

TRIAL OBJECTIONS

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- I. Must object to preserve right to appeal. See CPLR §§4017, 4110-b and 5501(a)(3) and (4).
 - a. Must state specific basis for objection (i.e., “Objection: hearsay”) to preserve issue for appeal. See People v. Everson, 100 N.Y.2d 609, 767 N.Y.S.2d 389 (2003).

- II. *Voir Dire* (Jury Selection)
 - a. **Batson Challenge:** Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986) (racially motivated peremptory challenges prohibited)(three prong test: (1) objector must make prima facie showing of race discrimination, (2) burden then shifts to respondent to offer a race-neutral basis for having struck juror, and (3) then court determines if purposeful discrimination has been shown). See also Watson v. Ricks, N.Y.L.J. Feb. 1, 2007 (S.D.N.Y.)(Magistrate Francis extended Batson to national origin discrimination).

- III. Trial Objections:
 1. **Motions *In Limine*** for advance ruling on evidentiary matters (i.e., redactions, limiting testimony, prohibiting anticipated issues from being discussed during *voir dire*, *etcetera*).
 - a. Make motion to TAP/IAS or judge supervising jury selection for advance advisory ruling (not binding on trial judge) to limit/prohibit certain issues being discussed during jury selection.
 - b. Motion can be made orally or in writing.
 - i. If oral, make motion before court reporter.
 - ii. If in writing, serve adversary with 8 days notice (CPLR 2214(b), plus an additional 5 days for mailing (CPLR 2103(b)(2)).
 - iii. Have all briefs/motion papers marked as a court exhibit and admitted into evidence as such to preserve issue for appeal.

2. **Objection, Leading.** Leading questions (i.e., questions designed to elicit a "yes" or "no" response or suggest the answer) are not permitted during direct examination, unless . . .
 - a. **Introductory/preliminary matters**
 - b. **Hostile, biased or unwilling witness**
 - i. Adversary called as witness is presumed hostile
 1. Impeachment with prior oral inconsistent statements permitted—treated as admission by party. Still cannot impeach adversary's character for truth and veracity. See Richardson on Evidence §6-425.
 - c. **Impeachment** by calling witness to testify to inconsistent statement made by another witness.
 - d. **Young, old, very sick** or unable to speak without assistance
Court's discretion whether or not to allow leading questions on direct examination.
3. **Beyond Scope of Direct Examination.** With the exception of impeachment, cross is limited to matters which have been elicited upon direct examination and their inferences. Richardson on Evidence §6-303.
 - a. By cross-examining witness beyond the scope of direct, makes the witness your witness. . .
 - i. Can no longer lead. All questions must be direct/open-ended in nature (i.e., who, what, where, when, how, why, *etcetera*)
 - ii. Once you make the witness your witness, you have vouched for the witness' credibility and therefore, cannot impeach with prior oral inconsistent statement.
Richardson on Evidence §6-427.
4. **Impeachment.** Unlike admission, see below, impeachment is not evidence of the fact contained within the statement, but merely to show that inconsistent statement was made. Richardson on Evidence §§6-412, 8-104 and 8-205.
 - a. **Impeachment of adversary's witness** on cross:
 - i. **Prior Oral Inconsistent Statement:** must lay **foundation:**
 1. Specify time and place that prior oral inconsistent statement made;
 2. Specify the person to whom the prior oral inconsistent statement was made;
 3. Specify the language or substance of the language used.
Richardson on Evidence §6-411(a).

- ii. **Prior Written Inconsistent Statement:** must lay **foundation:**
 - 1. Mark document for identification;
 - 2. Show or read writing to witness and if signed, show witness the signature;

Richardson on Evidence §6-411(b).
 - b. **Impeachment of your own witness** on direct:
 - i. Must be **signed writing or under oath**, otherwise, you cannot impeach your own witness. CPLR 4514.
5. **Bolstering:** Cannot offer proof of consistent statements even when witness' credibility has been attacked by adversary's proof of prior inconsistent statements.
- a. Exception: Charge of recent fabrication—permitted to offer proof of prior consistent statement made at time when no motive to falsify.
- Richardson on Evidence §6-503.
6. **Hearsay:** Exclude any out-of-court oral statement/conduct and/or documentary evidence that is being offered in court for the truth of its content, unless there is a hearsay exception. Richardson on Evidence §8-101. If not offered for its truth (i.e., offered merely for the fact that the statement was made), then it is not hearsay and can be admitted (i.e., inconsistent statements used for impeachment. Richardson on Evidence §8-104. Also, written document used to refresh the recollection of the witness.
- a. **Past Recollection Recorded.** If witness' recollection cannot be refreshed by a written document, it still may come into evidence as past recollection recorded. **Foundation**—1. Writing made at or near the time of the event; 2. witness observed the matter recorded; 3. the record correctly represented witness' knowledge and recollection when made; and 4. Witness lacks present recollection of the recorded information. Richardson on Evidence §§6-214 through 6-215.
 - b. **State of Mind exception:** witness may testify to out-of-court statement made by another, not for its truth, but simply to show its effect on witness' and/or declarant's state of mind. Richardson on Evidence §8-106.
 - c. **Failure to object exception:** Hearsay can be admitted for its probative value if no objection made.

- d. **Business Record exception:** even if self-serving, if proper foundation laid, a party's business records will be admissible for their probative value. Richardson on Evidence §§8-110 and 8-303 and 8-308. See *also*, CPLR 4518.
 - i. **Foundation to Admit Business Records:**
 1. **Made in the regular course of business;**
 2. **It was the regular course of business to have made such a record;**
 3. **Record was made at the time of the transaction or within a reasonable period of time thereafter; and**
 4. **"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".** Richardson on Evidence §8-307.
 - a. **Informant must have a business duty to impart the information.** Johnson v. Lutz, 253, N.Y. 124, 170 N.E. 517 (error to admit police report made by police officer who did not witness accident, but instead received information from non-police witnesses). Richardson on Evidence §8-307.
 5. **Foundation is supplied by custodian** of records, the author of the records or one who is familiar with the practices and procedures of the particular business with regard to its record keeping. Richardson on Evidence §8-306.
 - a. **Certification: CPLR 2306 and 4518(b)** (hospital and medical records maintained by government), **CPLR 2307** (library or government agency records) and **CPLR 4518(c)** (medical records)(see *also*, Wilson v. Bodian, 130 A.D.2d 221, 231, 519 N.Y.S.2d 126, 132(certification of medical records by private physician admissible)). Richardson on Evidence §8-309.
 - b. **History Portion of Hospital/Medical Records.** Even though self-serving, so long as patient's statement contained within history portion of medical/hospital record is medically relevant to the diagnosis or treatment of patient's condition, it is admissible. Richardson on Evidence §8-310. If history portion contradicts a party's

position and it can be established that it was made by the party, it comes in as an admission. Richardson on Evidence §8-310.

- ii. **Accident Reports:** Normally records prepared solely for the purpose of litigation are not admissible. However, if there is a business reason which requires such a report to be prepared, then it is admissible (i.e., accident report prepared in regular course of business to prevent future accidents or discipline employee). Richardson on Evidence §8-311.
- iii. **Best Evidence Rule:** Must be original document or a satisfactory explanation as to why a copy has been produced. Richardson on Evidence §8-304.
 - 1. **Voluminous Writings Exception to Best Evidence Rule:** Balance summaries/computer printouts.
- e. **Admission exception:** An act or statement (oral/written) by a party or a party's representative which is inconsistent with the party's position at the time of trial, is evidence against that party at trial. Richardson on Evidence §8-201. No foundation necessary and not necessary that declarant be unavailable. Richardson on Evidence §§8-203 and 8-205. Admission is evidence of the fact admitted. Richardson on Evidence §8-205.
 - i. **Admission can be based on hearsay.** Richardson on Evidence §8-206.
 - ii. **Vicarious Admission by Agent.** Admission by agent will bind the principal only if the agent has authority to speak on behalf of the principal. Richardson on Evidence §8-208. If made without authority or after agency terminated or made outside scope of authority will not bind the principal. *Id.*
- f. **Declaration against Interest exception: Foundation:** 1. Declarant must be unavailable (death, claim of privilege, beyond jurisdiction, mentally infirm; 2. at the time the statement was made, it must have been against the declarant's pecuniary, proprietary or penal interest to have made it; 3. declarant had competent knowledge of the facts; 4. declarant had no motive to misrepresent the facts; and 5. when against penal interest, independent proof beyond the declaration to confirm truth of the facts stated. Richardson on Evidence §8-403. Declaration against interest can be offered against anyone, irrespective of privity. Richardson on Evidence §8-412.

- g. **Former Testimony in Civil Action exception:** CPLR 4517
 - i. **Foundation:** Witness unavailability (death, beyond jurisdiction, privilege, illness, dead man's statute); identity of the subject matter and identity of the parties. Richardson on Evidence §§8-502 and 8-503. Former testimony of a witness may be used by any party for any purpose against any other party. CPLR 4517(a)(3).
- h. **Res Gestae/Contemporaneous Statements exception:**
 - i. **Declaration accompanying an act** (i.e., statement of revocation by testator at time Will destroyed evidences intent to revoke). Richardson on Evidence §8-602.
 - ii. **Present Sense Impression exception:** Statement describing and/or explaining an event made while witnessing event or immediately thereafter.
 - iii. **Excited Utterance/Spontaneous Declaration:**
 - 1. Statement made while "declarant was under stress of excitement caused by an external event sufficient to still his reflective faculties". Richardson on Evidence §8-605.
 - 2. Statement must be spontaneous—time factor.
 - a. Pain and Suffering:
 - i. Involuntary expressions of groans, moans and screams always admissible. Richardson on Evidence §8-610.
 - ii. Declaration of present pain and suffering not admissible unless made to a physician for treatment (not expert witness, unless to show basis for opinion) or declarant is dead or declaration is a spontaneous declaration. *Id.*
 - 1. Declaration of past pain not admissible, even when made to physician for treatment. *Id.*
 - iv. **State of Mind exception:** evidences reason, intent, motive and feeling at the time that the statement was made. Richardson on Evidence §§8-611 and 8-612.
- i. **Dying Declaration exception:** Used only in homicide cases and only when the declarant is the victim, the victim's death is the subject of the criminal charge and the circumstances of the death are the subject of the dying declaration. Richardson on Evidence §8-706. **Foundation**—1. Declaration in *extremis* at time statement was made (not essence that death immediately

follow the declaration); 2. Declarant was under a sense of impending death without any hope of recovery and 3. if declarant had not died, he/she would have been a competent witness. Richardson on Evidence §§8-702, 8-703, 8-704 and 8-705.

- j. **Pedigree Declaration exception:** oral and/or written history of family descent. Foundation—1) Declarant must be dead or unavailable; 2) declarant must be related by blood or affinity to the family and 3) declaration was made before the controversy arose (*ante litem motam*). Richardson on Evidence §§8-901 through 8-911.

7. **Opinion Evidence:**

- a. **Lay witness:** Ordinarily, a lay witness testifies to facts, not opinions. However, permissible for lay witness to testify to opinion of color, weight, size, quantity, light, darkness, race, language, sounds, taste, smell, **state of another's emotion**, another's physical condition, general strength, feebleness, identity and likeness, voice identification, appearance of intoxication, speed of moving vehicles, ownership of personal property, age estimate, rational/irrational nature of a person's conduct (cannot testify to ultimate issue, i.e, sanity, however, subscribing witness to will can testify to testator's soundness/unsoundness of mind).

Richardson on Evidence §§7-201 and 7-202.

- b. **Expert Witness: *Frye v. U.S., 293 F.1013 (D.C. Cir. 1923)***(must be generally accepted by the scientific community). New York follows Frye. Peo. v. Wesley, 83 N.Y.2d 417, 633 N.E.2d 451 (1994). Federal courts follow **Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)**. Trial court is gatekeeper to exclude unreliable expert testimony. Expert must be qualified based upon education, training, knowledge or experience. See H. Freedman, New York Objections §16:30.
 - i. **Daubert Checklist:** (1) whether expert's technique or theory has been tested or can be objectively, rather than subjectively, challenged; (2) whether the expert's technique or theory has been subject to peer review and publication; (3) known or potential rate of error of the technique or theory when applied; (4) existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community (Frye standard).

- ii. **Objection to qualification** if expert attempts to express an opinion on matters beyond his/her expertise. Richardson on Evidence §7-304.
 - iii. **Ultimate issue**: subject to court's discretion. Rests with determination as to whether jury can decide the issue without expert assistance. *But see* Fed. Rule of Evi. 704(a) ". . . testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact."
 - iv. **Hypotheticals**: CPLR 4515. Hypotheticals no longer required. Expert need not specify the data upon which the opinion is based prior to testifying to opinion. CPLR 4515. However, if opinion is not based upon facts supported by the evidence, then move to strike expert's opinion. Richardson on Evidence §7-310. Object to lack of adequate basis for opinion. H. Freedman, New York Objections §16:115.
 - v. **Expert may rely upon hearsay** for basis of opinion where hearsay declarant subject to full cross-examination. Also, expert can base opinion on learned treatises. Richardson on Evidence §§7-312 and 7-313.
8. **Medical and Diagnostic Tests objection**: CPLR 4532-a. X-rays, CAT-Scans, MRIs, EKGs, and other diagnostic tests are only admissible if notice of intent to introduce the same into evidence given 10-days prior to trial accompanied by affidavit/affirmation of physician that identifies the test, x-ray, heart monitoring strips, *etcetera*, and attests to the identifying information inscribed thereon and that if called as a witness, he/she would so testify and notice that the test, x-ray is available for inspection. Richardson on Evidence §7-317. Does not apply to diagnostic tests, x-rays, *etcetera*, contained in hospital record. Since x-rays are documents, they are subject to the best evidence rule. *Id.* CPLR 4532-a dispenses with the necessity of having to call an attesting witness. *Id.*
9. **Foundation Objections**: See above foundational requirements.
10. **Dead Man Statute**: CPLR 4519. Party or person interested in the outcome of the litigation is incompetent to testify to a personal transaction or communication with a deceased or mentally ill person when the testimony is offered against the representative of the deceased or mentally ill person. Richardson on Evidence §6-121. Dead Man's Statute not applicable where executor/administrator of estate examined in his own behalf or

former deposition/trial testimony of deceased introduced, involves facts surrounding an automobile, boat or aircraft accident. Richardson on Evidence §6-122. "The objection should be directed against the competency of the witness to testify to the personal transaction or communication, and not against the competency of the testimony." Richardson on Evidence §6-130.

11. **Privilege Objections.**
 - a. **Privilege Against Self-incrimination.** Fifth Amendment to the U.S. Constitution and N.Y.S. Constitution Article I, §6. Applicable in both criminal and civil actions. However, can't claim privilege as a protection against civil liability. CPLR §4501. Only the witness and not counsel may assert the privilege.
 - b. **Attorney-Client privilege.** CPLR §4503(a).
 - c. **Attorney Work Product and Material Prepared for Litigation privileges.** CPLR 3101(c) and (d)(2). Includes attorney's theory of case, legal opinion, witness statements, investigative reports.
 - d. **Doctor-Patient privilege.** CPLR 4504(a).
 - e. **Spousal privilege.** CPLR CPLR §4502(b).
 - f. **Clergy-Congregant privilege.** CPLR §4505.
 - g. **Professional Journalist privilege.** Shield Law. N.Y. Civ. Rights L§79-h. Journalist may not be held in contempt for refusing to divulge his/her confidential news source.
 - h. **Psychologist privilege.** CPLR §4507
 - i. **Social Worker privilege.** CPLR §4508.
 - j. **Rape Crisis Counselor privilege.** CPLR §4510(b).

12. **Common Objections During Witness Examination:**
 - a. Asked and Answered—repetitive question. H. Freedman, New York Objections §15:120.
 - b. Assuming facts not in evidence. *Id.* at §15-130.
 - c. Answer not responsive. *Id.* at §15-140.
 - d. Conclusion or opinion sought. *Id.* at §15-150.
 - e. Opinion as to third party's state of mind. *Id.* at §15-160.
 - f. Argumentative. *Id.* at §15-90.
 - g. Beyond the scope of testimony. *Id.* at §15-100. See above.
 - h. Prior criminal convictions. *Id.* at §15-110.
 - i. Arguing objections in jury's presence. *Id.* at §18-20.
 - j. Presenting material not in evidence. *Id.* at §18-50.
 - k. Compound. *Id.* at §6-20.
 - l. Cumulative. *Id.* at §6-60.
 - m. Prejudicial. *Id.* at §6-30.