However, the outcomes in *Warsaski* and *Lewis* may have

been driven by facts particularly adverse to the proponents. In *Warsaski*, objectants' expert claimed that decedent suffered from a chronic paranoid delusional psychosis that prevented him from knowing the natural objects of his bounty and caused him to project feelings of suspicion and hatred engendered by the psychosis on objectants, his two nephews. According to objectants' expert, a delusion – unlike dementia or senility – was not a condition that would have been readily apparent to the attesting witnesses. The Surrogate also found it significant that the psychiatrist based his opinion on a review of a series of letters and an autobiographical manuscript written by decedent, which she characterized as "a rambling, disjointed, stream of consciousness."

Moreover, although the proponent in *Warsaski* relied on the affidavits of the attesting witnesses, they "apparently [had] no independent recollection of the [will's] execution." Similarly, in *Lewis*, decedent's own treating physician, a little over a year after the decedent's execution of the will at issue, had described her as "crazy as a March hare," and the surviving attesting witnesses had, at best, a vague recollection as to the execution ceremonies for the will and codicils.

A determination of whether *Sylvestri* should be given the broad reading accorded it by Surrogate Roth should also take into account the fact there was "other evidence" in *Sylvestri* supporting the expert's conclusion, most notably, the *Sylvestri* Surrogate's observation that "even to the untrained eye, marked differences [were] apparent between the questioned signature . . . and the exemplar signatures."[9]

Remoteness of Underlying Events is Significant in Weighing Expert Testimony. The more remote the events on which an expert's opinion is based, the less weight such

[9] In addition, there existed conflicts in the attesting witnesses' testimony and inconsistencies between the trial and deposition testimony of the attorney-draftsman.

opinion will carry. *See, e.g.*, *Matter of Davis*, 29 Misc.2d 60 (Sur. Ct. Westchester Co. 1961) (opinion predicated on records of sanatorium confinement one year before will's execution, which indicated the decedent "had been frequently disoriented and confused as to dates, places and people," was insufficient to avoid dismissal of objection); *Matter of Kemble*, 149 A.D.2d 899 (3d Dep't 1989) (audiologist who examined decedent one and one-half years after will was executed properly precluded from giving his opinion as to the degree of any hearing loss at time of execution).

BUSINESS RECORDS

CPLR 4518 contains the business records exception to the hearsay rule, the purpose of which is to eliminate the burden of having to elicit testimony from each employee who participated in the record-making process. Many types of documents can qualify as business records under this hearsay exception, including but not limited to corporate records, telephone records, doctors' records, hospital records, and police reports.

Foundational Requirements. CPLR 4518(a) allows a business document to be admitted to prove the truth of its contents if certain foundational requirements – guaranteed to establish reliability – are met. First, the record must be made in the regular course of business (i.e., the record must be relied upon in the course of a regularly conducted business activity). Second, it must be the regular course of the business to make such a record (i.e., the business must routinely and systematically make such records). Third, the record must have been made at the time of the transaction or event being recorded or within a reasonable time thereafter. CPLR 4518. And under a fourth

foundational requirement, added by case law, the person making the record must either possess actual knowledge of the transaction recorded or have obtained the information from someone else within the organization who had a business duty to report it; alternatively, the record maker may obtain the information from a person outside the business whose statement as reflected in the record meets another hearsay exception. *Matter of Leon RR*, 48 N.Y.2d 117 (1979); *Johnson v. Lutz*, 253 N.Y. 124 (1930).

Business Duty Requirement. Under this foundational standard, not only must the person making the business record be under a duty to do so, but if the information contained in the record came from another source within the organization, that source must also be under a business duty to report the transaction or event to the maker of the record. *Matter of Leon RR*, 48 N.Y.2d 117 ("each participant in the chain producing the record, from the initial declarant to the final entrant, must be acting within the course of regular business conduct or the declaration must meet the test of some other hearsay exception"). If the informant is not under a business duty to report and no other hearsay exception applies, the document historically has not been admitted as a business record. *Murray v. Donlan*, 77 A.D.2d 337 (2d Dep't 1980), *app. dismissed*, 52 N.Y.2d 1071; *Matter of Baron*, NYLJ, Nov. 4, 2002, at 35, col. 4 (Sur. Ct., Suffolk Co. 2002). *But see Pencom Systems, Inc. v. Shapiro*, 237 A.D.2d 144 (1st Dep't 1997) (statements of job applicants reflected in employer's records were sufficiently reliable to be admitted under the business record exception); *People v. McKissick*, 281 A.D.2d 212 (1st Dep't 2001) (same). Similarly, private memoranda that are not are made in the regular course of business are inadmissible under CPLR 4518. *See, e.g., Matter of Potter*, 24 A.D.2d 812 (3d Dep't 1965).

Opinions Contained Within Business Records. Even opinions contained within such business records are admissible *if they meet the foundational requirements set forth above*, despite the fact that the persons offering such opinions are not subject to cross-examination. *See People v. Kohlmeyer*, 284 N.Y. 366 (1940) (doctors' opinions admissible). So, for example, diagnoses and other conclusory statements contained in hospital and other medical records would be admissible. Of course, the admissibility of such opinions will depend in part on whether the declarant would have been permitted to give opinion testimony if he or she had testified. *Miller v. Alagna*, 203 A.D.2d 264 (2d Dep't 1994). At any rate, opinions may, under appropriate circumstances, be given more or less weight. *Wilson v. Bodian*, 130 A.D.2d 221 (2d Dep't 1987).

Hearsay Statements Contained within Business Records. It sometimes happens that a document qualifying as a business record will contain hearsay statements by third parties unrelated to the business that generated the record. Those statements cannot be admitted unless (i) a hearsay exception applies, see e.g., *Taft v. New York City Transit*, 193 A.D.2d 503 (1st Dep't 1993), *Matter of Baron*, NYLJ, Nov. 4, 2002, at 35, col. 4 (Sur. Ct., Westchester Co.); or (ii) they are offered for a non-hearsay purpose, see e.g., *Splawn v. Lextaj Corp*., 197 A.D.2d 479 (1st Dep't 1993), *leave to app. denied*, 83 N.Y.2d (1994). If the source of the information contained in the record is unknown, it cannot be admitted. *Ginsberg v. North Shore Hosp.*, 213 A.D.2d 592 (2d Dep't 1995), *leave to app. denied*, 86 N.Y.2d 701 (1995); *Ward v. Thistleton*, 32 A.D.2d 846 (2d Dep't 1969); *Matter of Sullivan*, 185 Misc. 2d 39 (Sup. Ct., New York Co. 2000).

Business Record Exception Does Not Overcome Other Exclusory Rules. If statements contained within such business records are otherwise subject to exclusion

under another evidentiary principle, the fact that the records qualify as business records under CPLR 4518(a) will not overcome an objection to admissibility. So, for example, privileged communications between a doctor and her patient are not admissible simply because they are contained within a business record. *See, e.g., Dillenbeck v. Hess*, 73 N.Y.2d 278 (1989). *See also Bostic v. State*, 232 A.D.2d 837 (3d Dep't 1996).

Establishing the Foundation for Business Records. Typically, the above foundational requirements are established through the testimony of the custodian of the documents or some other person who has personal knowledge of the record-keeping procedures of the business. *See, e.g., Faust v. McPherson*, 4 Misc. 3d 89 (2d Dept 2004); *West Valley Fire Dist. No. 1 v. Village of Springville*, 294 A.D.2d 949 (4th Dep't 2002). For the purpose of admissibility, it is not necessary to introduce the testimony of the actual persons who supplied or recorded the information contained in the record. Richard T. Farrell, Prince, Richardson on Evidence § 8-306 (11th ed. 1995); Randolph Jonakait et al., New York Evidentiary Foundations, at 344 (2d ed.).

With respect to the business records of *non-parties* obtained pursuant to a subpoena duces tecum, in-court testimony is not required. The custodian or other qualified person can simply make an affidavit stating that he is a custodian of the relevant records or otherwise qualified to make the certification; that to the best of his or her knowledge, the records are an accurate and complete set of the subpoenaed documents; and that the records were made in the ordinary course of the business, it was regular course of the business to make such a record, and the record was made at the time of the transaction or event recorded or within a reasonable time thereafter. *See* CPLR 3122-

a(a).[10] (It is advisable to provide the non-party with an affidavit to this effect at the time the subpoena is served.)

Computer Records. As of 2002, computer business records are also admissible if the records are a "true and accurate representation" of the electronic record. CPLR 4518(a). In making this determination, the court may consider the method by which the electronic record was stored, maintained, and retrieved. CPLR 4518(a). The underlying electronic record must, of course, satisfy the foundation requirements of CPLR 4518(a).

Notice of Intent to Admit Business Records. Under CPLR 3122-a(b), any party intending to offer business records into evidence at trial must give notice of such intent at least thirty days before trial, and must specify where the business records can be inspected. Any party objecting to admission of the records must do so at least ten days before trial. CPLR 3122-a(c).

HOSPITAL RECORDS

CPLR 4518(c) obviates the need to call a witness to meet foundational requirements for certain kinds of business records, including hospital records relating to the condition and treatment of a patient. See CPLR 4518(c) and CPLR 2306.

Certification Required. Under the statute, hospital records are prima facie evidence of the facts set forth therein, provided the records are certified or authenticated by an appropriate person such as the head of the hospital, a qualified physician, or an employee delegated for that purpose. CPLR 4518(c).

[10] By its terms, CPLR 3122-a does not apply to parties. Because it applies only to business records obtained by subpoena, and subpoenas cannot be served without the state, it applies only to non-parties within the State of New York.

The certification must establish that the records meet all of the foundational requirements enumerated in CPLR 4518(a). *See, e.g., People v. Mertz*, 68 N.Y.2d 136 (1986) (certification must state that the record was made within a reasonable time of the events recorded).

Foundation for Hospital Records. To qualify as a record made in the regular course of the business of the hospital, a hospital record must relate to *diagnosis and treatment* of the patient; to the extent any portion of the hospital record does not serve a medical purpose, that portion will be excluded from evidence. *Williams v. Alexander*, 309 N.Y. 283 (1955); *Rodriguez v. Piccone*, 5 A.D.3d 757 (2d Dep't 2004); *Schroder v. Consolidated Edison Co.*, 249 A.D.2d 69 (1st Dep't 1998). So, for example, that portion of a hospital record that merely recounts the patient's history is not admissible unless it assists in the patient's diagnosis and treatment. *Williams v. Alexander*, 309 N.Y. 283 (1955). *See also, People v. Scott*, 294 A.D.2d 661 (3d Dep't 2002), *leave to app. denied*, 98 N.Y.2d 731-732.

As with all business records, in the event information contained in the record has been recorded by a person under a business duty but has come from a person with no duty to report it (for example, a family member), the information recorded will be deemed inadmissible unless another hearsay exception applies. *See* 9 Weinstein, Korn & Miller, New York Civil Practice ¶ 4518.12 (2d ed. 2008).

Once the foundational requirements have been satisfied, certified hospital records are deemed conclusively admissible, and attacks on the underlying information contained in the record go to the weight of the evidence rather than its admissibility. *Rodriguez v.*

Triborough Bridge and Tunnel Authority, 276 A.D.2d 769 (2d Dep't 2000), *app. dismissed*, 96 N.Y.2d 814 (2001).

Once admitted, such documents can be used to establish everything from a diagnosis of the patient's mental condition to daily observations of the patient's condition. *People v. Kohlmeyer*, 284 N.Y. 366 (1940); *Matter of O'Grady*, 254 A.D. 691 (2d Dep't 1938). This is so even though the doctor who made the entries is never called as a witness. However, the weight to be accorded the documentary record remains in the hands of the trier of fact.

X-Rays and Similar Tests. As for medical or diagnostic records that contain "graphic, numerical, symbolic or pictorial representations," such as x-rays and magnetic resonance images, CPLR 4532-a permits their admission into evidence without foundation testimony if the record contains certain identifying information -- including the name of the injured party and the date on which the test was done -- and, in addition, if the record has either been examined by the party against whom it is being offered or notice has been provided to him at least ten days before trial of counsel's intention to offer the exhibit and such notice is accompanied by a doctor's affidavit identifying the record, attesting that identifying information inscribed on the record is the same as is customarily inscribed by him or the facility in question, and attesting that he or she would testify if called as a witness. This rule relieves the medical practitioner of the burden of appearing in court to give foundation testimony concerning such medical tests.