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Hearsay, The New York and Federal Rules of Evidence: What's the Difference?

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HEARSAY, THE NEW YORK AND FEDERAL RULES OF EVIDENCE: WHAT'S THE DIFFERENCE?

Hon George C. Pratt:

We move on. Next, we have Professor Farrell. The topic, I guess, is overall hearsay. Is that a fair characterization, Professor Farrell?

*Professor Richard T. Farrell**:

Being a descendent of hod carriers, overall is probably a good way to put it.

Hon. George C. Pratt:

Professor Farrell comes to us from Brooklyn Law School.

Professor Richard T. Farrell:

INTRODUCTION

My volunteer is passing around a preliminary draft of what will eventually become the eleventh edition of *Richardson on Evidence*.[1] We are in page proofs on half of the book already. We expect to go to the printer by the end of this month or the beginning of next month.

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* Richard T. Farrell is presently a professor at Brooklyn Law School. Some of the courses he teaches include, Legal Research and Writing, Evidence, Federal Jurisdiction and Procedure, and Conflict of Laws. Prior to teaching, Professor Farrell clerked for the New York State Court of Appeals from 1965 until 1967. He also helped publish the tenth edition of *Richardson on Evidence* and is in the middle of publishing the forthcoming 11th edition.

1. JEROME PRINCE ET AL., RICHARDSON ON EVIDENCE (11th ed. forthcoming).

Let me just say a word about codification. What difference does it make? I am in favor of it and I cannot see anything wrong with the present system.

When I was preparing for this lecture, I ran across some other lecture notes I had prepared for another program. One of my favorite quotes turns out to be from the judicial writings of none other than the Honorable Jacob D. Fuchsberg,[2] after whom this law center is named. Judge Fuchsberg, in *People v. Rivera*,[3] reminded us that, "in this imperfect world, the right . . . to a fair appeal or, for that matter a fair trial, does not necessarily guarantee . . . a perfect trial or a perfect appeal."[4] The whole idea of programs like this is to try to get a little bit closer to the ideal, a universal understanding, or a general agreement among the profession as to what certain things mean.

Now, most of you have already received a copy of this particular material. I would like to call your attention to something. Under the Federal Rules of Evidence there is a definition of hearsay.[5] We have been talking about hearsay for the last half hour or so, but so far we have not agreed on what it is we are talking about. Hearsay is defined in Federal Rule of Evidence 801.[6] Now, I would like to call your attention to the

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2. Judge Jacob D. Fuchsberg is a New York University Law School graduate who had an illustrious career as a trial attorney. As an attorney he received the first one million dollar verdict in the nation. Judge Fuchsberg was elected to the New York Court of Appeals in 1974. *Sketches of the Judges on State's Court of Appeals*, N.Y. TIMES, Nov. 7, 1982, at 54. He was one of the past presidents of the New York State Trial Lawyers Association as well as the Association of Trial Lawyers of America. Judge Fuchsberg retired from the court in 1983. He is currently a senior partner at the Jacob D. Fuchsberg Law Firm in Manhattan, New York. This biography was taken from, Jacob D. Fuchsberg, *Law, Social Policy, and Contagious Disease: A Symposium on Acquired Immune Deficiency Syndrome (AIDS)*, 14 HOFSTRA L. REV. 1 (1985).

3. 39 N.Y.2d 519, 349 N.E.2d 825, 384 N.Y.S.2d 726 (1976).

4. *Id.* at 523, 349 N.E.2d at 828, 384 N.Y.S.2d at 728.

5. *See infra* note 6 (discussing the definition of hearsay as stated in the Federal Rules of Evidence).

6. FED. R. EVID. 801(c). Rule 801 defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." *Id.* In addition, the rule

material I passed out. Please look at the second paragraph of section 8-101.[7] By the way, I am rearranging the materials in *Richardson on Evidence* so that Article I will deal with general principles, Article II will discuss judicial evidence, Article III will explain presumptions, Article IV will clarify circumstantial evidence, etc. In other words, it will be arranged in a similar manner as the material in the Federal Rules of Evidence.[8]

Look at how the "feds" define hearsay[9] and also look at section 8-101 from *Richardson*: "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."[10] Now, I will go out and get you one of those big Famous Amos cookies if you tell me the difference between hearsay pursuant to the Federal Rules of Evidence and the general accepted definition

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outlines the circumstances where a statement is not considered hearsay and would thus be admissible. FED. R. EVID. 801(d).

7. The following is a draft of the proposed § 8-101 which will be found in the forthcoming 11th edition of *Richardson on Evidence*:

> The rule barring hearsay is one of the most important exclusionary rules in the law of evidence. As a working definition, we may say that a statement made out of court, that is, not made in the course of the trial in which it is offered, is hearsay if it is offered for the truth of the fact asserted in the statement. The definition of hearsay, of course, applies to what is written as well as to what is spoken. If the evidence is hearsay, and no exception to the rule is applicable, the evidence must be excluded upon appropriate objection to its admission.

PRINCE ET AL., *supra* note 1, § 8-101 (citations omitted).

8. The Federal Rules of Evidence are organized as a series of eleven articles. The rules are arranged in the following order: Article I contains general provisions; Article II, judicial notice; Article III, presumptions in civil actions and proceedings; Article IV, relevancy and its limits; Article V, privileges; Article VI, witnesses; Article VII, opinions and expert testimony; Article VIII, hearsay; Article IX, authentication and identification; Article X, contents of writings, recordings, and photographs; and Article XI, miscellaneous rules. Therefore, *Richardson on Evidence* should correlate more directly with the articles in the Federal Rules of Evidence.

9. *See supra* note 6.

10. FED. R. EVID. 801(c). *See* PRINCE ET AL., *supra* note 1, § 8-101 (defining hearsay as "a statement made out of court, that is, not made in the course of the trial in which it is offered, is hearsay if it is offered for the truth of the fact asserted in the statement").

of what hearsay is under the New York cases.[11] So here is the good news. The good news is that when you look at the kind of hodgepodge that the New York law of evidence is, it is a little bit of common law, a little bit of statute,[12] a little bit of this, a little bit of that, but all in all, it turns out to be not that terribly different than the Federal Rules of Evidence.[13]

I think it is a mistake to overemphasize the differences. By emphasizing the differences, you create the idea that we are talking about apples and oranges. But, in reality, it is not that different. There are merely some subtle differences. One might get the idea from what someone said earlier about Judge Weinstein's view of the world, that everything rests in the discretion of the trial judge.[14] I guess this is true as long as the

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11. *See supra* note 6 and accompanying text; *cf.* People v. Bolden, 58 N.Y.2d 741, 743, 445 N.E.2d 198, 199, 459 N.Y.S.2d 22, 23 (1982) (Gabrielli, J., concurring) (defining hearsay as "[a]n out of court statement of the declarant, communicated at the trial by a third party, is generally hearsay if it is offered for the truth of the fact asserted in the statement" (citing JEROME PRINCE, RICHARDSON ON EVIDENCE § 200, at 176-77 (10th ed. 1973))); People v. Sease-Bey, 111 A.D.2d 195, 488 N.Y.S.2d 822 (2d Dep't 1985). The appellate division followed the New York Court of Appeals in adopting the *Richardson on Evidence* definition of hearsay. *Id.* at 195, 488 N.Y.S.2d at 824.

12. *See, e.g.*, Barbara C. Salken, *To Codify or Not to Codify-That is the Question: A Study of New York's Efforts to Enact an Evidence Code*, 58 BROOK. L. REV. 641 (1992) (discussing the make-up of New York's rules of evidence).

13. *See* HAROLD J. BAER, JR., FEDERAL RULES OF EVIDENCE AND THEIR NEW YORK STATE PARALLELS (1986). See 1 RANDOLPH N. JONAKAIT ET AL., NEW YORK EVIDENTIARY FOUNDATIONS (1993) for a comparison and overview of the New York and Federal Rules of Evidence.

14. *See, e.g.*, United States v. Sessa, 806 F. Supp. 1063, 1067 (E.D. N.Y. 1992) ("Whether or not psychiatric testimony is admissible to impeach the credibility of a witness is within the discretion of the trial judge." (citing United States v. Pacelli, 521 F.2d 135, 140 (2d Cir. 1975))); Earl v. Bouchard Transp. Co., Inc., 735 F. Supp. 1167, 1174 (E.D.N.Y. 1990) ("The admissibility of evidence regarding future earning capacity is within the wide discretion of the trial judge." (citing Oliveri v. Delta S.S. Lines, Inc., 849 F.2d 742, 745 (2d Cir. 1988))); Cathleen C. Herasimchuck, *The Relevancy Revolution in Criminal Law: A Practical Tour Through the Texas Rules of Criminal Evidence*, 20 ST. MARY'S L.J. 737, 776 n. 97 (1989) ("The trial judge's experience and legal training can be relied upon to winnow the chaff

trial judge is Judge Weinstein. But the black flag of anarchy flies over the federal courthouse in the courtroom where everything is up to the discretion of the trial judge. Then who is in charge? The answer is, like in any anarchy situation, nobody is in charge and everybody is in charge. It is not that way at all. The good news is that most of the rules are pretty much the same. The bad news, of course, is that there are differences.

THE HEARSAY DIFFERENCES BETWEEN THE NEW YORK AND FEDERAL RULES OF EVIDENCE

There are two similarities and differences that I would like to address this morning. Now, one philosophic difference - what is hearsay? Hearsay is evidence of an out-of-court statement offered to prove some fact contained in that statement.[15] I do not think anybody has told you about what the hearsay rule is. If you have a pencil please write down the hearsay rule right now. No Aqui. No se habla hearsay. That is the hearsay rule. Very simple? No, because when you are discussing hearsay, you are in fact discussing the exceptions to the rule.[16]

A. Admissions

What is it that fits the definition of hearsay that can be received in evidence to prove some fact contained in this out-of-court

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from the wheat." (citing JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN ON EVIDENCE ¶ 104[02], at 104-22 (1985))).

15. *See* BLACK'S LAW DICTIONARY 649 (5th ed. 1979). Hearsay is defined as "[a] statement, other than one made by the declarant while testifying at the trial or hearing offered in evidence to prove the truth of the matter asserted." *Id.*; *see also supra* notes 6-7 and accompanying text.

16. *See* FED. R. EVID. 801(d)(1). This rule lists the situations in which prior statements by a witness are not hearsay, for example when a statement is consistent with the declarant's testimony and is offered to rebut a charge of fabrication. *Id.* Federal Rule of Evidence 803 lists the hearsay exceptions which apply regardless of the declarant's availability, for example the present sense impression or the excited utterance. FED. R. EVID. 803. Rule 804 lists the exceptions to the hearsay rule that can only be used if the declarant is unavailable. FED. R. EVID. 804.

statement? It is the exceptions to the hearsay rule. One of the places where an apparent difference occurs between the federal rules and the New York rules of evidence is when you deal with the first exception to the hearsay rule, admissions.[17] If you look at the Federal Rules of Evidence, you will see that they tell us what hearsay is not.[18] Among other things, the statement is not hearsay if the statement is offered against a party and is the party's own statement.[19]

Now, in New York's original volume in 1980,[20] as well as in the most recent version,[21] the New York view is that an admission is an exception to the hearsay rule,[22] because the

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17. *See* Potamkin Cadillac Corp. v. B.R.I. Coverage Corp., No. 94-7157, 1994 WL 541804, at *7 (2d Cir. Oct. 5, 1994) (holding that "[a]ssertions by a party in documents it has prepared and offers into evidence are admissible against it as admissions"). Admissions are defined as "[c]onfessions, concessions or voluntary acknowledgments made by a party of the existence of certain facts. More accurately regarded, they are statements by a party, or some one identified with him in legal interest, of the existence of a fact which is relevant to the cause of his adversary." BLACK'S LAW DICTIONARY 47 (6th ed. 1990).

18. According to the Federal Rules of Evidence hearsay is not a prior statement made by a witness if the statement is (1) "inconsistent with the declarant's testimony" if the testimony was given under oath, or (2) "consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive," or (3) an identification of a person made subsequently to perceiving the person. FED R. EVID. 801(d)(1). In addition, hearsay is not an admission by a party opponent. FED. R. EVID. 801(d)(2).

19. FED. R. EVID. 801(d)(2)(A). The rule provides in pertinent part: "A statement is not hearsay if (2) the statement is offered against a party and is (A) the party's own statement, in either an individual or a representative capacity." *Id. See* Wheel v. Robinson, No. 93-2307, 1994 WL 465494, at *5 (2d Cir. Aug. 25, 1994) (holding that the plaintiff's statements were admissible as admissions by a party).

20. NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK 9 (1980).

21. NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK (1991).

22. *See* Giles v. Schuyler-Chemung-Tioga Bd. of Coop. Educ. Servs., 199 A.D.2d 613, 614, 604 N.Y.S.2d 345, 346 (3d Dep't 1993) (stating that it is "uncontested that an admission against interest made by a party to a civil action is competent evidence against that party as an exception to the hearsay

admissions exception allows evidence of an out-of-court statement to be received into evidence to prove some fact contained in the statement.[23]

The federal rules found, and I think quite correctly, that there is one thing about all the other exceptions to the hearsay rule you really cannot say about an admission. For most of the other exceptions from the hearsay rule, there is at least some nuance, some taste, some hint of reliability.[24] I will give you an example. When somebody says, "I know that I have done wrong. I know that burning down O'Leary's Bar and Grill was a bad thing to do," you get the kind of curbstone idea that if somebody is going to go around saying something like that, he knows when he is saying it that he is making a declaration of his responsibility, in a monetary sense, for the arson of O'Leary's Bar, and, perhaps, in the criminal sense, for the crime of arson. We are perfectly willing to believe that when people say bad things about themselves, they are probably telling the truth.[25] Also when somebody says a good thing about themselves like, "I am not a crook," you tend to disbelieve them.

Now, there is another thing. Of the two people involved, one is the person who made the statement, the declarant.[26] When I give

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rule"); People v. Patterson, 184 A.D.2d 916, 918, 584 N.Y.S.2d 954, 956 (3d Dep't 1992) (holding that the defendant's statement made to a testifying witness was admissible under the admission exception to the hearsay rule).

23. *See* cases cited *supra* note 22 (discussing New York's view on admissions).

24. *See* JONAKAIT ET AL., *supra* note 13, at 271-94. Hearsay exceptions based primarily on a showing of reliability include business records, past recollection recorded, present recollection refreshed, excited or startled utterances, present sense impressions or contemporaneous statements, declarations of state of mind or emotion, and declarations of bodily condition. *Id.*

25. *See* Reed v. McCord, 160 N.Y. 330, 341, 54 N.E. 737, 740 (1899). "The theory upon which this class of cases is held to be competent is that it is highly improbable that a party will admit or state anything against himself or against his own interest unless it is true." *Id.*

26. A declarant is "a person who makes a statement." FED. R. EVID. 801(b). *See* BLACK'S LAW DICTIONARY 407 (6th ed. 1990). A declarant is "[a] person who makes a declaration . . . . In the law of evidence, [a declaration] is

the introductory lecture on hearsay, I use a cartoon of Donald Duck, the "duck"-clarant, is a person whose statement is being testified to by somebody else.[27] Then, I use a cartoon of Yogi Bear, the bear is the witness. The duck is the "duck"-clarant, the bear is the witness. When the bear wants to testify on trial to what the duck said, this is the classic hearsay problem.[28]

The problem with the admissions exception to the hearsay rule, is that there is no circumstantial guarantee of trustworthiness.[29] As one of the sections in the material that I have distributed to you points out, the New York rule of admission is a statement made by a party, anytime, anywhere, to anybody, that turns out down the road to be contrary to that party's position on trial.[30]

For example, let us look at vicarious liability[31] under Section 388 of the Vehicle and Traffic Law in New York.[32] Pursuant to

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an unsworn statement or narration of facts made by a party to the transaction, or by one who has an interest in the existence of the facts recounted." *Id.*

27. *See supra* note 26 (defining declarant).

28. *See, e.g.*, Leake v. Hagert, 175 N.W.2d 675, 684 (N.D. 1970) (holding that statement to adjuster was hearsay since declarant, who was not a party in the action, did not testify at trial, nor was the statement subject to cross-examination).

29. *See supra* note 24 and accompanying text.

30. *See* Reed v. McCord, 160 N.Y. 330, 341, 54 N.E. 737, 740 (1899) (stating that "admissions by a party of any fact material to the issue are always competent evidence against him, wherever, whenever or to whomever made"); *see also* PRINCE ET AL., *supra* note 1, § 8-201 (11th ed. forthcoming). "As a general rule, any declaration or conduct of a party which is inconsistent with the party's position on trial may be given in evidence against that party as an admission." *Id.*

31. *See* BLACK'S LAW DICTIONARY 1566 (6th ed. 1990). Vicarious liability is defined as "[t]he imposition of liability on one person for the actionable conduct of another, based solely on a relationship between the two persons . . . for example, the liability of an employer for the acts of an employee, or, a principal for torts and contracts of an agent." *Id.* For a general overview of vicarious liability see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499-501 (5th ed. 1984).

32. N.Y. VEH. & TRAF. LAW § 388 (McKinney 1986). Section 388 provides in pertinent part:

> Every owner of a vehicle used or operated in this state shall be liable and responsible for death or injuries to person or property resulting from negligence in the use or operation of such vehicle, in the business

this statute the owner of an automobile is liable for injuries caused by the driver.[33] In the following example, we will assume that the driver is operating the car with the owner's permission. Suppose that back on March 16, 1993, the owner of a car is walking down the street and meets a friend and says, "Hey friend." Friend says, "Hey owner, how are you doing?" "I am fine, how are you doing?" "Hey, you are walking, where is your car?" "Oh, I loaned my car to my neighbor, Fred." Now, that is a perfectly innocuous statement. What surrounded that statement? Any kind of guarantee of the trustworthiness of, "Where is your car?" "I Loaned it to Fred." Let us say that Fred goes out that night and gets into an accident. Now, who winds up being sued? The owner. He gets on the stand and he testifies, "Yeah, I told him he could move the car from the driveway to the sidewalk. That is what I told him. I did not say he could drive out to the North Fork of Long Island." Can the bear get on the stand and testify that the party, the duck, the defendant, the owner, said that he had loaned his car to Fred? Sure he can. But where is the circumstantial guarantee of trustworthiness? This is a perfectly neutral statement made under the circumstances when you cannot, even with the most fevered imagination, come up with any argument that when the owner of the car said, "I loaned it to Fred" he had not even a hint or a trace, unless he is paranoid, that anything in that statement would come back and haunt him as evidence, as part of the predicate for his liability under section 388 of the Vehicle and Traffic Law.

Now, I believe, influenced by the lack of trustworthiness that surrounds the admission, the defense decided to exclude it from the definition of hearsay. However now look at what happens. You get to the bottom line at the trial, or the civil action in the state system. Can the jury take the testimony of the witness that the owner said, "I loaned the car to Fred" and use that statement as the basis for a finding that Fred was driving the car with the

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of such owner or otherwise, by any person using or operating the same with the permission, express or implied, of such owner.

Id.

33. *Id.*

owner's permission? Answer: Yes. In the federal system, it is the same question. Is that statement a statement made by a party?[34] Can it be heard in evidence in the federal system? Yes.[35] What is the jury to do with this statement? The jury can use the fact content of that statement, the non hearsay statement, as the predicate for their finding of fact that the car was being operated with the owner's permission.[36] The bottom line result is that there is no difference except for this quibble of characterization. So is it, or is it not, an exception to the hearsay rule?

B. The Business Records Exception

In *People v. Kennedy*,[37] Chief Judge, Judith Kaye,[38] referred to the business records exception as "the most important exception to the hearsay rule."[39] I do not know about that. The state version is basically the codification of a suggestion made

34. FED. R. EVID. 801(d)(2)(A), *supra* note 19. *See* United States v. Abou-Saada, 785 F.2d 1 (1st Cir.), *cert. denied*, 477 U.S. 908 (1986). In a criminal prosecution for conspiracy to possess and distribute heroin, the defendant's act of pointing to a coconspirator was assertive in nature thus establishing a party admission. *Id.* Therefore, under the Federal Rules of Evidence it did not constitute hearsay. *Id.* at 8.

35. *See, e.g.*, United States v. Penass, 997 F.2d 1227, 1229 (7th Cir. 1993) (stating that defendant's own statement, "I know I did it . . . I hit her in the head with an ax," was admissible against defendant in criminal prosecution for assault with a deadly weapon).

36. *See* United States v. Cline, 570 F.2d 731, 735 (8th Cir. 1978) (allowing the jury in a second degree murder trial, to consider defendant's statement concerning the whereabouts of the murder weapon as substantive evidence "because it qualified as an admission").

37. 68 N.Y.2d 569, 503 N.E.2d 501, 510 N.Y.S.2d 853 (1986).

38. Judith Kaye is the Chief Judge of the New York Court of Appeals appointed by Mario Cuomo in 1993. Chief Judge Kaye is a former partner of the Manhattan law firm of Olwine, Connelly, Chase, O'Donnell & Weyher as well as a past director and vice president of the Legal Aid Society. This biography was taken from, Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111, 125 (1988).

39. *Kennedy*, 68 N.Y.2d at 578, 503 N.E.2d at 507, 510 N.Y.S.2d at 859 ("The business records exception has been recognized as probably the most important hearsay exception.").

back in the 1920's by the Commonwealth Fund.[40] This is a forerunner, an early version of the American Law Institute and its statement. The business records exception of the hearsay rule in New York is found in the Civil Practice Laws and Rules section 4518 [hereinafter CPLR].[41] It is found in Federal Rule of Evidence 803(6).[42] If you put the two statutes side by side, they will be almost identical, there is very little difference in the common progenitor of this commonwealth statute.[43] The big difference is, if the particular document, the business record, qualifies under the CPLR, the circumstances surrounding its preparation, under New York law, go to the weight to be afforded the information received from the business record.[44]

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40. The Commonwealth Fund was a charitable foundation organized to encourage legal research. One of its first tasks was to "reform the law of evidence." After five years the committee issued a report suggesting five changes in the law of evidence. For a general overview of the work of the committee, see generally Salken, *supra* note 12, at 654.

41. N.Y. CIV. PRAC. L. & R. 4518 (McKinney 1992). Rule 4518(a) provides in pertinent part:

> Generally. Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible in evidence in proof of that act, transaction, occurrence or event, if the judge finds that it was made in the regular course of any business and that it was the regular course of such business to make it, at the time of the act, transaction, occurrence or event, or within a reasonable time thereafter.

Id.

42. FED. R. EVID. 803(6). Rule 803(6) provides in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness: A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Id.

43. *See* Salken, *supra* note 12, at 654.

44. *See* People v. Kennedy, 68 N.Y.2d 569, 576, 503 N.E.2d 501, 505, 510 N.Y.S.2d 853, 857 (1986). "Whether records admitted pursuant to CPLR

The circumstances surrounding the preparation of the business record go toward the weight of the business record.[45] I will give you an example. In *Toll v. State*,[46] a leading New York Appellate Division case written by Judge Cooke,[47] the business record that was in question was an accident report.[48] The report had been prepared by the very individual whose conduct led to the suit against his employer, the State of New York.[49] Now, you can imagine that the snow plow driver, when he was writing up his accident report, had considerable incentive to put a tinge of favorability on his description of how the accident occurred. Objection was made to the admission of this otherwise qualifying report as a business record on the ground that it had been prepared by the very person whose conduct had caused the law suit to be brought against the defendant. In addition, it was the defendant who was offering the accident report into evidence.[50]

Judge Cooke, in a different decision, held that the circumstances surrounding the preparation of the record goes toward the weight to be afforded to the evidence drawn out of this business record.[51] The Federal Rules of Evidence state that the trial judge, here we go back to that observation about Judge

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4518(a) are in fact regular business records is not . . . a matter going only to [the] weight of the evidence; other circumstances of the making of the record may go to [the] weight once the threshold requirements for admissibility are met." *Id.*

45. *Id.*

46. 32 A.D.2d 47, 299 N.Y.S.2d 589 (3d Dep't 1969).

47. Judge Lawrence Cooke was elected county judge and surrogate of Sullivan County in 1955 six years prior to being elected to the New York State Supreme Court. Judge Cooke was elected to the New York Court of Appeals in 1974 and was named Chief Judge in 1979. He retired from the bench in 1985. This biography was taken from, *Sketches of the Judges on State's Court of Appeals*, N.Y. TIMES, Nov. 7, 1982, at 54.

48. *Toll*, 32 A.D.2d at 48, 299 N.Y.S.2d at 591.

49. *Id.*

50. *Id.*

51. *See* People v. Porter, 46 A.D.2d 307, 311, 362 N.Y.S.2d 249, 255 (3d Dep't 1974). Judge Cooke determined that even though certain entries were out of chronological order, they would not be prevented from being admitted into evidence. However, such a deficiency would effect the weight to be given the evidence found in the record. *Id.*

Weinstein,[52] has the discretion to reject an otherwise qualifying business record, if the trial judge concludes that the circumstances surrounding its preparation indicate substantial lack of trustworthiness.[53]

The New York and Federal Rules of Evidence are the same, but in one case the state rule allows more into evidence than the federal system does.[54] Bob Pitler[55] and I were discussing this earlier, and Bob has identified at least fifteen places in the hearsay area alone, where the law of state and the federal rules part company.[56]

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52. *See supra* text accompanying note 14.

53. *See* United States v. Kim, 595 F.2d 755, 762 (D.C. Cir. 1979) (stating that it was within the discretion of the trial court judge to refuse to admit a telex into evidence under the business records exception to the hearsay rule because the circumstances of the preparation of the document indicate a lack of trustworthiness); *see also supra* note 42 discussing Federal Rule of Evidence 803(6).

54. Although the Federal and New York Rules of Evidence appear similar, as illustrated below, the courts have interpreted them differently. *See supra* note 42 defining Federal Rule of Evidence 803(6) compared to New York Civil Practice Law and Rules section 4518 *supra* note 41; *see also* Palmer v. Hoffman, 318 U.S. 109, 114 (1943) (stating that Rule 803(6) only applies to a record drafted during the regular course of business, however, the rule does not extend to any regular course of conduct associated with the business); Johnson v. Lutz, 253 N.Y. 124, 127, 170 N.E. 517, 518 (1930) (stating that the person who reports the transaction must be acting within the regular course of business). *See generally* JACK B. WEINSTEIN, BASIC PROBLEMS OF STATE AND FEDERAL EVIDENCE 275-78 (5th ed. 1976) (discussing the business records exception and specifically explaining that the federal interpretation is more restrictive than the New York interpretation).

55. Robert Pitler is a professor at Brooklyn Law School where he teaches Criminal Justice, Criminal Procedure, and Evidence. He clerked for Judge Breitel from 1974-75. Professor Pitler is a former New York City District Attorney as well as a former Chief of the Appeals Bureau of the Manhattan District Attorney's office. THE AALS DIRECTORY OF LAW TEACHERS 1993-1994 765 (1994).

56. The following are a few examples of where the federal and New York state rules part company in the hearsay area. Rule 801(d)(2)(D) allows an admission made by the agent of a party to be used against the party. FED R. EVID. 801(d)(2)(D). In Cox v. State, 3 N.Y.2d 693, 698, 148 N.E.2d 879, 882, 171 N.Y.S.2d 818, 821-22 (1958), the court of appeals held that an employee's statement lacked the reliability of a statement made by the actual

C. Present Sense Impression

Let me make one more observation about the dynamics of the common law system. In a case called *People v. Nieves*,[57] the New York Court of Appeals stated that it was "not prepared at this time to abandon the well-established reliance on specific categories of hearsay exceptions in favor of an amorphous 'reliability' test . . . ."[58] I always get nervous when I hear "not at this time," but tomorrow, watch out.

Despite this sentiment, as recently as a few months ago, the New York State Court of Appeals, fell into line and in *People v. Brown*[59] adopted the present sense impression exception to the hearsay rule,[60] which is the first of the enumerated exceptions to

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party and could not be admitted into evidence. *Id.* In People v. Brown, 80 N.Y.2d 729, 734-35, 610 N.E.2d 369, 373, 594 N.Y.S.2d 696, 700 (1993), the court recognized the present sense impression exception to hearsay in Federal Rule of Evidence 803(1). *Id.* However, the court stated that the statement must be corroborated by other evidence, thus differentiating it from the New York rules. *Id.* A third difference between the state and Federal Rules of Evidence concerns the state of mind exception to the hearsay rule. In People v. Chambers, 125 A.D.2d 88, 91-92, 512 N.Y.S.2d 89, 91 (1st Dep't 1987), the court noted that a statement about the state of mind of a declarant was admissible. *Id.* However, the court exacted a stringent test making such statements admissible only where there is a high degree of truthfulness found within the statement. *Id.* The Federal Rules of Evidence do not apply such a stringent test in allowing this exception. Finally, Federal Rule 803(24) allows statements that are hearsay to be admitted into evidence where the statements are reliable but they do not fit into one of the stated exceptions. FED. R. EVID. 803(24). New York, on the other hand, rejected this idea in People v. Nieves, 67 N.Y.2d 125, 131, 492 N.E.2d 109, 112, 501 N.Y.S.2d 1, 4 (1986).

57. 67 N.Y.2d 125, 492 N.E.2d 109, 501 N.Y.S.2d 1 (1986).

58. *Id.* at 131, 492 N.E.2d at 112, 501 N.Y.S.2d at 4.

59. 80 N.Y.2d 729, 610 N.E. 2d 369, 594 N.Y.S.2d 696 (1993).

60. People v. Woods, 610 N.Y.S.2d 108, 109 (4th Dep't 1994) (holding that "statements made contemporaneously with or immediately after the events described, were admissible under the present sense impression exception to the hearsay rule"); *Brown*, 80 N.Y.2d at 729, 610 N.E.2d at 369, 594 N.Y.S.2d at 696. The court in *Brown* held that a spontaneous description of the events in question that are made "contemporaneously with the observation are admissible if" they are substantially corroborated by other evidence. *Id.* In addition, the court held that such statements are admissible even if the declarant is simply an unidentified witness and not a participant in the events.

the hearsay rule in New York and Federal Rule of Evidence 803(1).[61]

CONCLUSION

While I will concede very rapidly that the common law system is, perhaps, not as efficient as the legislative alternative because courts have this very passive mode, they will decide questions when they come, but they will not reach out and try to decide things until they are put into position of having assignment. But do not abandon hope, oh ye in favor of codification, it will happen eventually. We are not stuck in a system that is so grounded in the common law. Remember the common law era, the height of which was back in the time when some historian said that life was nasty, British, and short. If you look at the history of that era, so were some of the people.

It is always a pleasure to come visit. Thank you very much for having me.

Hon. George C. Pratt:

Thank you Professor Farrell. I think once your revision of *Richardson on Evidence* is published, which will follow the format of the Federal Rules of Evidence, it may be a long step toward codification, because a quick reference to define what the state rule of evidence is for most lawyers is to run to *Richardson*. Now, they are going to get used to seeing the same numbered categories as in the federal rule.

Id.; Berger v. New York, 157 Misc. 2d 521, 597 N.Y.S.2d 555 (Sup. Ct. N.Y. County 1993) (stating that the reason for this exception is that the statement is made at the same time as the event thus, not leaving the declarant time to reflect or intentionally misrepresent what was seen).

61. FED. R. EVID. 803(1). This rule provides that: "The following are not excluded by the hearsay rule, even though the declarant is available as a witness: a statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter." *Id.*