



**Evidence Update 2017
Suffolk Academy of Law
Tuesday, November 28, 2017**

Presenter:

**Larry Cunningham
Vice Dean, Professor of Legal Writing,
and Director of the Center for Trial and Appellate Advocacy**

Materials Prepared By:

**William Accordino, Jr., 3L & Research Assistant, St. John's Law
Madeline Collins, 3L & Research Assistant, St. John's Law
Larry Cunningham, St. John's Law**

Table of Contents

Speaker Biography	3
Agenda	5
“The Hurdles of Evidence”	6
Summaries of Statutory Amendments	7
Summaries of Selected Cases	10

Speaker Biography

Larry Cunningham

Vice Dean

Professor of Legal Writing

Director, Center for Trial and Appellate Advocacy

St. John's University School of Law



Dean Cunningham has served in a variety of roles in the Law School administration: Associate Academic Dean (2013-16), Associate Dean for Student Services (2011-13), and Assistant Dean for Students (2010-11). In his current role as Vice Dean, Dean Cunningham supervises most of the internal functions and offices of the Law School, including academic affairs, student services, and operations. Dean Cunningham is also responsible for assessment, strategic planning, accreditation compliance, personnel matters, budgetary issues involving full-time and adjunct faculty, relationships with outside agencies, service on University groups, and liaising with University offices. Dean Cunningham is a member of the University's Strategic Priorities Review Team.

Dean Cunningham teaches Evidence, Appellate Advocacy, Criminal Procedure: Adjudication, Legal Writing, Criminal Law, and New York Criminal Practice. In 2012 and 2017, he received the Dean's Teaching Award for Criminal Law and Evidence, respectively. He combines a mix of teaching styles to promote active learning and utilizes technology, such as Prezi, to further students' learning. In 2016, Dean Cunningham was awarded a grant from the U.S. Fulbright Specialist Program to teach at the Royal University of Law and Economics in Phnom Penh, Cambodia.

Dean Cunningham's scholarship includes research in criminal justice ethics, criminal procedure, appellate practice, juvenile justice, mental health law, and insurance law. He has been a frequent speaker on legal education and other topics before bar associations, law schools, and other organizations. In June 2008, he testified before the United States Senate Judiciary Committee, Subcommittee on the Constitution, on the legality of laptop searches at the international border.

After clerking for a United States district judge, Dean Cunningham served as an Assistant Commonwealth's Attorney in Alexandria, Virginia, where he was in charge of juvenile delinquency prosecutions. Later, he was an Assistant District Attorney in the Appeals Bureau of the Bronx District Attorney's Office, where he also coordinated the office's post-adjudication insanity review cases and served as an on-call homicide duty prosecutor.

Prior to joining the St. John's faculty, Dean Cunningham was a professor at Texas Tech University and held visiting appointments at Stetson University, Texas Wesleyan University, and Brooklyn Law School.

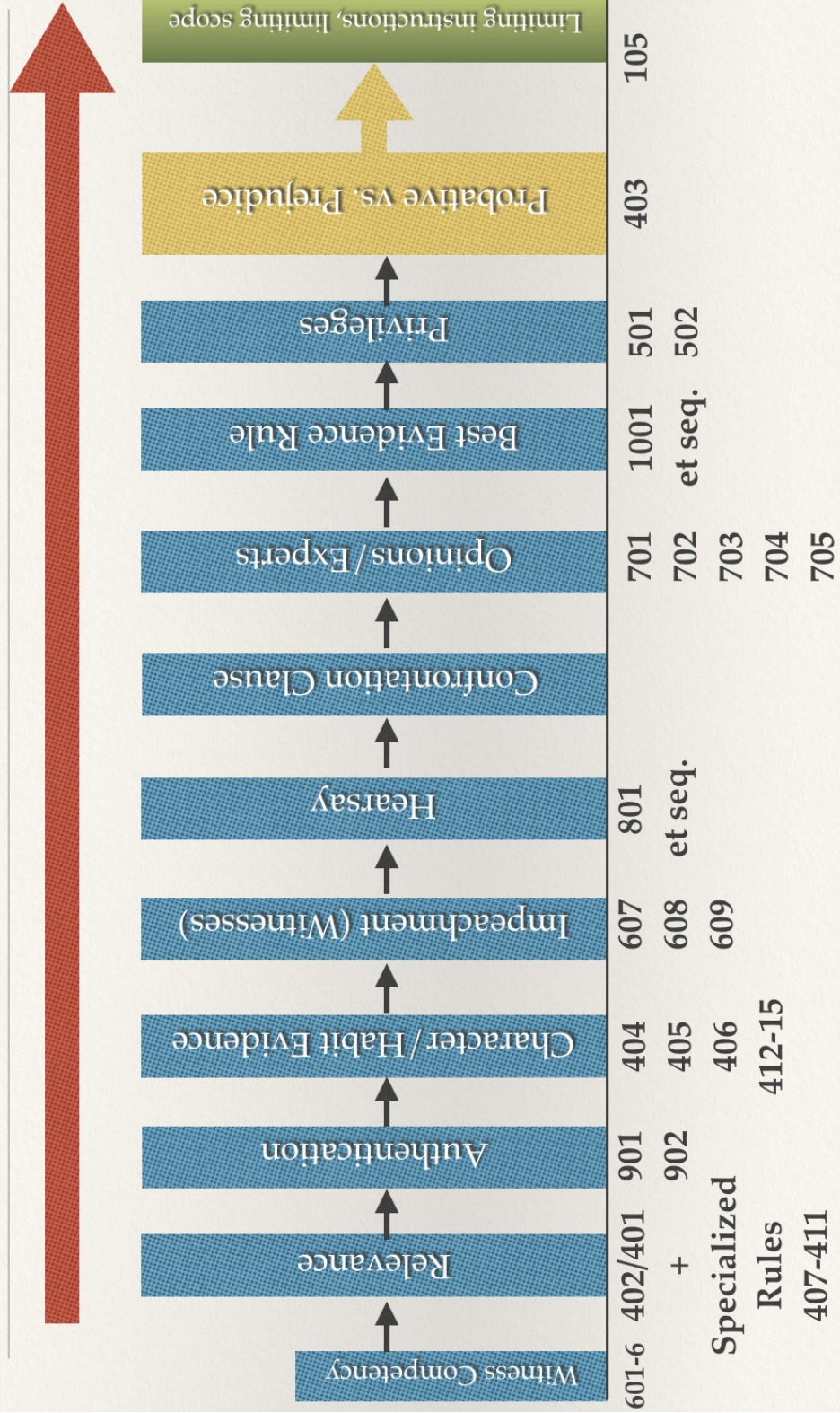
Dean Cunningham received his J.D. magna cum laude from Georgetown University Law Center, where he was an Executive Editor of the Georgetown Law Journal's Criminal Procedure Project, Executive Director of the Barristers' Council, and was elected to the Order of the Coif. He graduated summa cum laude and valedictorian of John Jay College of Criminal Justice. In 2012, he received a Master Certificate in Strategic Organizational Leadership from Villanova University. He is a Certified Six Sigma Green Belt and admitted to practice law in New York, Texas, and Virginia.

Agenda

- I. Introduction
- II. Review: Evidence policies
- III. Statutory Developments
- IV. Selected Cases
- V. Hypotheticals

The Evidence Hurdles

Don't forget
Judicial Notice
(201)



Statutory Amendments

Amendments to the Federal Rules of Evidence

(effective 12/1/17, assuming no Congressional action)

FRE 803(16)

Congress amended the ancient documents exception to the rule against hearsay under Federal Rule of Evidence 803(16). The rule originally permitted documents older than twenty years, which could be authenticated, to be admitted but the rule was amended to documents prepared before January 1, 1998. The Advisory Committee Notes indicate the committee was concerned with the ease with which electronically produced documents after that date could be fabricated. The committee reasoned an ESI version of the document would likely be available for documents created after that date.

FRE 902(13) & (14)

Congress added two subparagraphs to the rule permitting self-authentication of some evidence, both related to electronic data. Under subparagraph (13), a record generated by an electronic process or system that produces an accurate result can be self-authenticated through the certification of a qualified person. Under subparagraph (14), if authenticated through digital identification, data copied from an electronic storage device can be self-authenticated through the certification of a qualified person. Both subparagraphs indicate the certification must comply with the requirements from subparagraphs (11) and (12). The Advisory Committee Notes point out these additions are only related to authenticating the records and data and admissibility is still subject to other objections.

Amendment to NY CPLR

(effective 8/21/17)

§ 4518(c)

The state legislature amended the subsection of the business records exception which deals with the admissibility of hospital records, medical records, and books and papers from a library or other municipal department. The amendment relates specifically to hospital records located outside the state of New York. For records located outside of New York to be admissible, the head of the hospital, laboratory or department, an employee designated for that purpose, or another qualified person must certify or otherwise attest to the authenticity of the records.

Amendments to NY Criminal Procedure Law

CPL § 60.25, 60.30 (effective 7/1/17)

As part of a sweeping collection of reforms designed to reduce wrongful convictions, upon recommendation of the Justice Task Force, the state legislature amended these CPL provisions, which govern in-court and out-of-court identifications. Specifically, the legislation aimed to decrease the problems associated with eyewitness identifications by adopting so-called “best practices” in policing.

A witness who identified, from memory, the defendant as the perpetrator of the crime, has long been allowed to testify that, in addition, he or she identified that same person at an in-person identification. Now, the amendment to CPL § 60.30 also allows the witness to testify that he or she picked the defendant out of a photo array. The rationale of the new rule is that an identification close in time to the events has a degree of reliability. New York was the only state that had prohibited testimony about confirmatory photo arrays. That said, the amendment to the CPL requires that the photo array must have been conducted in a double-blind fashion, such that the officer conducting the procedure either does not know where the suspect is in the array or does not know which of the people in the array is the suspect. Failure to follow this process should result in preclusion as evidence in chief.

If a witness is unable to make an in-court identification, a photo array identification may now be used in its place. See CPL § 60.25.

CPL § 60.45 (effective 4/1/18)

The Justice Task Force also recommended the recording of defendants’ statements to police in an effort to reduce false confessions. Moving forward, a “custodial interrogation” by a “public servant” in a “detention facility” when the questioning “involves” a specified felony must be recorded. The entire interrogation, including advisement of rights and waiver, must be recorded. A “public servant” includes a police officer or prosecutor. The covered felonies are: an A-I felony (other than a “controlled substance” felony); the A-II felonies of “predatory sexual assault” and “predatory sexual assault against a child”; a class B violent felony offense defined in Penal Law article 125 (homicide); and a class B violent felony offense defined in Penal Law article 130 (sex offense). There are various exceptions to the rule where “good faith” excuses the lack of recording, e.g. malfunction of the equipment, lack of available equipment, the suspect is in a hospital, or the “statement is made during an interrogation that is conducted when the interviewer is unaware that a qualifying offense has occurred.” “Good cause” is also found the questions involved basic ones of pedigree or where the interrogation would jeopardize the safety of a person or reveal the identity of a confidential informant.

What are the consequences of failing to comply with the duty to record under the statute? The statute provides that a statement cannot be suppressed based “solely upon the failure to video record” the statement. Instead, the court shall consider the failure to record as

a factor, but not as the sole factor, in determining whether such confession, admission or other statement shall be admissible. If a confession is not recorded and good cause is lacking, but the court nevertheless admits the statement because it was voluntarily made, the court must give an instruction to the jury (upon request of the defendant) that the failure to record the defendant's statement may be weighed as a factor, but not as the sole factor, in determining whether such confession, admission or other statement was voluntarily made, or was made at all.

SELECTED CASES

Prior Bad Acts, Sufficiency of Evidence, & Hearsay

***United States v. Dupree*, 870 F.3d 62 (2d Cir. 2017)**

Three brothers, Brian, David, and Samuel, were convicted of conspiracy to commit murder of a rival dealer in furtherance of a drug trafficking conspiracy. Brian and David were also convicted of conspiring to traffic cocaine. On appeal, the brothers asserted the District Court incorrectly admitted evidence of their participation in a drug conspiracy in Maryland approximately twenty years ago, the evidence at trial was insufficient to support the convictions, and that the District Court incorrectly admitted hearsay evidence. The brothers were convicted of a drug conspiracy-related murder in Staten Island in 1994 and a drug conspiracy in Staten Island between 2011 and 2013. The government offered testimony related to a similar drug conspiracy the brothers were involved in in Maryland around the same time as the murder. The Second Circuit held the District Court correctly admitted the testimony for the purpose of showing knowledge and intent as it related to drug trafficking and was not offered to show the propensity of the brothers to engage in drug trafficking. The Second Circuit also noted the inclusionary approach of that circuit which allows evidence of prior bad acts for any purpose other than to show a propensity. Further, the Second Circuit held the alleged hearsay statements attributed to the rival dealer, and murder victim, as statements against penal interest because the victim referenced his own drug activity. The Second Circuit also held the District Court correctly admitted a statement made by one of the brothers regarding a desire to kill a witness to the murder as a statement against penal interest. The convictions were affirmed.

Uncharged Prior Bad Acts

***People v. Brewer*, 66 N.E. 3d 1057 (N.Y. 2016)**

A defendant was convicted of multiple counts of sexual abuse of two children. At trial, the prosecution sought to introduce evidence of defendant's sexual history with adults, his prior physical abuse of the children, his history with drugs, and that defendant was in possession of drugs when arrested. The defendant challenged the evidence as inadmissible under the *Molineux* standard which prohibits evidence of an uncharged crime or prior bad acts to show a defendant's propensity for committing a crime. The trial court admitted the evidence of the defendant's drug use and sexual history with adults because it corroborated the testimony of the victims and their mother that the defendant engaged in sexual activity, which included drug use, in the same manner with adults and the victims. The trial court further held the probative value of the evidence outweighed any potential prejudice to the defendant. The Court of Appeals affirmed the decision of the trial and appellate courts.

Uncharged Prior Bad Acts

***People v. Frumusa*, 79 N.E.3d 495 (N.Y. 2017)**

A defendant was convicted of grand larceny for embezzling money from a hotel he owned with another individual. At trial, the prosecution sought to introduce a contempt order from a civil proceeding brought by the defendant's business partner. The contempt order resulted from the defendant's failure to turn over money from the hotel that he had diverted to his other businesses. The trial court analyzed the contempt order under the *Molineux* rule, which

prohibits evidence of uncharged crimes or prior bad acts for propensity purposes, and admitted the evidence. The Court of Appeals found the contempt order was not *Molineux* evidence because there was no separate crime or bad act, only evidence of the same crime, so there was no danger the jury would draw an improper propensity inference. However, the Court of Appeals noted the decision did not need to be reversed because the parties' arguments would have been the same regarding the probative value and potential prejudicial effect of the contempt order. The Court of Appeals affirmed the decision of the trial and appellate courts because the probative value of the contempt order in showing defendant's larcenous intent outweighed any potential prejudicial effect.

Uncharged Prior Bad Acts & Expert Testimony

***People v. Anderson*, 149 A.D.3d 1407 (3d Dep't 2017)**

A defendant was convicted of multiple cocaine trafficking related offenses. On appeal, the defendant asserted the trial court erred in admitting evidence related to an uncharged sale of ecstasy and testimony from the prosecution's expert witness. The evidence of defendant's sale of ecstasy came from recordings made in investigating the defendant for the crimes he was charged with in which the defendant discussed the sale of ecstasy. The Appellate Division held the trial court correctly admitted the evidence because it was "inextricably interwoven" with the testimony involving defendant's sale of cocaine. The prosecution's expert in the case testified as to the meaning of coded language the defendant used in conducting his drug trafficking. The Appellate Division held the trial court correctly admitted the evidence because the expert was qualified to testify in the area and only testifying as to his opinions as the meaning of the coded language. The Appellate Division affirmed the convictions but modified the sentence.

Uncharged Prior Bad Acts & Prior Convictions

***People v. Anthony*, 152 A.D.3d 1048 (3d Dep't 2017)**

A defendant was convicted of multiple counts of murder and robbery. On appeal, the defendant asserted the trial court erred in admitting evidence of defendant's gang membership and a prior conviction related to false impersonation during an arrest. Just prior to the murder, the defendant tried to convince the victim to join his gang and the prosecution off. The Appellate Division held the trial court correctly admitted the evidence of defendant's gang membership under the *Molineux* rule because it was offered to provide context for testimony and show defendant's motive for the murder. The Appellate Division further held the trial court correctly admitted the evidence of defendant's prior conviction under the *Sandoval* standard because evidence of the conviction was limited to date and title of crime and conviction. This limitation on the evidence also served as a limitation on any unduly prejudicial effect admission of the conviction may have had. The Appellate Division affirmed the convictions.

Uncharged Prior Bad Acts

***People v. Leonard*, 29 N.Y.3d 1 (2017)**

In a prosecution for child sexual assault, the People introduced—over defense objection—evidence of a prior occurrence in which the defendant assaulted the same victim. The Court held that this was improper under *Molineux* because it went to show that he had a propensity

to commit the crime. The Court rejected the People's alternative theories of background (the previous incident was not necessary to fill in the gaps of the victim's testimony), intent (it could be inferred from the charged act), or motive (the argument is classic propensity reasoning in this case).

Propensity in *Federal Sexual Assault Cases*

***U.S. v. Schaffer*, 851 F.3d 166 (2d Cir. 2017)**

The defendant was charged in federal court with child sexual assault. At trial, the prosecution offered video evidence of prior occasions in which the defendant had committed this crime against other victims, pursuant to Rule 413. The Court of Appeals held that Rule 413 does not violate due process in part because Rule 403 requires the Court to balance the probative value with the prejudicial effect.

Evidence of Drug Use

***Ultegra, LLC v. Mystic Fire Dist.*, 676 F.App'x 33 (2d Cir. 2017)**

Owners of property damaged in a fire (allegedly started by an intoxicated firefighter) appealed a jury verdict in favor of the fire department and individuals associated with the department. On appeal, the property owners assert the District Court incorrectly excluded evidence of drug use by one of the department's firefighters. The Second Circuit held the District Court correctly excluded the evidence because the property owners' complaint did not contain any allegations of drug use. Even if the complaint had alleged drug use by one of the firefighters, the Second Circuit went on to say any probative value would be outweighed by the likelihood the evidence would confuse the jury.

Admissibility of Condition of Accused, Rape Shield, Prior Acts, & Prior Convictions

***People v. Serrano-Gonzalez*, 146 A.D.3d 1013 (3d Dep't 2017)**

A defendant was convicted of rape and sexual abuse. On appeal, the defendant asserted the trial court made a number of evidentiary errors. First, defendant asserted the trial court erred in allowing the victim to testify as to defendant's HIV status because the probative value of the testimony was outweighed by the testimony's unduly prejudicial effect on the defendant. The trial court found the testimony was highly probative because the defendant and victim had a prior consensual sexual relationship which ceased when the victim learned the defendant contracted HIV and the value outweighed any potential for undue prejudice. The Appellate Division held the trial court correctly admitted the testimony and noted the defendant did not preserve any objection related to his constitutional right to privacy. Second, the defendant asserted the trial court erred in preventing the defendant from offering evidence of statement the victim made to one of defendant's nurses. The Appellate Division held the trial court correctly excluded the evidence as inadmissible hearsay because it was not an excited utterance and the victim, though speaking to a nurse, was not seeking a diagnosis or treatment. Further, the evidence was not admissible to impeach the credibility of the victim because the conversation between the victim and the nurse occurred weeks before the rape so was not relevant to the victim's mental state at the time of the crime. Third, the defendant asserted the trial court erred in excluding evidence of DNA from a donor, not the defendant, collected from the victim's rape kit. The Appellate Division held the trial court correctly excluded this evidence

under the Rape Shield Law because defendant sought to use the evidence to question the victim as to her sexual history. Fourth, the defendant asserted the trial court incorrectly allowed the redaction of self-inflicted and defendant-inflicted cutting from the victim's medical records. The Appellate Division held the trial court correctly excluded the evidence because the reports were not probative as to the veracity of the victim's testimony. Finally, the defendant asserted the trial court erred in admitting evidence of multiple misdemeanor and felony charges. The Appellate Division held the trial court struck an appropriate balance under the *Sandoval* standard in permitting the prosecution to question the defendant about the convictions but prohibiting the prosecution from mentioning sentencing or the underlying facts of the crime unless the defendant denied the convictions. The Appellate Division affirmed the convictions.

Probative Value vs. Danger of Unfair Prejudice

***United States v. Monsalvatge*, 850 F.3d 483 (2d Cir. 2017)**

Three defendants were convicted of two armed robberies of a check-cashing stores. On appeal, the defendants assert the District Court incorrectly permitted the government to show clips from a movie to show the *modus operandi* of the defendants in committing the second robbery. At trial, the government showed four clips from a movie about a series of bank robberies called "The Town" to show the inspiration for the defendants' *modus operandi* for the second robbery and to explain the difference between the two robberies. The first robbery was clumsily executed, but the second (committed after the release of "The Town") was executed flawlessly and almost identically the method used in the movie. The combined length of the clips was just over one minute and the clips were of scenes similar to the second robbery. The Second Circuit held the District Court correctly held the clips were relevant, in part because the movie was released between the two robberies, and they did not pose a risk of unfair prejudice to the defendants. The Second Circuit noted the length of the clips was short and the District Court instructed the jury the clips were only being shown for the purpose of showing *modus operandi* and noted the differences between the clips and the robberies at issue. "In fact, nearly every distinctive aspect of the 2012 robbery can be traced to the film. The robbers' disguises, with minor differences, appear to combine the navy-blue police jacket with a hood and text detail on the front left side of the jacket in Clip 1 and the sunglasses and badge in Clip 4. The idea for special-effects masks imitating real skin is in Clip 3. The idea to use bleach to eliminate traces of DNA is in Clip 2 (and the effects of using bleach are explained in Clip 1). Threatening an employee by revealing knowledge of a home address is in Clip 4. That is every key facet of the 2012 robbery. Taken individually, each of these elements might not be sufficiently distinctive to raise a connection to the film. But taken together, as they occurred here, the attributes of the 2012 robbery are clearly connected to the film." The Second Circuit affirmed the convictions in part and reversed in part as to one defendant.

Probative vs. Prejudice

***People v. Davis*, 149 A.D.3d 451 (1st Dep't 2017)**

A defendant was convicted of murdering his grandmother. On appeal, the defendant asserts the trial court erred in admitting evidence related to pornography websites the defendant visited shortly after his grandmother's death. The trial court ruled the probative value of the

evidence, in refuting defendant's claim to have been grieving in the time after he killed his grandmother, outweighed any potential undue prejudice to defendant. The Appellate Division held the trial court correctly admitted the evidence and affirmed the conviction.

Probative vs. Prejudice

***People v. Newton*, 144 A.D.3d 1617 (4th Dep't 2016)**

A defendant was convicted of manslaughter. On appeal, the defendant asserted the trial court erred in admitting a recording from a jailhouse telephone. The Appellate Division held the trial court correctly admitted the evidence because the probative value of the conversation outweighed any potential undue prejudice to the defendant caused by the jury learning he was incarcerated. The Appellate Division affirmed the conviction.

Adverse Inference

***Woods v. START Treatment & Recovery Ctr., Inc.*, 864 F.3d 158 (2d Cir. 2017)**

An employee alleging retaliation under the Family and Medical Leave Act ("FMLA") appealed a jury verdict in favor of the employer. On appeal, the employee, among other arguments, asserted the District Court incorrectly instructed the jury that it could draw an adverse inference based on the employee's invocation of her Fifth Amendment privilege against self-incrimination during her deposition. The Second Circuit held the District Court erred in giving that instruction for three reasons. First, the employee suffered acute prejudice from any adverse inferences drawn regarding questions about whether she had been previously been accused of wrongdoing. Second, the employee also suffered acute prejudice from any adverse inference drawn regarding questions about whether she had previously been convicted of immoral or unethical conduct. Admission of a conviction is only permissible if the crime is a felony and the court decides an element of that crime related to dishonest acts or false statements. Third, the danger of unfair prejudice generally outweighed any probative value of the employee's invocation of her Fifth Amendment privilege. The Second Circuit vacated the judgment and remanded the case for further proceedings.

Mailing Presumption

***Olin Corp. v. Insurance Co. of North America*, 218 F.Supp.3d 212 (S.D.N.Y. 2016)**

A chemical company filed suit against its insurance company in litigation that has been ongoing for thirty-two years. After the court granted partial summary judgment in favor of the chemical company, the insurance company claimed certain documents showed the notice provided by the chemical company of federal suits filed against the chemical company. The court withdrew its prior ruling deeming the notice sufficient. The chemical company asserted it was entitled to a presumption of proper notice under New York law when regular office procedures are followed in the mailing of notice. The court noted the chemical company would have to provide evidence at trial to support the assertion that regular office procedures were followed because the notice was purportedly not received by the insurance company until six months after the chemical company claims it was sent.

Rule of Completeness, Curative Admissibility, & Prior Bad Acts

***United States v. Lumiere*, 249 F.Supp.3d 748 (S.D.N.Y. 2017)**

A former employee of a management fund was convicted of wire fraud, securities fraud, and conspiracy to commit those offenses at a jury trial. In moving for a new trial, the employee asserted, among other arguments, that the court violated the completeness doctrine when it admitted portions of a recording of the employee into the record. The court held the portions of the recording the employee sought to introduce were irrelevant. The employee argued in the alternative that the entire recording should have been introduced as evidence of the employee's good faith in acting. When admitting portions of a statement or recording, the court noted it is not required to include post-hoc explanations of the criminal behavior and held the admission of the recording was proper. In a further challenge to the same recording, the employee asserts the full recording should be admitted under the doctrine of curative admissibility. The court that held that even if the employee had attempted to admit the full recording at trial, the evidence the employee sought to cure was properly admitted so curative admissibility did not apply. The employee also asserted another recording in which the employee suggested extortion should have been excluded as propensity evidence. The court held the recording was properly admitted because the employee claimed he acted in good faith and the recording went to show an opposing inference could be drawn from his behavior. The court denied the employee's motion for a new trial.

Prior Convictions

***People v. Cooley*, 149 A.D.3d 1268 (3d Dep't 2017)**

A defendant was convicted of sale of a controlled substance. On appeal, the defendant asserted the trial court incorrectly admitted evidence of defendant's prior convictions for various crimes. The trial court, under the *Sandoval* standard, allowed the prosecution to question the defendant as to the convictions but limited the inquiry to the dates of the convictions and not the nature of the charges or the underlying facts. The Appellate Division held the trial court struck an appropriate balance between the probative value of the convictions and any undue prejudice that evidence may cause. The Appellate Division affirmed the conviction.

Evidentiary Foundation

***People v. Fort*, 146 A.D.3d 1017 (3d Dep't 2017)**

A defendant was convicted of attempted robbery. On appeal, the defendant asserted the trial court incorrectly admitted exhibits created from surveillance footage because the prosecution failed to lay the proper foundation for that evidence, among other objections. At trial, the prosecution provided testimony from a detective, an investigator, and two employees from the bar which took the surveillance footage. They testified as to the operation of the surveillance footage and how the exhibits, including a flash drive, video disc, and still photos, were made from that system. The Appellate Division held the trial court correctly admitted the evidence and affirmed the conviction.

Chain of Custody

***People v. Franqueira*, 143 A.D.3d 1164 (3d Dep't 2016)**

A defendant was convicted of criminal possession of a weapon and menacing. On appeal, the defendant asserted the prosecution did not establish the chain of custody of a handgun admitted into evidence. An officer located the handgun in a grassy area and radioed for an

evidence box and camera. The officer photographed the handgun and another officer collected it into evidence. The gun was turned over to the lab and logged in the evidence. The weapon was test fired by technicians who also followed the proper procedures for logging the evidence. The Appellate Division held the trial court correctly admitted the evidence and affirmed the conviction.

Chain of Custody

***People v. Pleasant*, 149 A.D.3d 1257 (3d Dep't 2017)**

A defendant was convicted of robbery and strangulation. On appeal, the defendant asserted the trial court erred in admitting the victim's iPhone which was returned to the victim between defendant's arrest and trial. The trial court admitted the iPhone despite the break in the chain of custody. The Appellate Division held the trial court correctly admitted the evidence and noted that a strict chain of custody is not required to admit evidence when the evidence possesses unique characteristics and is not subject to material alteration which would not be evidently apparent. "Here, the victim identified the iPhone in her testimony, stating that the phone appeared to be in the same or substantially the same condition, and confirming that it contained her information, contacts and music. Additionally, a police officer testified that he took photographs of the phone and its identifying numbers after it was taken from defendant and before it was returned to the victim, and that the photographs depicted the same phone that the victim identified in court. This was clearly sufficient to support the admission of the phone without proof of the chain of custody." Additionally, any doubt caused by the break in the chain of custody went to the weight of the evidence and not its admissibility. The Appellate Division affirmed the convictions.

Authentication

***People v. Price*, 29 N.Y.3d 472 (2017)**

A defendant was charged with robbery. At issue was whether the People properly authenticated an online photograph purporting to show the defendant holding a firearm and money. The victim was unable to identify the gun as the one that was used in the robbery. Moreover, no witness was able to testify that the photograph was a fair and accurate depiction of the scene or that it was unaltered. The Court declined to adopt the People's theory that the photograph was authenticated as the defendant's because it was on his profile page. First, there was no evidence that the page actually belonged to the defendant. Second, there was no evidence that he used the account to communicate with anyone. Third, there was no evidence linking the page to any electronic devices used by the defendant. Fourth, there was no evidence of any password protection. In short, it was insufficient that the page contained the defendant's name and picture to authenticate the rest of its contents as belonging to him.

Hearsay & Confrontation

Public Documents, Business Records, Authentication, & Residual Hearsay Exception

***United States v. Prevezon Holdings, Inc.*, 319 F.R.D. 459 (S.D.N.Y. 2017)**

The federal government brought an action against several companies alleged to have participated in a scheme that defrauded the Russian Treasury out of approximately \$230 million. The government sought to introduce evidence obtained from a Russian criminal case file and Russian arbitration proceedings related to the fraud. The Russian government refused to comply with requests for documents from the United States so the government obtained the files through Russian attorneys. The criminal case file contained banking records produced by the banks and seized by Russian authorities for the criminal trial. The attorney who obtained the criminal case file testified to their authenticity via a videotaped deposition. He had photographed the files and transferred them to a drive. The attorneys who provided the arbitration files were not able to testify. The court further held the arbitration files could be authenticated through comparison with the criminal case file and were also admissible for non-hearsay purposes. The government sought to offer certain banking records from the criminal case file for their truth under the residual exception to the hearsay rule. The court admitted that evidence under the residual exception. The records were accompanied by sufficient guarantees of trustworthiness and admitting the records would serve the purposes of the rules of evidence and the interests of justice. The court granted the United States' motion and admitted the records.

Hearsay

***United States v. Cummings*, 858 F.3d 763 (2d Cir. 2017)**

Cummings was convicted by a jury of drug distribution, two counts of murder, and various firearm charges related to the murder and drugs. On appeal, Cummings asserts the District Court incorrectly admitted testimony from a witness who claimed Cummings made threats against him while the two were incarcerated at the same institution. The witness testified that Cummings had "indirectly" threatened to shoot him in the face. The witness' testimony was unclear as to whether "indirectly" meant the witness heard the statements himself or whether a third party told the witness Cummings had threatened to shoot him. The Second Circuit found the testimony was hearsay within hearsay because the witness' testimony indicated he did not hear the threats directly from Cummings. The court noted that the threat from Cummings would be admissible as a hearsay exception as either consciousness of guilt or the party opponent exception if the witness heard the threat himself. The Second Circuit held the testimony was inadmissible because there was no hearsay exception for the statement from the third party to the witness informing the witness that Cummings had threatened him. The Second Circuit remanded the matter for a new trial after balancing the probative value of the witness' testimony against the likelihood it would unduly prejudice the jury to hold the admission of the testimony was not harmless error.

Hearsay & Confrontation Clause

***People v. Carrasquillo-Fuentes*, 142 A.D.3d 1335 (4th Dep't 2016)**

A defendant was convicted of murder, assault, possession of a weapon. On appeal, the defendant asserted the trial court incorrectly admitted the recording of a 911 call in which a witness indicated she observed the shooters leaving the scene of the crime in violation of the Confrontation Clause. The trial court admitted the recording as a nontestimonial excited utterance. The Appellate Division held the trial court correctly admitted the testimony and that the prosecution did not need to establish the witness' unavailability at trial to admit the excited utterance. Further, the Appellate Division held the 911 operator was asking the witness questions in order to respond to an ongoing emergency. The Appellate Division affirmed the convictions.

Confrontation Clause

***People v. Giurdanella*, 144 A.D.3d 479 (1st Dep't 2016)**

A defendant was convicted of assault. On appeal, the defendant asserted the trial court violated the Confrontation Clause by allowing the victim to testify by video-conferencing. The victim was a dual citizen of the United States and Egypt. After the assault and before trial, the victim returned to Egypt for physical rehabilitation but was prevented from getting on his return flight by Egyptian immigration officials. The trial court rejected the defendant's assertion that a full evidentiary hearing was required before the court could decide whether to allow the testimony via video conferencing. The Appellate Division found the prosecution offered clear and convincing proof of the necessity for the video conferencing and held the testimony by video conferencing did not violate the Confrontation Clause. The Appellate Division affirmed the conviction.

Recorded Recollection & Confrontation Clause

***People v. Tapia*, 151 A.D.3d 437 (1st Dep't 2017)**

A defendant was convicted of attempted assault. On appeal, the defendant asserted the trial court erred in admitting the record of an officer's grand jury testimony. The trial court admitted the evidence as a past recollection recorded because the officer testified he did not recall the events in question, the record did not refresh his recollection, that the record represented his recollection when made, and that he testified truthfully to the grand jury. The Appellate Division held the trial court correctly admitted the record and further noted there was not a Confrontation Clause issue because the officer testified and was cross examined at trial.

Adoptive Admissions

***People v. Vining*, 28 N.Y.3d 686 (2017)**

A defendant was charged with various crimes related to assaulting his ex-girlfriend. At issue for the Court of Appeals was the admissibility of a jailhouse phone call between the defendant and his ex-girlfriend. The People offered it the call as an adoptive admission by silence. During the call, the victim repeatedly accused the defendant of breaking her ribs, which he never denied. Instead, he gave evasive answers. An adoptive admission occurs "when a party acknowledges and assents to something 'already uttered by another person, which thus becomes effectively the party's own admission'." (quoting *People v. Campney*, 94 N.Y.2d 307 (1999)). Assent can be manifested by the party's silence, when a reasonable person would have protested. Likewise,

an evasive answer can also indicate assent. The Court held that the trial court did not err as a matter of law in admitting the recording and allowing the jury to give it due weight.

Experts

Expert Testimony

***United States v. Prevezon*, 251 F.Supp.3d 684 (S.D.N.Y. 2017)**

The United States brought a civil forfeiture action against companies who defrauded the Russian Treasury for approximately \$230 million. The companies moved for summary judgment and the United States filed a motion *in limine* to exclude testimony from the companies' tracing expert. The court held the expert must limit his testimony to specific transactions at issue in the forfeiture action and evidence offered in the proceeding. The court denied the companies' motion for summary judgment and granted the United States' motion to limit the expert testimony.

Expert Testimony

***Dover v. British Airways, PLC*, No. 12-cv-5567, 2017 WL 2480898 (E.D.N.Y. June 5, 2017)**

Members of an airline's frequent flyer program filed a class action suit related to fuel charges added to the price of rewards flights. The court rejected the majority of the parties' challenges to each other's experts but held an evidentiary hearing was required to determine the admissibility of one of the airline's experts. The court held the members' first expert testifying to the lack of a connection between the airlines' fuel expenses and fuel charges was qualified because of his twenty-five years working in the airline industry and offered relevant testimony based on a reliable foundation. The members' econometrics expert offered reports noting the lack of a close relationship between the airlines fuel costs and fuel charges. The court rejected each of the airline's challenges to the testimony because the testimony was relevant to the issue and based on reliable methods, despite the expert not using a regression analysis to reach his conclusion. The court also rejected the members' challenge to two of the airline's experts on similar grounds. However, the regression analyses performed by the airline's third expert required further attention. The parties contested the reliability of the regression analyses and the court held an evidentiary hearing was required to look into the matter more closely to ensure spurious and statistically meaningless testimony is not offered.

Expert Testimony

***Hughes v. The Ester C Co.*, 317 F.R.D. 333 (E.D.N.Y. 2016)**

Purchasers of a vitamin C supplement filed a class action against the companies selling the supplement alleging deceptive business practices. The purchasers moved to certify a nationwide class and the companies sought to strike the testimony of the purchasers' damages expert. The court noted that the Supreme Court and Second Circuit have yet to rule on whether the *Daubert* analysis should be applied to expert testimony at the class certification stage. The court held the *Daubert* analysis does apply at the class certification stage but the inquiry is limited to whether the expert testimony is admissible to establish the requirements of Federal Rule of Evidence 23. The companies assert the purchasers' expert was not qualified because he did not hold a graduate degree nor was he ever employed in the areas in which he claimed expertise. The court held the expert was qualified based on classes he took while earning his M.B.A. and the fact that other courts had found him qualified in the past. The companies also challenged the expert's methodology, claiming it could not calculate class-wide damages. The

court declined to address the methodology at the class certification stage and accepted the testimony for the limited purpose of determining whether the class action met the predominance requirement.

Expert Testimony

***Hewitt v. Metro-North Commuter RR*, 244 F.Supp.3d 379 (S.D.N.Y. 2017)**

A railroad employee filed a claim against a railroad under the Federal Employers' Liability Act ("FELA") alleging his injuries were caused by the railroad's negligence in its failure to provide adequate tools, supervision, and manpower. The railroad moved for partial summary judgment and to exclude testimony from an ergonomics expert and the employee's treating orthopedic surgeon which was based on the testimony of the ergonomics expert. The ergonomics expert testified to the employee's exposure to ergonomic risk factors while cleaning the interior of train cars. The railroad asserted the testimony should be excluded because the expert did not observe any of the railroad's employees, relied upon statements from the employee, relied on videotapes of employees from other railroads, and did not include any quantitative analysis. The court noted the Second Circuit had yet to rule admissibility of ergonomics expert testimony and that other District Courts within the circuit were inconsistent on the issue. The court found the employee's expert was qualified, the study was based on reliable data, and was performed using reliable methods. Further, the court held the ergonomics expert could testify as to the railroad's lack of an ergonomics mitigation program but was precluded from testifying as to any legal conclusions. The court noted the expert testimony would still be subject to Federal Rule of Evidence 403 after the dispositive motions had been resolved.

Expert Testimony

***LVL XIII Brands, Inc. v. Louis Vuitton Malletier S.A.*, 209 F.Supp.3d 612 (S.D.N.Y. 2016)**

A start-up company ("Level 13") filed suit against Louis Vuitton ("LV") alleging a trademark violation over the right to affix a metal toe plate to luxury sneakers, and LV filed counterclaims. The parties each moved for summary judgment as to their claims, including LV's motion to exclude the testimony of Level 13's expert. Level 13 attempted to offer the expert testimony to show the toe plate had acquired a secondary meaning, that consumers associated the toe plate with Level 13 as a brand rather than an identifying feature of the sneaker itself. The court excluded the testimony because the expert did not conduct a marketing analysis or secondary meaning survey, did not have sufficient experience in a relevant area to qualify as an expert, and the testimony offered was not a fit to the relevant issues at trial. The expert, though he may have been qualified to testify in other areas, lacked any specific training or experience as to the issue of secondary meaning. The court granted and denied the parties' motions for summary judgment to the extent that all claims were dismissed.

Expert Testimony

***Brutton v. United States*, 687 F.App'x 56 (2d Cir. 2017)**

The passenger of a taxi that was injured in a collision with a postal truck appealed the dismissal of a suit filed under the Federal Tort Claims Acts. On appeal, the passenger asserted the District Court incorrectly limited the testimony of her treating physician. The District Court allowed the treating physician to testify as to what he learned while treating the passenger but the

physician could not testify as to whether an earlier event could have caused the injuries, since the requisite expert report was not made or given under Rule 26. Approximately a month before the car accident, a piece of ceiling fell on the passenger and she went to the emergency room complaining of injuries similar to those allegedly caused by the taxi accident. Under New York law, a plaintiff must provide expert testimony to rule out any alternative causes of the injury complained of which the passenger failed to do. The Second Circuit held the District Court correctly exercised its discretion in limiting the treating physician from testifying as to whether the prior accident could have caused the injuries and affirmed the judgment.

Expert Testimony

***Callahan v. Wilson*, 863 F.3d 144 (2d Cir. 2017)**

The parents of the victim of a police shooting appealed a jury verdict in favor of the officer on an excessive force claim. On appeal, the parents assert the jury instruction on the excessive force claim was improper and that the District Court improperly excluded expert testimony and evidence of prior instances in which the officer fired his weapon. As to the jury instruction, the Second Circuit held the difference between the jury instruction given and the accepted standard constituted reversible error and remanded for a new trial. The Second Circuit also provided guidance for the District Court on remand for two evidentiary issues. First, the District Court properly excluded expert testimony as to the police room clearing training the officer received because it was not relevant to the excessive force claim. Second, the District Court properly excluded evidence of prior instances in which the officer fired his weapon because even if the evidence was properly offered for non-propensity purposes, the prejudicial effect outweighed any relevance.

Expert Testimony; Exculpatory Evidence; Planting Evidence; Admission of Prior Statements *Restivo v. Hesseman*, 846 F.3d 547 (2d Cir. 2017)

The executor of the estate of a police detective (“Appellant”) appealed a jury verdict from a second trial in favor of two men wrongfully convicted of a rape and murder (“Respondents”) on a malicious prosecution claim based on the suppression of exculpatory evidence and the planting of inculpatory evidence. At the first trial, Respondents offered expert testimony related to minimally accepted police practices concerning when exculpatory evidence should be turned over to the prosecutor and the feasibility of Respondents’ claim that the police planted inculpatory evidence. As to the exculpatory evidence, Respondents’ expert testified the evidence does not need to definitively prove innocence to be considered exculpatory and under the factors in this case, the evidence should have been given to the prosecutor under minimally accepted police practices at the time. As to the feasibility of planting evidence, the expert testimony focused on post-mortem root banding (“PMRB”) in hairs found in Respondents’ van. PMRB is a type of decomposition that occurs in hairs attached to cadavers. The District Court allowed the experts to testify that PMRB typically took days to develop but could not testify using the words “scientific certainty” because there was some doubt as to how early PMRB can form. The experts could testify based on “technical or other scientific knowledge.” Appellant sought to offer expert testimony from a statistician claiming PMRB could not be distinguished from other ante-mortem root banding and that the research on the timing of PMRB was insufficient to support the testimony of the Respondents’ experts. The District Court excluded

the testimony because the formation of PMRB was not an appropriate topic for expert testimony from a statistician. Respondents' expert on minimally accepted police practices also testified that an affidavit the police detective had sworn to linking Respondents' to the crime also supported the feasibility of Respondents' claim the police detective planted the inculpatory evidence.

On appeal, Appellant challenges four evidentiary rulings by the District Court from the second trial. First, Appellant asserted various statements by Respondents' and their alleged co-conspirator's confession should have been admitted. The Second Circuit held the District Court correctly excluded the confession of the alleged co-conspirator because it was not relevant to the malicious prosecution claim. The District Court also correctly excluded the statement from one of the Respondents' because it contained a second-level of hearsay, in the form of a statement attributed to the other Respondent, for which there was no exception. Second, Appellant asserted the expert testimony from Respondents' PMRB experts should have been excluded because those experts could not testify with "scientific certainty." The Second Circuit held the District Court, after applying the remaining *Daubert* factors, correctly permitted the experts to testify. Third, Appellant asserted the expert testimony from its statistician should have been admitted. The Second Circuit held the District Court correctly excluded the testimony because whether PMRB could be distinguished from ante-mortem root banding was not an appropriate topic for a statistician and the statistician's criticisms of existing PMRB studies were not relevant. Fourth, Appellant asserted Respondents' police practices expert should have been excluded because he misinformed the jury as to the standard for turning over exculpatory evidence and other police practices used to convict Respondents. The Second Circuit held the expert correctly testified as to minimally accepted police practices rather than the materiality of the exculpatory evidence itself and was relevant to the issue. The Second Circuit affirmed the jury's verdict from the second trial.

Expert Testimony

***Vale v. United States*, 673 F.App'x 114 (2d Cir. 2016)**

A prisoner alleging medical malpractice on the part of the Federal Bureau of Prisons ("FBP") appealed the District Court's grant of summary judgment in favor of the FBP. On appeal, the prisoner asserted the District Court incorrectly excluded testimony from the prisoner's expert. The prisoner filed a claim under the Federal Tort Claims Act ("FTCA") alleging the prison negligently failed to diagnose his illness. Pursuant to New York Law, applicable to the FTCA claim because the alleged tort occurred in the New York, the prisoner needed to offer expert testimony to establish a breach of the standard of care in the community and that the breach caused the prisoner's injuries. The Second Circuit held the District Court correctly excluded testimony from the prisoner's expert because the expert was not qualified to give expert testimony and that testimony did not meet the standards for reliability. The expert was trained in anesthesiology, was not familiar with the appropriate treatment for the prisoner's conditions, did not possess a valid license to practice medicine, and had not practiced medicine in 16 years. More, his opinions were conclusory and speculative. The Second Circuit affirmed the grant of summary judgment in favor of the FBP.

Expert Testimony

***Forte v. Liquidnet Holdings, Inc.*, 675 F.App'x 21 (2d Cir. 2017)**

An employee asserting gender discrimination appealed the District Court's grant of summary judgment in favor of the employer. On appeal, the employee asserts the District Court incorrectly excluded expert testimony offered by the employee's expert on the issue of pay discrepancy between the genders. In producing the report at issue, the employee's expert used only pay figures provided by the employee, failed to control for any variables other than pay, and only analyzed the pay of employees at a lower level of seniority than the employee. For expert testimony to be admissible, it must be based on reliable principles and methods and must be relevant to the issue being litigated. The District Court excluded the report because the expert failed to verify the data provided by the employee and should have included other variables when determining the cause of the pay discrepancy between the individuals involved in the analysis. Further, the Second Circuit held the testimony was of little relevance to the employee's claims because all parties involved in the study were of a lower level of seniority than the employee. The Second Circuit affirmed the ruling of the District Court.

Admissibility of Evidence & Expert Testimony

***Goldemberg v. Johnson & Johnson Consumer Co., Inc.*, 317 F.R.D. 374 (S.D.N.Y. 2016)**

Consumers of personal care products filed a class action suit against the manufacturer alleging violations of multiple state consumer protections laws. The manufacturer filed a motion to preclude a preliminary expert report related to linking damages to the alleged misconduct by the manufacturer, and the consumers moved for class certification. At the class certification stage, the plaintiffs are required to show their damages were caused by the defendant's alleged misconduct and those damages must be consistent with the class-wide theory of liability. The consumers' expert offered testimony regarding the inherent harm in paying a premium for a product, due to the manufacturer's claim of all natural ingredients in this case. The court found the expert's methodology was sufficiently reliable and certified multiple subclasses divided by state.

Expert Testimony

***In re Vivendi, S.A. Sec. Litig.*, 838 F.3d 223 (2d Cir. 2016)**

A French global media company appealed a jury verdict in favor of the company's shareholders on securities fraud claims. On appeal, the media company asserted, among other arguments, that the District Court erred when it admitted expert testimony related to loss causation and damages offered by the shareholders. The shareholders' expert conducted an event study to distinguish the effect on the stock price of information specific to the company's stock from information that would affect stock prices more broadly. Within the information specific to the company, the expert then identified moves in the stock price attributed to statements related to the company's liquidity risk. Though there was not a correlation between statements by the company on its liquidity and significant moves in the stock price, the expert testified those statements kept the company's stock price at an artificially inflated level. The Second Circuit went on to note that price impact can result from information that maintains an artificially inflated stock price and does not necessarily need to be shown by significant jumps in the company's stock price. The Second Circuit held the District Court correctly admitted the testimony.

Expert Testimony

***People v. Flores*, 153 A.D.3d 182 (2d Dep’t 2017)**

The defendants were convicted of various counts of gang assault and assault and two of the defendants were also convicted of weapons charges. On appeal, the defendants asserted the trial court incorrectly admitted expert witness testimony regarding gang culture, among other objections. The Appellate Division noted the defendants’ objections were only partially reserved for review because at trial they objected to the relevancy of the testimony and not to the qualifications of the expert. The Appellate Division held the trial court correctly admitted the evidence because the expert was qualified and the testimony was relevant to show the defendants’ motives, the culpability of each of the defendants, and the defendants’ relationship to the victim. However, the Appellate Division reversed the convictions because the trial court empaneled an anonymous jury.

Expert Testimony & Victim Testimony

***People v. Williams*, 146 A.D.3d 410 (1st Dep’t 2017)**

A defendant was convicted of assault. On appeal, the defendant asserted the trial court erred in admitting expert testimony regarding “street lingo and terminology” and testimony from the victim regarding an anonymous threatening phone call he received. The trial court permitted an expert to testify as to the meaning of words and phrases used by the defendant on a phone call during his pretrial incarceration. The Appellate Division held the trial court correctly admitted the testimony because the expert testified as to the meaning of the slang generally and did not testify as to the meaning of the phone call in the context of the case. The Appellate Division also held the trial court correctly admitted testimony by the victim regarding an anonymous threatening phone call the victim received approximately ten hours after the assault because it was introduced to support the prosecution’s narrative and not to show consciousness of guilt. The Appellate Division affirmed the convictions.

Expert Testimony

***U.S. v. Natal*, 849 F.3d 530 (2d Cir. 2017)**

In a case of first impression for the Second Circuit, the court held that testimony on how cell phone towers operate must be offered by an expert witness.” In this arson case, the court held that a records custodian for the phone company could not qualify as such an expert. The error was harmless, however.

Judicial Notice

Judicial Notice

***Stephens v. Trump Org. LLC*, 205 F.Supp.3d 305 (E.D.N.Y. 2016)**

A cybersquatter filed a defamation and tortious interference with business claims against Trump Organization and individual defendants, including President Trump (collectively, “Trump”). The cybersquatter registered the domain name “trumpestates.com” presumably with the intention of selling the domain name to Trump. Trump filed a complaint with an agency associated with the United Nations to obtain an administrative decision, not binding on courts, to get the cybersquatter to transfer the domain name. The UN agency found in favor of Trump and ordered the domain name be transferred. The cybersquatter then initiated this action. In deciding Trump’s motion to dismiss, the court took judicial notice of the content of trumpestates.com which included an offer to sell the domain name for \$4,000 and links to articles detailing the instant litigation. The court noted that the content of the website, created by the cybersquatter, was essentially the same as the content of Trump’s allegedly defamatory statements related to the cybersquatter’s use of the domain name. The court granted the motion to dismiss and denied the cybersquatter’s motion for leave to amend the complaint.

Judicial Notice, Exculpatory Evidence, & Fabrication of Evidence

***Ying Li v. City of New York*, 246 F.Supp.3d 578 (E.D.N.Y. 2017)**

A woman, indicted on charges for the death of her child which were eventually dropped, filed suit against the City of New York and various other defendants (the “City”) alleging federal and state violations of her rights. The woman was imprisoned at Rikers Island for four years awaiting trial before her bail was lowered and she was released a few months before the charges were dropped. The City filed motions to dismiss, asserting the woman failed to state a claim which the court granted and denied in part. In deciding the motion to dismiss, the court found the criminal complaint against the woman was incorporated by reference in the Amended Complaint and took judicial notice of various other exhibits related to the woman’s indictment. The court declined to take judicial notice of grand jury minutes from the indictment of the woman’s husband who was also charged in the child’s death because the City sought to rely on the truth of those documents.

Judicial Notice

***Fernandez v. UBS AG*, 222 F.Supp.3d 358 (S.D.N.Y. 2016)**

Clients of Puerto Rican investment companies heavily invested in debt issues from the Puerto Rican government filed a class action suit against those investment companies and the banks that operated the investment funds alleging breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and breach of contract under state law. The companies and banks filed a motion to dismiss regarding, among other issues, the state law tort claims resulting from the alleged breaches. The court took judicial notice of SEC proceedings against the investment companies, two lawsuits filed against the investment companies, and articles from mainstream news sources, though the court seemed hesitant to consider this information to decide a statute of limitations issue at the motion to dismiss stage. The court held that information triggered inquiry notice on the part of clients and the statute of limitations began running.

However, the court noted there was not sufficient information linking the banks involved in the funds to any fraud. The court dismissed the tort claims against banks but denied the motion to dismiss as it related to the investment companies.

Judicial Notice, Expert Testimony, & Ancient Documents

***MMA Consultants 1, Inc. v. Peru*, 245 F.Supp.3d 486 (S.D.N.Y. 2017)**

An Illinois company filed suit against the Peruvian government attempting to collect on bonds the Peruvian government issued in 1875 to a consignment company it had authorized to sell guano in the United States. In 1907, the Peruvian Congress required the government to pay the full debt to the consignment company once the bond certificates were returned to the government. In 1937, Peru passed a law that stated government debt would expire within fifteen years if the bondholders did not collect interest or assert ownership in some other way. The record does not indicate how an Illinois company came to possess these bonds nor why it initiated attempts to collect on them in 2015. The Peruvian government filed a motion to dismiss asserting the court did not have subject matter jurisdiction and even if it did, the Illinois company's claims failed on the merits. The court noted that when deciding a motion to dismiss brought under Federal Rule of Evidence 12 it can consider evidence not offered in the pleadings under certain circumstances. The court took judicial notice of an arbitration award from 1901 in favor of the consignment company related to the debt owed it by the Peruvian government and considered it in deciding the motion to dismiss. Neither party contested the authenticity of the award and the Illinois company was on notice of the award and the award was integral to the Complaint. The Illinois company further objected to the court's consideration of an expert declaration attached to Peru's motion to dismiss which included testimony from an expert and newspaper articles and other trade publications. The court declined to consider the testimony because the individual did not qualify as an expert and the testimony was not appropriate for lay person testimony. However, the court did take judicial notice of some of the articles and other materials relied on by alleged expert despite those documents qualifying as hearsay. The court held they were admissible under the ancient documents exception because they were more than twenty years old and were self-authenticating. The court granted Peru's motion to dismiss for lack of subject matter jurisdiction pursuant to the Foreign Sovereign Immunities Act.

Judicial Notice

***United States v. Michael*, 664 F'Appx 32 (2d Cir. 2016)**

A defendant was convicted by a jury of two firearms-related offenses. On appeal, the defendant asserted the evidence offered against him at trial was insufficient to support a guilty verdict. At trial, the government offered phone records to evidence which were kept in Coordinated Universal Time ("UTC") which is five hours behind Eastern Standard Time ("EST"). During deliberations, the jury asked to have UTC defined and, over the objections of both parties, the District Court informed the jury of the difference between UTC and EST. The Second Circuit held the District Court did not abuse its discretion in taking judicial notice of the definition of EST and informing the jury. The Second Circuit affirmed the jury verdict.

Court Considering Foreign Law & Judicial Notice

***In re Vitamin C Antitrust Litig.*, 837 F.3d 175 (2d Cir. 2016)**

Chinese manufacturers of vitamin C appealed a jury verdict in favor of direct and indirect purchasers in an antitrust action. On appeal, the manufacturers asserted the District Court erred in finding the Chinese government's interpretation of its own laws was not conclusive and that the court should take judicial notice of diplomatic communications from the Chinese government expressing displeasure with the suit. As to the level of deference courts should show to a foreign government's interpretation of its own laws, the District Court found a statement from the Chinese government was not conclusive as to the court's interpretation of Chinese law. The Second Circuit held the statement from the Chinese government was conclusive and the District Court incorrectly interpreted the Federal Rules of Civil Procedure and precedent from the circuit. As to the judicial notice, the Second Circuit held the District Court should take judicial notice of the diplomatic communications from the Chinese government for the sake of comity, particularly given China's strong economic protectionist interests.

Privilege

Privileged Communications

***United States v. Wey*, 252 F.Supp.3d 237 (S.D.N.Y. 2017)**

A defendant was charged with eight counts related to securities fraud but those charges have since been dropped. Prior to the charges being dropped, the defendant filed an application to subpoena certain documents of nonparty Nasdaq. Nasdaq moved to quash the subpoena asserting, in part, its documents were protected by the deliberative process, law enforcement, and investigative privileges. The deliberative process privilege is a qualified privilege that protects documents created to assist an agency in decision-making and is related to the process by which decisions are made. The law enforcement privilege is a qualified privilege that protects the disclosure of law enforcement techniques and procedures and to protect law enforcement and its interests. The investigative privilege is a qualified privilege that some courts have held apply to non-governmental self-regulatory organizations. The District Court found Nasdaq's attempts to assert each of the privileges as both procedurally improper and substantively lacking. The District Court denied Nasdaq's motion to quash the subpoena.

Compromise Offers, Settlement, Etc.

Admissibility of Compromise Offer to Wrongfully Terminated Employee

***Coutard v. Municipal Credit Union*, 848 F.3d 102 (2d Cir. 2017)**

An employee alleging his termination violated the Family and Medical Leave Act (“FMLA”) appealed the District Court’s grant of summary judgment in favor of the employer. On appeal, the employee asserted the District Court incorrectly admitted evidence of a compromise offer made by the employer after the employee was terminated. The employers asserted the employee’s failure to accept reinstatement in exchange for settling the claim represented a failure to mitigate damages on the part of the employee. The Second Circuit held the District Court erred in admitting the evidence as compromise offers are not admissible to disprove the truth of a claim or the amount of damages. The Second Circuit vacated the District Court’s grant of summary judgment in favor of the employer and remanded for further proceedings.

Offers of Compromise or Settlement

***Sheng v. M&TBANK Corp.*, 848 F.3d 78 (2d Cir. 2017)**

An employee denied the ability to work remotely while pregnant appealed the admission of a compromise offer from the employer conditioned on dropping the FMLA claim at issue. On appeal, the employee asserted the District Court incorrectly admitted the company’s offer to reinstate the employee and allow her to work remotely in exchange for dropping the FMLA claim. The employee was pregnant and working remotely from Los Angeles when the company reorganized the department where she was working and required her to relocate to Buffalo. After the employee refused to relocate, she was terminated and filed suit. The compromise offer did not explicitly state reinstatement was in direct exchange for the employee dropping the claim but in order for a compromise or settlement offer to be admissible, the offering party must convincingly rebut a presumption the offer was conditional. The Second Circuit held the District Court incorrectly admitted the offer at trial and also stated the District Court was mistaken in questioning the precedent underlying the presumption an offer of compromise or settlement is conditional. The Second Circuit partially vacated the judgment from the District Court and remanded for further proceedings.

Settlement Agreements & Expert Testimony

***MF Global Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F.Supp.3d 558 (S.D.N.Y. 2017)**

The administrator of a defunct company’s Chapter 11 administration plan filed suit against that company’s outside auditors. In preparation for trial the parties combined filed more than twenty motions *in limine* on a variety of issues. The administrator sought to have various pieces of evidence excluded and the auditors sought to have testimony of four experts and various other pieces of evidence excluded. The court granted in part the administrator’s motion to exclude evidence of a settlement agreement reached in a separate civil action and noted such evidence is generally excluded due to its low probative value and high probability to cause unfair prejudice. However, the auditors were permitted to use the settlement agreements as evidence of the bias of certain witnesses. As to the expert testimony, the court granted and denied in part the auditor’s motions. The court held two of the experts could not testify to Public Company Accounting Oversight Board (“PCAOB”) standards because their area of

expertise was limited to financial markets and credit ratings. Accordingly, those experts could testify as to what credit rating agencies and regulators would do in hypothetical scenarios but could not speculate as to the state of mind of market participants. A third expert would be allowed to testify but could not comment on what auditing standards require because she had no expertise in that area. The court denied the auditor's motion as to the administrator's fourth expert who offered testimony as to the calculation of damages. The court noted that any flaws in the damages methodology went to the weight rather than the admissibility of the evidence.

Settlement Negotiations

***Cerni v. J.P. Morgan Sec. LLC*, 208 F.Supp.3d 533 (S.D.N.Y. 2016)**

An employee filed suit against his employer alleging he was retaliated against in violation of the Age Discrimination in Employment Act ("ADEA"). The employer filed a motion to dismiss asserting, in part, that the only evidence of the retaliation claim was a document incorporated in the complaint which was inadmissible as a settlement offer. The court held the admissibility of the document was irrelevant at the motion to dismiss stage. Further, the court noted the Federal Rules of Evidence did not preclude admission of evidence of settlement negotiations which show liability for making or carrying out threats. The court denied the employer's motion to dismiss as it related to the retaliation claim.