GUIDE TO NEW YORK EVIDENCE

ARTICLE 1: GENERAL RULES & COURT FUNCTION

TABLE OF CONTENTS

1.00. Title

This compilation of New York rules of evidence shall be cited as the Guide to New York Evidence.

Note

For the various citation forms, see:

http://www.nycourts.gov/judges/evidence/0-TITLE_PAGE/CITATION/guidecitation.shtml

1.01. Scope of the Guide

Unless a statute or decisional law prescribes a special rule of evidence for a particular civil or criminal proceeding, this Guide is intended to set forth the evidentiary rules applicable to proceedings in all courts of the State of New York.

Note

This rule sets forth the current practice in New York courts regarding the application of New York's rules of evidence.

Statutes setting forth the governing procedures for various courts and proceedings include the following:

Civil Practice Law and Rules: CPLR 101 ("The civil practice law and rules shall govern the procedure in civil judicial proceedings in all courts of the state and before all judges, except where the procedure is regulated by inconsistent statute"); CPLR 105 (d) ("[c]ivil judicial proceeding" is a "prosecution, other than a criminal action, of an independent application to a court for relief"); CPLR article 45 ("Evidence").

Criminal Procedure Law: CPL 60.10 ("Unless otherwise provided by statute or by judicially established rules of evidence applicable to criminal cases, the rules of evidence applicable to civil cases are, where appropriate, also applicable to criminal proceedings").

Surrogate's Court Procedure Act: SCPA 102 ("The CPLR and other laws applicable to practice and procedure apply in the surrogate's court except where other procedure is provided by this act") (*see Matter of Martin*, 80 Misc 17, 26 [Sur Ct, NY County 1913] ["The rules of evidence applied in this court . . . are now uniform with the rules applied in other tribunals of the state"]).

Family Court Act: Family Court Act § 165 (a) ("Where the method of procedure in any proceeding in which the family court has jurisdiction is not prescribed by this act, the procedure shall be in accord with rules adopted by the administrative board of the judicial conference or, if none has been adopted, with the provisions of the civil practice act to the extent they are suitable to the proceeding involved"). (*See also Matter of Schwartz v Schwartz*, 23 AD2d 204, 206 [1st Dept 1965] ["the determination of when it is 'appropriate' to apply the provisions of the CPLR to the numerous and

unusual situations which will arise in the Family Court will depend upon the circumstances of the cases as they arise"].)

This Guide does not attempt to describe all proceedings in which a particular evidentiary rule may be inapplicable as a result of statutory law. Examples of some of the judicial proceedings in which the rules of evidence, in whole or part, are deemed inapplicable include: CPL 400.30 (4) (exclusionary rules of evidence inapplicable in hearings determining the amount of fines); CPL 710.60 (4) (hearsay admissible in suppression hearings); Correction Law § 168-n (3) (as set forth in *People v Mingo*, 12 NY3d 563 [2009], "reliable hearsay" is admissible when determining a sex offender registration level); Mental Hygiene Law § 81.12 (court may waive the rules of evidence for good cause in Mental Hygiene Law art 81 appointment of a guardian proceeding); UJCA 1804 (rules of evidence inapplicable in small claims hearings).

Some statutes set forth specific evidentiary rules to be applied in certain proceedings, including: CPL 180.60 (proceedings upon a felony complaint); CPL 400.21 (second felony offender hearing); CPL 410.70 (revocation of probation hearing); Domestic Relations Law § 144 (admissions in an action for annulment); Family Court Act § 531 (corroboration in paternity proceedings); Family Court Act § 624 (termination of parental rights); Family Court Act § 834 (proceedings involving family offenses); Family Court Act § 915 (confidentiality of statements made in conciliation proceedings); Family Court Act § 1046 (a) (vii) (specified privileges inapplicable in child protective proceeding).

Other statutes provide the rules of evidence are to apply to certain proceedings: CPL 190.30 (grand jury proceedings); Family Court Act § 439 (proceedings conducted by support magistrates); Mental Hygiene Law § 10.07 (c) (CPLR art 45 applies in Mental Hygiene Law art 10 proceedings).

It should also be noted that the Court of Appeals has held that in certain proceedings the constitutional due process requirement may affect the admission of evidence. (*E.g. Matter of State of New York v Floyd Y.*, 22 NY3d 95, 106 [2013] ["A requirement that evidence meet a test of reliability and substantial relevance is necessary to protect the important liberty interests at stake in (Mental Hygiene Law) article 10 proceedings"]; *People v Robinson*, 89 NY2d 648 [1997] [a defendant's constitutional right to due process requires the admission of hearsay evidence consisting of grand jury testimony when the declarant has become unavailable to testify at trial and the hearsay is material, exculpatory and has sufficient indicia of reliability].)

1.02. Purpose and Construction

In recognition of the absence of a New York statutory code of evidence, the objective of this Guide is to bring together in one document, for the benefit of the bench and bar, New York's existing rules of evidence, setting forth each rule with a note on the sources for that rule.

Given that most of New York's evidentiary rules are not codified and that the New York Court of Appeals provides the controlling interpretation of the New York State constitution, statutes and common law, this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals.

The rules of evidence set forth in this Guide are not intended to alter the existing law of New York evidence and shall not be construed as doing so or as precluding change in the law when appropriate.

Note

It bears emphasis that this Guide sets forth the existing law of New York evidence at the moment of publication and that the law of evidence is continuously subject to change. Most notably, perhaps, because New York's law of evidence relies primarily on the common law of evidence, it is best to remember, as former Chief Judge of the Court of Appeals Stanley Fuld explained:

> "The common law of evidence is constantly being refashioned by the courts of this and other jurisdictions to meet the demands of modern litigation. . . . Absent some strong public policy or a clear act of pre-emption by the Legislature, rules of evidence should be fashioned to further, not frustrate, the truth-finding function of the courts . . . . "

(*Fleury v Edwards*, 14 NY2d 334, 341 [1964, Fuld, J., concurring]; *see People v Conyers*, 52 NY2d 454, 460 [1981] ["the rule announced in our decision today (dealing with pretrial silence) represents a simple recognition of our judicial

responsibility to formulate rules of evidence to protect the integrity of the truth-finding process"].)

As a result, the Committee on Evidence will periodically examine the state of the law of evidence and update this Guide as necessary. Any revision of a rule will be explained in the Note to the rule.

Finally, as set forth in the rule, "this Guide places particular emphasis on and adheres to the controlling precedents of the New York Court of Appeals." To the extent possible, therefore, the Guide employs the language of the Court of Appeals. In the occasional instance where no controlling Court of Appeals precedent exists, Appellate Division precedent uniformly followed by the courts may form the basis for a rule. In instances where the law of New York converges with other evidence codes, such as the 1982 and 1991-92 Proposed Code of Evidence for New York prepared by the New York State Law Revision Commission, the Uniform Rules of Evidence, or the Federal Rules of Evidence, language from those rules may be used in this Guide.

1.07 Court Control Over Presentation of Evidence[1]

(1) In the exercise of the court's responsibility to supervise and oversee the conduct of a hearing or trial, the mode and order of presenting evidence and examining witnesses is committed to the sound discretion of the court.

(2) In a criminal proceeding, a court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense. The right to present a defense, however, does not give defendants carte blanche to circumvent the rules of evidence.

(3) The court in the exercise of its discretion may permit a party to:

(a) introduce rebuttal and surrebuttal evidence that normally addresses new matters raised by the opposing party on that party's case, albeit a court may, in its discretion, in the interests of justice, permit evidence that is not technically of a rebuttal or surrebuttal nature;

(b) recall a witness; and

(c) in an exceptional circumstance, reopen a party's case, provided, however, the court may not permit the People to reopen their case at a suppression hearing if they have been given a full and fair opportunity to be heard and the court has rendered its decision.

(4) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may on its own, rule that a question, in form or substance, is not proper, or that a response to a

question is not proper and is struck, or that proffered evidence is inadmissible.

(5) The court shall enforce a stipulation between opposing parties concerning an item of evidence, relevant fact, or claim unless the court rules in the sound exercise of its discretion in the furtherance of the interests of justice to relieve a party or parties, in whole or in part, from the stipulation, particularly where doing so would not significantly prejudice a party.

Note

Subdivision (1) is derived from a long line of Court of Appeals decisions that follow the common law in defining a trial judge's traditional power (*e.g. People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]; *Feldsberg v Nitschke*, 49 NY2d 636, 643 [1980] ["(T)he order of introducing evidence and the time when it may be introduced are matters generally resting in the sound discretion of the trial court"]; *Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]).

The common law is embedded in or supplemented by statutory law. For example, CPLR 4011 empowers the court to "determine the sequence in which the issues shall be tried and otherwise regulate the conduct of the trial in order to achieve a speedy and unprejudiced disposition of the matters at issue in a setting of proper decorum." And CPL 260.30 and 320.20 (3) specify the order of criminal jury and non-jury trials, respectively.

Court of Appeals decisions have recognized that those statutes do not circumscribe the broad common-law power accorded trial judges in conducting civil trials (*Feldsberg*, 49 NY2d at 643) and criminal trials (*People v Washington*, 71 NY2d 916, 918 [1988] ["CPL 260.30 sets forth the order in which a jury trial is to proceed, but the common-law power of the trial court to alter the order of proof in its discretion and in furtherance of justice remains at least up to the time the case is submitted to the jury" (internal quotation marks omitted)]; *People v Smith*, 166 AD2d 385, 385-386 [1st Dept 1990], *affd for reasons stated in App Div mem op* 79 NY2d 779 [1991] [where the People's expert witness was unavailable and the

People had thus not rested, the court did not err in requiring the defendant, over his objection, to proceed with his case and, specifically, his testimony]; *People v Olsen*, 34 NY2d 349, 353 [1974]; *People v Benham*, 160 NY 402, 437 [1899]).

Subdivision (2) is derived from Court of Appeals decisions, as summarized in *People v Jin Cheng Lin* (26 NY3d 701, 727 [2016]):

> "[A] 'court's discretion in evidentiary rulings is circumscribed by the rules of evidence and the defendant's constitutional right to present a defense' (*People v Carroll*, 95 NY2d 375, 385 [2000]). Nevertheless, '[t]he right to present a defense does not give criminal defendants carte blanche to circumvent the rules of evidence' (*People v Hayes*, 17 NY3d 46, 53 [2011] [citation and internal quotation marks omitted], quoting *United States v Almonte*, 956 F2d 27, 30 [2d Cir 1992])."

Almonte, cited by *Lin* and *Hayes*, noted the limitations on the right to present a defense.

> "The right to present a defense, however, does not give criminal defendants carte blanche to circumvent the rules of evidence. Restrictions on a defendant's presentation of evidence are constitutional if they serve 'legitimate interests in the criminal trial process,' *Rock v. Arkansas,* 483 U.S. 44, 55, 107 S.Ct. 2704, 2711, 97 L.Ed.2d 37 (1987) (quoting *Chambers v. Mississippi,* 410 U.S. 284, 295, 93 S.Ct. 1038, 1046, 35 L.Ed.2d 297 (1973)), and are not 'arbitrary or disproportionate to the purposes they are designed to serve.' *Rock,* 483 U.S. at 56, 107 S.Ct. at 2711. *See also Taylor v. Illinois,* 484 U.S. 400, 414–16, 108 S.Ct. 646, 655–56, 98 L.Ed.2d 798 (1988)" (*Almonte*, 956 F2d at 30).

Examples of the application of the constitutional right to a defense are:

- The constitutional right to a defense requires "the admission of hearsay not encompassed within a hearsay exception when the court finds that the declarant is unavailable to testify and the hearsay is material, exculpatory and has sufficient indicia of reliability" (Guide to NY Evid rule 8.01 [1] [b], Admissibility of Hearsay).

- In *People v Deverow* (38 NY3d 157 [2022]), the Court held that the trial court erred in excluding a defense witness on the grounds that the witness's

proffered evidence was collateral, and in excluding three 911 calls that the defense sought to introduce as "present sense impression" exceptions to the hearsay rule. Those rulings, the Court held, "deprived defendant of 'a meaningful opportunity to present a complete defense' " (*id.* at 168). "Although this 'right to present a defense does not give criminal defendants carte blanche to circumvent the rules of evidence' (*People v Hayes*, 17 NY3d 46, 53 [2011] . . .), a trial court must not apply the rules 'mechanistically to defeat the ends of justice' (*Chambers v Mississippi*, 410 US 284, 302 [1973])" (*id*. at 164).

- In *People v Cerda* (40 NY3d 369, 377 [2023]), a prosecution for sexual abuse of a minor, the Court held that evidence of the complainant's sexual conduct should have been admitted under CPL 60.42 (5) and pursuant to the defendant's constitutional right to a defense, given that the proffered evidence provided an "alternative, innocent explanation for the cause of the [complainant's] identified injuries and bears on the issue of guilt or innocence."

Subdivision (3) restates New York law allowing judicial discretion in conducting specific aspects of a trial.

Subdivision (3) (a) is derived both from CPL 260.30 (7), which gives the court discretion to allow the People to offer rebuttal evidence to the defendant's evidence and the defendant then to rebut the People's rebuttal evidence, and from Court of Appeals precedent reaching the same conclusion in civil cases (*e.g. Ankersmit v Tuch*, 114 NY 51, 55-56 [1889]; *Marshall v Davies*, 78 NY 414, 420 [1879]).

To be admissible, rebuttal and surrebuttal evidence must address new matters raised by the opposing party on that party's case (*People v Harris*, 98 NY2d 452, 489 [2002] ["The opportunity to present rebuttal, however, does not permit a party to hold back evidence properly part of the case-in-chief and then submit that evidence to bolster the direct case after the opponent has rested"]). A trial court may in its discretion, in the interest of justice, however, permit evidence on rebuttal that is not technically of a rebuttal nature (*see Marshall v Davies*, 78 NY at 420 ["These (rebuttal) rules may in special cases be departed from in the discretion of the trial judge, but a refusal to depart from them is no ground of exception"]; *People v Harris*, 98 NY2d at 489 ["Even where evidence is not technically of a rebuttal nature and more properly a part of the party's direct case, however, a court has discretion, in the interest of justice, to allow its admission on rebuttal pursuant to CPL 260.30 (7)"]).

Subdivision (3) (b), which concerns the power of a court to permit a witness to be recalled, is derived from *Feldsberg*. There, the Court stated:

> "Nor can it be doubted that recall of a witness for redirect examination is subject to the discretion of the court. Generally, sound trial practice demands that every witness be questioned in the first instance on all relevant matters of which he has knowledge and be excused at the completion of this testimony. In this manner, the litigation is contained within reasonable limits, the adversary is aware of the evidence he will have to meet and the jury is not unnecessarily confused. Recall at a later point in the trial not only may inject untoward administrative burdens into the litigation by reopening the whole range of prior testimony, but may also unfairly disadvantage the adversary in his ability to meet the proof or unnecessarily divert the jury's attention away from the material issues of the case. In certain situations, however, the trial court may find it necessary to depart from this general rule and may do so in its discretion" (49 NY2d at 643-644 [citations omitted]).

Consistent with *Feldsberg*, a court also has the discretion to allow a witness to be recalled for further cross-examination (*cf. People v Gibson*, 106 AD3d 834, 835 [2d Dept 2013] ["Supreme Court providently exercised its discretion, and did not deprive (the defendant) of the right to confront adverse witnesses against him, when it denied his request to recall a prosecution witness for further cross-examination"]; *People v Yu Weng*, 47 Misc 3d 138[A], 2015 NY Slip Op 50584[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2015] ["We further find no error with respect to the court's refusal to allow the defense to re-call the undercover officer the day after his cross-examination had concluded. The cross-examination had been completed without improper restriction, and, other than stating that he had 'additional questions,' defense counsel articulated no basis for further questioning" (citations omitted)]; *see People v Montes*, 16 NY3d 250, 253 [2011] ["the inability to recall (an unavailable witness) did not violate defendant's rights under the Confrontation Clause"]).

Subdivision (3) (c) states the general rule that a court has the "power to permit the introduction of evidence after the close of the offerer's case or prohibit the same" (*Feldsberg*, 49 NY2d at 643 [citations omitted]; *People v Ventura*, 35 NY2d 654, 655 [1974] ["The determinations as to whether to reopen the case for further testimony . . . rested in the reasonable discretion of the Trial Judge"]; *cf. People v Hecker*, 15 NY3d 625, 659-660 [2010] [the record on whether defense

counsel gave a pretextual reason for excusing a juror "would have been more complete if Supreme Court agreed to defense counsel's proposal" to further question the juror]).

A court's sound exercise of discretion to permit a party to reopen its case may, however, be circumscribed by the nature or timing of the application. In *Olsen* (34 NY2d at 353), for example, the Court advised that a trial court should use "utmost caution" in determining whether to permit a party to reopen its case after the jury has retired to deliberate:

> "There are obvious reasons why at this stage the power to reopen a case for additional proof must be exercised with utmost caution. One reason of course is that at some point the trial must come to an end. If requests to reopen were casually granted and became routine, the orderly trial process, fundamental to our jurisprudence, would soon erode away. Another consideration, apart from the merits of a predictable trial pattern, is that new evidence introduced during the jury's deliberations is likely to be given 'undue emphasis . . . with consequent distortion of the evidence as a whole' giving rise to the real possibility of prejudice to the party against whom the evidence is offered" (*id.*).

On its facts, *Olsen* held that the trial court abused its discretion in permitting the prosecution to reopen its case after the jury started deliberations to address an alleged credibility issue involving a prosecution witness that had been prompted by a jury note. The "evidence submitted to the jury under these circumstances," the Court held, "is bound to be given great weight even though it bears only indirectly on the main issue" (*id.* at 355). A similar rationale led the Court in *People v Escobar* (36 NY2d 883, 884 [1975]) to find no abuse of discretion in a trial court's denial of a defendant's request to permit its case to be reopened after the completion of summations to permit the defense to introduce recantation testimony from a prosecution witness.

The Court of Appeals has also cautioned that there are "narrow circumstances" in which a trial court may reasonably exercise its discretion to permit a party to reopen its case to prove a missing element (*People v Whipple*, 97 NY2d 1, 8 [2001]). In *Whipple*, the trial court properly exercised its discretion to permit the People to reopen their case to prove a missing element, given that "the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense" (*id.* at 3).

In the context of a suppression hearing, after the People have rested but before the court has rendered a decision, the Court of Appeals in *People v Cook* (34 NY3d 412, 422 [2019]) held that the trial court has discretion to reopen the suppression hearing and permit additional evidence. *Whipple* did not "so tightly cabin the hearing court's discretion prior to rendering a decision" to only those circumstances where the issue to be presented after reopening is simple to prove and not seriously contested (34 NY3d at 422). Once the decision has been rendered, however, absent a showing that the People were "deprived of a full and fair opportunity to be heard," it would be an abuse of discretion to permit the hearing to be reopened (*id*. at 419; *People v Kevin W.*, 22 NY3d 287, 289 [2013]; *People v Havelka*, 45 NY2d 636 [1978]; *see People v Grant*, 159 AD3d 640, 640 [1st Dept 2018] ["The hearing court properly reopened the suppression hearing to permit the People to present evidence on the theory of inevitable discovery, because the People were not afforded a full and fair opportunity to litigate that issue during the initial hearing"]).

By statute, a trial court may permit the defense to reopen a pretrial determination and denial of a suppression motion if the "court is satisfied, upon a showing by the defendant, that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion" (CPL 710.40 [4]; *see People v Clark*, 88 NY2d 552, 555 [1996] ["additional pertinent facts" requires "at least that the facts asserted be 'pertinent' to the issue of official suggestiveness such that they would materially affect or have affected" the earlier determination]; *see also People v Banch*, 80 NY2d 610, 618-619 [1992] [trial court erred in not reopening a suppression hearing when it was discovered at trial that the defense had not received the correct memo book of the officer who testified at the hearing]).

Subdivision (4). The rule set forth in subdivision (4) relates to a trial court's authority to "rule that a question, in form or substance, is not proper, or that a response to a question is not proper and is struck, or that proffered evidence is inadmissible," notwithstanding the failure of a party to object.

Although the parties have the basic responsibility to present evidence and object to offered evidence, the Court of Appeals has stated that "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-seeking process" (*People v Jamison*, 47 NY2d 882, 883 [1979]). "Indeed, as part of the responsibility of insuring a fair trial, [the judge] may seize the affirmative, when proper and

necessary, to clarify perplexing issues, to develop significant factual information, to enforce propriety, orderliness, decorum and expedition in trial" (*People v De Jesus*, 42 NY2d 519, 523 [1977]).

The trial court, therefore, retains the discretion to exclude offered evidence on its own when the evidence is irrelevant, or it is in the interests of a fair trial to exclude the evidence (*see People v Nellis*, 217 AD3d 1056, 1061 [3d Dept 2023] ["compounding the magnitude of the prosecutor's misconduct was the fact that County Court made no effort to intervene or otherwise attempt to minimize or alleviate the prejudice being caused to defendant"]; ABA Standards for Criminal Justice, Special Functions of the Trial Judge standard 6-1.1 [a] [3d ed 2000] ["The trial judge has the responsibility for safeguarding both the rights of the accused and the interests of the public in the administration of criminal justice. The adversary nature of the proceedings does not relieve the trial judge of the obligation of raising on his or her initiative, at all appropriate times and in an appropriate manner, matters which may significantly promote a just determination of the trial"]; CJI2d[NY] Model Instructions, Preliminary Instructions, https://www.nycourts.gov/judges/cji/5-sampleCharges/CJI2d.Preliminary_Instructions.pdf ["(T)he court has an obligation under the laws of New York to make sure that certain fundamental rules of law are followed even if one of the lawyers does not voice an objection. So, on occasion, you may hear me say sustained or words to that effect, even though one of the lawyers has not objected"]).

The Court of Appeals has nonetheless cautioned: "Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]; *see People v De Jesus*, 42 NY2d at 523 [While a court's "active participation is not foreclosed, care should be assiduously exercised lest the Trial Judge's conduct, in the form of words, actions or demeanor, does not divert or itself become an irrelevant subject of the jury's focus"]).

Subdivision (5) is derived from *People v Gary* (26 NY3d 1017, 1019 [2015]) and *Matter of New York, Lackawanna & W. R.R. Co.* (98 NY 447, 453 [1885]). The Court of Appeals has cautioned that while "courts are ordinarily bound to enforce party stipulations," a court may exercise its discretion to relieve a party from a stipulation, "particularly where doing so would not significantly prejudice the other side" (*Gary*, 26 NY3d at 1019).

[1] In August 2020, subdivision (3) (a) and (b) was removed from this rule and set forth separately as rule 1.09 (Court Power to Call and Examine Witnesses).

In December 2020, subdivision (2) (a) and (c) was amended to include the reasons for allowing rebuttal and surrebuttal evidence and the reopening of a party's case.

In December 2022, subdivision (2) was added, and the remaining subdivisions renumbered accordingly.

In May 2024, the Note to subdivision (2) was updated to include the holding in *People v Cerda* (40 NY3d 369 [2023]).

1.09 Court Determination of Preliminary Questions [1]

(1) The court shall decide any preliminary question as to the admissibility of evidence, including any factual or foundational question necessary for the admissibility of evidence. A court is not bound by the ordinary exclusionary rules of evidence and may consider any reliable evidence, although whether the rules of privilege must be adhered to has not been expressly settled.

(2) In a trial by jury, the court shall not inform the jury of the factual or foundational basis for the court's decision when doing so would potentially usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence.

Note

This rule comes into play when an issue about the admissibility of offered evidence is raised under a rule of evidence. It recognizes that the applicability of the rule will depend upon the determination of whether the requirements of the rule have been satisfied, e.g. the determination of preliminary questions. This rule sets forth the role of the court in making that determination.

Subdivision (1). Subdivision (1) states the traditional and well established rule in New York that the trial court decides all questions regarding the admissibility of evidence. (*See e.g. People v Feldman*, 299 NY 153, 158, 169-170 [1949]; *People v Walker*, 198 NY 329, 334 [1910]; *Russell v Hudson Riv. R.R. Co.,* 17 NY 134, 140 [1858].) To the extent the applicability of a rule of evidence depends upon the existence of a condition(s), the court also determines the existence of the condition(s). (*See e.g. People v Parks*, 41 NY2d 36, 46-47 [1976]; *People v Marks*, 6 NY2d 67, 75 [1959]; *Poppe v Poppe*, 3 NY2d 312, 315 [1957]; *Meiselman v Crown Hgts. Hosp.*, 285 NY 389, 398-399 [1941].) As necessary, a hearing may be had to resolve a preliminary question as explained by the Court of Appeals in *Marks* (6 NY2d at 75):

> "This New York rule [that a court decides preliminary questions] is not only well grounded in practice but is also sound in principle. The admissibility of evidence may depend upon complicated, collateral fact issues, which would be confusing in jury trials. If, in addition to the questions of fact which are directly involved, any number of collateral issues must be tried in order to determine the admissibility of evidence upon the principal issue, it would obstruct rather than facilitate the administration of justice."

To the extent the determination involves a factual inquiry, the court acts as a trier of fact. (*See Kearney v Mayor of City of N.Y.*, 92 NY 617, 620 [1883].) The court need not accept the uncontradicted testimony of a witness. (*See People v Caprio*, 25 AD2d 145, 151 [2d Dept 1966], *affd* 18 NY2d 617 [1966].)

Additionally, the "determination of . . . preliminary questions of fact is not restricted by the ordinary exclusionary rules of evidence." (*People v Lynes*, 64 AD2d 543, 543 [1st Dept 1978] [citing inter alia Fed Rules Evid rule 104 (a)], *affd* 49 NY2d 286 [1980]; *People v Cotto*, 169 Misc 2d 194, 197-198 [Sup Ct, NY County 1996] [hearsay relied upon in determining whether factual foundation for a hearsay exception has been satisfied], *affd* 240 AD2d 193 [1st Dept 1997], *affd* 92 NY2d 68 [1998].)

Whether the court may compel disclosure of privileged communications in the course of making its determination has not been addressed by the Court of Appeals. Other jurisdictions follow Uniform Rules of Evidence rule 104 (a) which provides that rules on privileged communications remain applicable in the course of determining preliminary questions. (Uniform Rules Evid rule 104 [a] ["In making its determination, the court is not bound by the rules of evidence except the rules with respect to privileges"]; *see also* Fed Rules Evid rule 104 [a] ["In so deciding, the court is not bound by evidence rules, except those on privilege"].)

Subdivision (2). This rule is derived from those cases which hold that a trial judge may not usurp the function of the jury in evaluating witnesses or evidence by, for example, inappropriate questioning of a witness, or commenting on the credibility of a witness or on the proof of an element of the crime. (*See People v Mendes*, 3 NY2d 120, 121 [1957] ["because of the ever present and serious threat that a jury's determination may be influenced by what it interprets to be the court's own opinion, this prerogative (of the trial judge to ask questions) should be exercised with caution"]; *People v Leavitt*, 301 NY 113, 117 [1950] ["the court usurped the function of the jury in commenting on the credibility of a witness for

defendant saying, 'And I will say another thing—that *I wasn't quite satisfied with (the defense witness's) story*' "]; *People v Kohn*, 251 NY 375, 379 [1929] [in a burglary case, the trial judge improperly instructed the jury that " 'the inference is irresistible that the person who was there wanted to steal' "].)

Informing the jury of a trial court's factual or foundational determination in the admission of evidence may equally usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence. Thus, for example, all four Departments of the Appellate Division have held that the court is not required to formally certify a witness as an expert when the court determines the witness is qualified to give expert opinion. (*E.g. People v Gordon*, 202 AD2d 166, 167 [1st Dept 1994]; *People v Wagner*, 27 AD3d 671, 672 [2d Dept 2006]; *People v Grajales*, 294 AD2d 657, 659 [3d Dept 2002]; *People v Eldridge*, 221 AD2d 966, 967 [4th Dept 1995].) As stated by the Appellate Division, Third Department, in *People v Lamont* (21 AD3d 1129, 1132 [3d Dept 2005] [citations omitted]): "The trial court has considerable discretion in determining the admissibility of expert testimony. The court is not required to explicitly declare a witness an expert before permitting such testimony. In fact, there is legitimate criticism of that practice on the basis that making such a declaration in front of a jury improperly bolsters the witness and appears to grant the witness the imprimatur of the court."

Other self-evident examples would include a court not telling a jury that it was admitting a confession because the court found it was voluntarily made; or that it was admitting an identification because it was not premised on a suggestive identification proceeding; or that it was admitting certain statements because it had found a prima facie case of conspiracy.

By contrast, a trial court may need to inform the jury of the law applicable to the consideration of certain types of evidence; e.g. a statement admitted not for its truth; the reason for the introduction of *Molineux* evidence and that it is not admitted to show propensity.

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[1] In May 2023, subdivision (2) was amended to include words that were and are in the Note, namely: "when doing so would potentially usurp the jury's function and improperly convey or suggest to the jury that the court has an opinion about the significance of a witness or of certain evidence."

In December 2023, subdivision (1) was amended to add the second sentence.

1.11. Court's Power to Call or Examine Witness

(1) Provided the court does not assume the function or appearance of an advocate for a party in the action or proceeding, the court in the sound exercise of its discretion may:

(a) in those unusual circumstances in which the court feels compelled to do so, call and examine a witness on its own. Before doing so, the court must, on the record, explain its reasons for calling the witness and afford the parties an opportunity to be heard outside the presence of the jury. All parties are entitled to cross-examine the witness called by the court.

(b) in limited circumstances, examine witnesses, whether called by the court or by a party, when necessary, for example, to clarify unclear answers from a witness with language difficulty, or to insure that a proper foundation is made for the admission of evidence, or, without assuming the role of an advocate, to elicit significant facts, clarify or enlighten an issue, or facilitate the orderly and expeditious progress of the trial. A party may object to questions so asked and to evidence thus adduced.

Note

Subdivision (1). Although the parties have the basic responsibility to present evidence and make objection to offered evidence, the Court of Appeals has stated that "neither the nature of our adversary system nor the constitutional requirement of a fair trial preclude a trial court from assuming an active role in the truth-finding process" (*People v Jamison*, 47 NY2d 882, 883 [1979]). Subdivision (1) sets forth two ways, recognized by the Court of Appeals, that a court may take such an active role.

Importantly, however, the Court has cautioned that: "Although the law will allow a certain degree of judicial intervention in the presentation of evidence, the line is crossed when the judge takes on either the function or appearance of an advocate at trial" (*People v Arnold*, 98 NY2d 63, 67 [2002]).

Subdivision (1) (a) is derived from *Arnold* (98 NY2d 63) where the court's power to call a witness was directly in issue. In deciding that issue, the Court initially reviewed the general nature of a trial court's discretion in eliciting testimony, finding that:

> "There is no absolute bar to a trial court asking a particular number of questions of a seated witness; or recalling a witness to the stand; or even allowing the People in narrow circumstances to re-open their case after a defense motion for a trial order of dismissal, when doing so advances the goals of truth and clarity. A court may not, however, assume the advocacy role traditionally reserved for counsel, and in order to avoid this, the court's discretion to intervene must be exercised sparingly" (*id.* at 67-68 [citations omitted]).

From that premise the Court then stated:

> "We do not hold that a court may never call its own witness over the objection of a party. In those unusual circumstances in which a court feels compelled to do so, it should explain why, and invite comment from the parties. In that way, the court can consider what it aims to gain against any claims of possible prejudice. Moreover, an appellate court will have a basis on which to review the trial court's exercise of discretion" (*id.* at 68).

Subdivision (1) (b) concerning the court's power to examine witnesses, whether called by itself or by a party, is derived from Court of Appeals precedent that recognizes the court's role is "neither that of automaton nor advocate" (*People v Yut Wai Tom*, 53 NY2d 44, 56 [1981]). Rather, the court must assure the effective presentation of proof for the jury's consideration, "assuming an active role in the resolution of the truth" (*People v De Jesus*, 42 NY2d 519, 523 [1977]). Thus, a court "may, for example, if a witness has a language difficulty, intervene to clarify unclear answers. [It] may also properly question witnesses to insure that a proper foundation is made for the admission of evidence" (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981]), and a court may examine witnesses when "necessary to elicit significant facts, to clarify or enlighten an issue or merely to facilitate the orderly and expeditious progress of the trial" (*People v Mendes*, 3 NY2d 120, 121 [1957]). Both *Yut Wai Tom* and *Mendes*, however, cautioned that such examination must be conducted sparingly, and that care must be taken in examination lest the court assume the advocate's function. "In last analysis, however, [the court] should be guided by the principle that [the court's] function is to protect the record, not to make it" (*People v Yut Wai Tom*, 53 NY2d 44, 58 [1981] [While "some of the (court's 1300) questions were clearly appropriate by way of clarification or because of language difficulties, there can be no question that in his substantial examination of the witnesses the Trial Judge departed from his appropriate role in a number of respects"]).

1.13. Court Reconsideration of an Evidence Ruling

(1) Absent undue prejudice to a party, a judge may revisit his or her own evidentiary rulings during trial.

(2) Except as provided in subdivisions three and four, in order to promote the efficient and orderly adjudication of cases in courts of coordinate jurisdiction, a judge should not ordinarily reconsider, disturb, or overrule an order of another judge of coordinate jurisdiction in the same proceeding.

(3) When it becomes necessary in the course of a trial to substitute a judge for the judge who was presiding over the trial, the substitute judge may revisit de novo an evidentiary ruling of the former presiding judge and issue a different ruling absent a showing of undue prejudice to a party. A mid-trial reversal in a criminal proceeding of an evidentiary ruling that impedes the defense strategy, for example, may result in undue prejudice to the defendant.

(4) On a retrial, a court may reconsider evidentiary rulings made in a prior trial.

Note

Subdivision (1) recites a rule set forth in *People v Cummings* (31 NY3d 204, 208 [2018]; *see People v Gonzalez*, 8 AD3d 210, 210-211 [1st Dept 2004] ["The court's midtrial offer of a more favorable *Sandoval* ruling did not cause any prejudice to defendant"]).

Subdivision (2) is an outgrowth of the "law of the case" doctrine, "a judicially crafted policy that expresses the practice of courts generally to refuse to reopen what has been decided, [and is] not a limit to their power. As such, law of the case is necessarily amorphous in that it directs a court's discretion but does not restrict its authority" (*People v Evans*, 94 NY2d 499, 503 [2000] [internal quotation marks and citation omitted]). Its purpose is "to eliminate the inefficiency and disorder that would follow if courts of coordinate jurisdiction were free to overrule one another in an ongoing case" (*id.* at 504). Thus, the Court "recognized as much in *Matter of Dondi v Jones* (40 NY2d 8, 15 [1976]), when it cautioned that 'a court should not ordinarily reconsider, disturb or overrule an

order in the same action of another court of co-ordinate jurisdiction' " (*Evans*, 94 NY2d at 504). There are, however, exceptions as set forth in subdivisions (3) and (4).

Subdivision (3) recites a rule also drawn from the holding in *Cummings*:

> "Where, as here, the evidentiary ruling [with respect to an 'excited utterance'] was reversed [by the substitute judge] before the jury was empaneled, absent a showing of prejudice resulting from, for example, a mid-trial reversal of an evidentiary ruling that impedes the defense strategy, we cannot say that an abuse of discretion occurred" (31 NY3d at 209).

Thus, *Cummings* treats a substitute judge's authority to revisit an evidentiary ruling as being the same as the judge who originally made the ruling. As stated by the Court:

> "The decision to admit hearsay as an excited utterance is an evidentiary decision, 'left to the sound judgment of the trial court,' and thus may be reconsidered on retrial. There is no reason to apply a different rule to a successor judge within the same trial and we, therefore, have no basis to adopt a per se rule prohibiting a substitute judge from exercising independent discretion concerning an evidentiary trial ruling" (*Cummings*, 31 NY3d at 208 [citations omitted]).

Subdivision (4) is drawn from various decisional law rulings (*see Cummings*, 31 NY3d at 208 ["On retrial, evidentiary rulings may be reconsidered"]; *Evans*, 94 NY2d at 500-501 [a *Sandoval* ruling may be revisited by the successor judge presiding over the retrial]; *People v Nieves*, 67 NY2d 125, 136-137 [1986] [noting an "excited utterance" decision at the first trial may be revisited at a retrial]; *People v Malizia*, 62 NY2d 755, 758 [1984] ["Evidentiary rulings made at one trial, however, are normally not binding in a subsequent trial"]).

Not all rulings on the admission of evidence at a trial are, however, necessarily evidentiary within the meaning of this rule. In addition to noting that on retrial "evidentiary rulings may be reconsidered," *Cummings* added that "orders determining the result of a suppression hearing generally cannot" (*Cummings*, 31 NY3d at 208; *see Nieves*, 67 NY2d at 137 n 5 ["In contrast (to evidentiary rulings), the findings made pursuant to a hearing on an article 710 motion are ordinarily binding at any retrials of the same case, and where an appellate court concludes that the record of the hearing reveals that evidence must be suppressed, the People are not entitled to a new hearing to try to sustain a theory which they could have, but failed to raise at the first trial"]). By statutory law, however, as *Nieves* noted, the defense may be permitted to reopen a

suppression hearing on a showing of newly discovered evidence (CPL 710.40 [4]).

In *Evans* (94 NY2d at 504 [citations omitted]), the Court of Appeals cited with approval Appellate Division decisions holding that the following types of rulings may not be reconsidered on retrial: "*People v Leon*, 264 AD2d 784 [1999] [barring reconsideration of request for a *Mapp* hearing]; *People v Rodriguez*, 244 AD2d 364 [1997] [barring reconsideration of motion to dismiss indictment]; *People v Guin*, 243 AD2d 649 [1997] [barring reinspection of Grand Jury minutes]; *People v Broome*, 151 AD2d 995 [1989] [barring *Wade* hearing redetermination])."