

New York State Judicial Institute  
Citywide Association of Court Attorneys  
Electronic Evidence: Selected Topics

Judge Mark D. Cohen

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New York, New York

# Selected Topics

- Business Records
- Hearsay Exceptions
- Judicial Notice of Electronic Evidence:  
Websites
- Audio Recordings
- Video/Surveillance Recordings
- Illegally Obtained Electronic Evidence

# Statutes

- CPLR 4518(a): Admissibility of Business Records:
  - An “Electronic Record” of any Business, (Including a Profession, Occupation or Calling of Any Kind”) as Defined in Technology Law 302(2) May be Admissible as Long as Business Record Criteria Established:
    - Made in Regular Course of Business
    - Regular Course of Business to Make
    - Made at or about Time or Reasonable Time Thereafter
- Court May Consider “Method or Manner by Which Electronic Record Was Stored or Maintained or Retrieved in Determining Whether the Exhibit is a True and Accurate Representation of Such Electronic Record”

# C.P.L.R. 4539

Copies of Records Made in “Regular Course of Business, Institution or Member of a Professional Calling” Are Admissible If Original is in Existence and Available For Inspection Under Direction of Court

So, What About a Printouts of  
Electronic Spreadsheets Showing a  
Party's On-Line Account Information  
in Action on Credit Card Debt?

Are They Admissible on Their Face?

Cach of Colorado, LLC v. Lazorovsky,  
46 Misc.3d 1201(a)  
(Civ. Ct. Richmond Co. 2014)

- Redacted Printout of Electronic Printout of D's Citbank MasterCard Account Information Submitted by P in Support of Motion by D to Dismiss Complaint on Ground Plaintiff Never Existed as Corporate Entity
- Court Held This Evidence Inadmissible Under CPLR 4518 and 4539 and State Technology Law
- Complaint Dismissed

Also, Keep in Mind,  
F.R.Ev. 901(b)(4)

- Evidence (e.g., Electronic in Nature) May Be Authenticated By Reference to its “Appearance, Contents, Internal Patterns, or Other Distinctive Characteristics, When Taken in Conjunction With The Circumstances”

# Hearsay

Definition: An Out of Court Statement Made by  
a Non-Testifying Witness, Presented For the  
Truth of the Matter Asserted



# Some Exceptions to Hearsay: Electronic Evidence

- Admission of Party-Opponent
  - *Sea-Land Serv., Inc v. Lozen Int'l, LLC*, 285 F.3d 808 (9<sup>th</sup> Cir. 2002): Email Forwarded by Party-Opponent:
- Business Records: CPLR 4518
  - Computer Printouts
  - Medical Records – Treatment and Diagnosis
- State of Mind:
  - Effect of Emails on Plaintiff's State of Mind in Libel Action: *Rombom v. Weberman*, 2002 WL 1461890 (Sup Ct. Kings Co. 2002), *aff'd*, 309 A.D.2d 844 (2<sup>nd</sup> Dept. 2004)
- NY Common Law Public Records Exception:
  - *Miriam Osborn Memorial Home Assoc. v. Assessor of City of Rye*, 9 Misc.3d 1019 (Sup. Ct. Westch. Co. 2005) – Printout of Webpage of Gov't Website Containing Real Property Sales Information Admissible
- CPLR 4539: As Discussed, Copies of Records Made in "Regular Course of Business, Institution or Member of a Professional Calling" Are Admissible If Original is in Existence and Available For Inspection Under Direction of Court

# People v. Ortega/Benston, 15 N.Y.3d 610 (2010)

- Ortega*: Trial Court Admitted Redacted Hospital Records of Assault CW as Business Records That Contained “Domestic Violence” and “Safety Plan”
- Benston*: Trial Court Admitted Hospital Records of CW in CPSP Case That Contained Indication CW “Forced to Smoke a White Substance” (D Claimed CW Voluntarily Turned Over Money)
- Court of Appeals Affirmed 7-0 (Lippman, C.J.): Statements Contained in Records Concerning Medical Diagnosis and Treatment Are Reliable and Admissible as Business Records
- Judge Smith, Concurring: Per *Johnson v. Lutz*, Records Admissible as “Hearsay Within Hearsay” = Business Records + Hearsay Exception For Medical Diagnosis and Treatment
- Pigott, J., Concurring: The Records Were Not Reflective of Medical Treatment and Diagnosis But Any Error in Admission of Records Was Harmless

# Palisades Collection LLC v. Barbara Kedik, 67 A.D.3d 1329 (4<sup>th</sup> Dept. 2009)

- Plaintiff, as Claimed Assignee of Defendant's Credit Card Debt Submitted Affidavit From Discover Bank With Attached Spreadsheet Listing Defendant's Discover Account as Debt Sold to Plaintiff in Support of Action to Recover Balance Owed on Card
- Court Affirmed Lower Court Order Dismissing Lawsuit on Plaintiff's Standing to Sue
  - Although Plaintiff's Purported Agent Averred Spreadsheet Was Kept in Regular Course of Business and Entries Therein Made in Regular Course of Business, Agent Failed to Establish "When, How or By Whom The Electronic Spreadsheet Submitted in Paper Form Was Made" or That He Was Familiar With Discover's Business Practices or Procedures

People v. Daniel Manges,  
67 A.D.3d 1328 (4<sup>th</sup> Dept. 2009)

- Trial Court Erred in Admitting Printout of Electronic Data That Was Displayed on Computer Screen as Business Record as Proof Defendant Presented a Check Claimed to Be Forged
- No Proof Data Resulting in Printout Entered in Regular Course of Business of Bank
- Indeed, Bank Teller Testified, “Anyone [At The Bank] Can Sit Down at a Computer and Enter Information

# Judicial Notice

- Facts Not Subject to Reasonable Dispute That Are: 1) Generally Known Within Territorial Jurisdiction of Trial Court or 2) Capable of Accurate and Ready Determination By Resort to Sources Whose Accuracy Cannot Reasonably Be Questioned

*–People v. Alicia, 306 N.Y. 686 (1969)*

- Within Court's Discretion

- Adversary Entitled to Opportunity to be Heard on Whether Judicial Notice Should Be Taken by Court

People v. Roland Ramos,  
13 N.Y.3d 909 (2010)

- Fax'ed Copy of Bank Account Records to DA's Office Admitted in Evidence During Trial
  - No Custodian of Records Foundation
  - No C.P.L.R 4518 Business Records Foundation
- Court of Appeals Unanimously Reversed *People v. Ramos*, 60 A.D.3d 1091 (2<sup>nd</sup> Dept. 2009) [3-1 Vote]
  - Where Bank Records Are “Reliable and Trustworthy,” Court Can Take “Judicial Notice” and Admit Such Because They Are “Self-Authenticating,” **But This Was Not “Such a Document”**

# Judicial Notice of Electronic/Website Evidence

- Government Examples
  - Court of Record’s Computerized Records
  - Official Government Websites [F.R.Ev. 902(5) – Self Authenticating]
    - Downloading Information – Hearsay Issues vs. Inherent Reliability
  - NYS DOS – “Entity Information”
  - N.Y.S. DOS – Professional Licensing Information
  - U.S. Naval Observatory – Time of Sunrise
  - Federal Reserve Board – Prime Interest Rate
  - National Personnel Records Center – Retired Military Personnel
- Private – Commercial Examples
  - *Mapquest* for Driving Distances
  - Hospital Websites for Medical Conditions and Causes [*Gallegos v. Elite Model Management Corp.* 758 N.Y.S. 2d 777 (Sup. Ct. N.Y. Co. 2003)]
  - Retirement Earnings Posted on Website [*O’Toole v. Northup Grumman Corp.*, 499 F.3d 1218 (10<sup>th</sup> Cir. 2007)] – T.Ct. Erred in Not Taking Such Judicial Notice

N.Y.C. Medical and Neurodiagnostic, P.C. v.  
Republic Western Ins. Co.,  
3 Misc.3d 925  
(Civ. Ct. Queens Co., N.Y. 2004)

- Trial Judge Made Independent Review of Website to Determine if Doing Business in NY
- On Motion to Renew, Court Held That Even Assuming Took It Judicial Notice of Facts - Information Posted on Corporate Party's Website Constitute Admissions and Are Encompassed by Admissions Exception to Hearsay
- But On Appeal [8 Misc.3d 33 (App. Term 2004)] – Reversed: No Showing Website Was of “Undisputed Reliability” & Opposing Party Had No Opportunity to Be Heard



A Suppression Hearing Centers on a Traffic Violation Stop Based on a Defective Rear Tail Light in the Defendant's Vehicle. After The Hearing Has Concluded But Before The Judge Announces His Decision, He Conducts an Experiment On the Tail Light To Determine Whether The Defect Could Have Been Seen By a Sheriff's Deputy As Claimed At the Hearing. The Judge Relies on the Results in His Decision to Suppress.

Is This Proper Judicial Notice of Facts?

People v. Michael L. Allen,  
90 A.D.3d 1082 (3<sup>rd</sup> Dept. 2011)

- No
- While Trier of Fact May Apply “Logic, Common Sense and Everyday Experience to Interpret Admitted Evidence,” It Can’t “Engage in Conduct that Tends to Put Factfinder in Possession of Evidence that Was Not Introduced at Trial”
- But ...Excluding Erroneous Test, Suppression Order Reversed on Entire Record – Defendant Failed To Carry Burden Stop Unlawful

# Tape/Digital Recordings

- Witness Qualified to Operate Recording Instrument
- Witness Recorded a Certain Conversation
- Witness Used Certain Equipment to Record
- Equipment Was in Good Working Order
- Proper Procedures Were Used to Record
- Chain of Custody Maintained Over Tape/CD
- Witness Listened to Tape/CD Recording and It is Fair and Accurate Reproduction/Depiction of Conversation
- Witness Recognizes Tape/CD as the Same as One Used
- Transcript is Helpful but Only as Aid to Jury/Court

So, What About Tape-Recorded  
Conversations Between a Murder  
Victim and the Defendant That Were  
Purportedly Recorded by Victim at an  
Unknown Time and Placed in Storage  
Before Being Provided by Roommate  
to Police?

Have These Been Properly  
Authenticated?

# People v. Karen T. Ely, 68 N.Y.2d 520 (1986)

- DA Sought Admission in Evidence of Tape Recorded Conversations Between D and V, Her Husband, in Murder by Strangulation Case
  - DA Claimed Motive For Murder Was to Prevent D From Exercising Overnight Parenting Time as Part of Pending Divorce Case in Albany
- Tapes Admitted on This Foundation:
  - Two Tapes: V's Roommate Testified: V Made Them at an Unknown Time and Place; She Stored It in Their Home and After Murder, Turned it Over to Police
  - Third Tape: V's Matrimonial Lawyer Testified V Gave it To Him After "About 3-4 Weeks," There Were Notations On It In V's Handwriting

# People v. Karen T. Ely, 68 N.Y.2d 520 (1986)

- Court of Appeals Reversed 7-0
- Foundation For Admission of Tape Recordings is “Clear and Convincing Proof That the Tapes are Genuine and That They Have Not Been Altered”
- Court Outlined 4 Methods For Proper Foundation:
  - 1) Testimony of a Participant in the Conversation that it is a “Complete and Accurate Reproduction of the Conversation and Has Not Been Altered;
  - 2) Testimony of a Witness to the Conversation or its Recording (Such as the “Machine Operator” to the Same Effect;
  - 3) Testimony of a Participant in the Conversation Together with Proof by an Expert Witness after Analysis “Of the Tapes for Splices or Alterations”; or
  - 4) Demonstration of a “Chain of Custody” that Establishes, in Addition to Evidence Concerning the Making of the Tapes and Identification of the Speakers, That Within Reasonable Limits, Those Who Handled Tape from its Making to its Production in Court Identify it and Testify to its Custody and Unchanged Condition.
- Method # 4 Employed Here Insufficient

# People v. Mathew P. Galunas, 107 A.D.3d 1034 (3<sup>rd</sup> Dept. 2013)

- People Offered Tape-Recorded Conversations Between D and CI in Narcotics Task Force Investigation
- Foundation Proper: Per *People v. Ely* on “Clear and Convincing” Proof:
  - Detectives Testified to “Events Surrounding Creation of Recordings, Identified the Voices of the Informant and Defendant and Set Forth a Chain of Custody of the Recordings”
    - Detective-Operator of Recorder Immediately Reviewed Recording at Conclusion of Conversations, Secured Them In Police Custody, Immediately Prior to Trial Reviewed Recordings and Confirmed They Were “Fair and Accurate.”
    - A Second Detective Testified That He Knew D for 35 Years and Identified One Voice on the Recording as the D’s

# People v. Randy Dicks, 100 A.D.3d 528 (1<sup>st</sup> Dept. 2012)

- At Narcotics Sale Trial Foundation for Admission of Tape-Recorded Conversations Established By:
  - Testifying Detectives (i) Described Creation of Recordings and (ii) Identified Voices of Informant and D on Recordings
- Defendant's Identity as Speaker on Recording Established by Testimony of Another Participant in Conversation, as Well as Surrounding Circumstances, Including Several Face-to-Face Meetings
- See Also, *People v. Jackson*, 121 A.D.3d 1185 (3<sup>rd</sup> Dept. 2014) [Same Holding in Controlled Buy Narco Case]



# What About Surveillance Recordings?

# People v. Darren Patterson, 93 N.Y.2d 80 (1999)

- Same Rules For Admission of Video Surveillance Recordings as For Audio Recordings
  - Need Proof of Authentication and Foundation, Including Chain of Custody to Demonstrate Integrity
- Court Reversed Conviction on Other Grounds But in Dictum Held Admission of Commercial Store Surveillance Recording of Robbery Error:
  - Proof “Too Tenuous and Amorphous”
  - 911 Call Apparently Recorded Background Noises of Unidentified Man Reporting Robbery Insufficient to Provide “Inferential Linkages”

People v. William Hill,  
110 A.D.3d 410 (1<sup>st</sup> Dept. 2013)

- “Common Sense” Approach Adopted to Permit Admission into Evidence of Surveillance Video Based on Testimony of Moonlighting Detective Who Stated That While Working Second Job For Security Company, Hooked Up the Surveillance Cameras to the Video Recorder and Checked on a Daily Basis That The System Was Functioning Properly
- Detective Also Testified to Unaltered Condition of Tape = Trial Court Properly Concluded Video Accurately and Completely Depicted The Events at Issue

People v. Philip J. Messina,  
43 Misc.3d 78  
(App. Term 2<sup>nd</sup> Dept. 2014)

- Copy of DVD Surveillance Recording Introduced in Evidence Over Objection in D's Bench Contempt Trial
  - DVD Purportedly Captured Images of D Throwing Hammer at Home of D's Former BIL and SIL Who Were Protected by TOP
  - SIL Copied DVD and After Providing it to Investigator, Over-Written Within 48 Hours of Copying
    - Testified to Installation and Manner Surveillance Equipment Maintained
  - D's Estranged W Testified She Witnessed Entire Incident
- D's Request For Adverse Inference Instruction Re; Uncopied Portion Denied

People v. Philip J. Messina,  
43 Misc.3d 78  
(App. Term 2<sup>nd</sup> Dept. 2014)  
[Cont'ed]

- App. Term Affirmed
- Video Properly Authenticated by W's Who Knew Instrument and D
  - D Had Every Opportunity to Submit DVD to Expert to Challenge its Authenticity and Did Not
- D's Claim Tape "Faked" Rejected Even With Short Gaps in Recording
  - People Had No Control Until DVD Copy Provided to Investigator
- Adverse Inference Request Properly Denied (Again it Was a NJ Trial) & If Error Harmless Due to EW Evidence
- Also No *Brady* Error Either Since Per *P v. Hayes, 17 N.Y.3d 46 (2011)*, No Affirmative Duty by Police to Collect Exculpatory Evidence

# Illegally Obtained Recordings

- C.P.L.R 4506: Contents of Illegally Obtained Intercepted Electronic Communications (and Any Derived Evidence) Inadmissible in Any Trial or Hearing
  - Applicable to Both Criminal and Civil

McLaughlin v. McLaughlin,  
104 A.D.3d 1315 (4<sup>th</sup> Dept. 2013)

- Family Court Admitted Audio of Incident in Home Between H and W, Recorded With Either Party's Knowledge on Order of Protection Application
- 4<sup>th</sup> Dept. Affirmed: The Parties' Son Was Present and Thus Consented to Recording
  - CPLR 4506 and P.L. 250.02 Not Implicated

Gurevich v. Gurevich,  
24 Misc.3d 808,  
(Sup. Ct. N.Y. Co. 2008)

- W Accessed Emails From H's Account Using His Password in Support of Child Support Claims
  - Claimed No Revocation of Permission
- H Claimed They Were “Stolen” and CPLR 4506 Required Suppression
- Court Rejected Claim This Was “Eavesdropping” or Unlawful Accessing of “Electronic Communication” Under P.L. 250.05
- Material Was Not “Intercepted” But “Stored”
  - *Moore v. Moore*, N.Y.L.J. 8/14/08 @ p. 26 (Sup. Ct. N.Y. Co)
  - *Boudakian v. Boudakian*, N.Y.L.J. 12/26/08 @ p. 27 (Sup. Ct. Queens Co.)



# O'Brien v. O'Brien, 899 So. 1133 (Fla. App. 2005)

- Wife Secretly Installed Spyware Program (“Spector”) on Husband’s Computer in Matrimonial Action
- Captured Private On-Line Chats With Another Woman, Websites Visited and Secretly Took Photos of Screen
- Court Affirmed T.Ct’s Grant of Husband’s Motion to Preclude Introduction of Evidence (And Injunction) Under Florida Statute [Security Communications Act-FSA Sec. 943.03(1)] Similar to C.P.L.R. 4506
- These Were Illegally Intercepted “Electronic Communications” Under Statute

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## Man Who Intercepted Wife's Emails Cleared by Jury

Mark Hamblett, New York Law Journal

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A husband who set up his then-wife's email account so that her emails were forwarded to him, and continued collecting her emails after their divorce, has been cleared of liability under a federal privacy law.

A jury in White Plains on Friday found that Adel Abadir was not liable under the federal Wire Tap Act, 18 U.S.C. §2511, on accusations he secretly used auto-forwarding when he set up the email account for Annabelle Zaratzian in 2003 and never told her after the couple split.

Zaratzian, who discovered the breach in 2010, claimed that Abadir violated the act three ways: by intercepting her communications, by disclosing her communications and for using the contents of the communications—all in a dispute in Family Court over how much income Zaratzian earned in 2008.

Southern District Judge Vincent Briccetti had ruled in September that Abadir would have to

Questions?

Thanks to Jim Fagan for Assistance in  
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