July, 2009

Evidentiary Issues in Housing Court

Gerald Lebovits

NEW YORK STATE JUDICIAL INSTITUTE

SUMMER SEMINAR FOR JUDGES

July 2009 &
August 2009

(Revised July 29, 2009)

EVIDENTIARY ISSUES IN HOUSING COURT

By Gerald Lebovits and Julia Marter

EVIDENTIARY ISSUES IN HOUSING COURT

By Gerald Lebovits and Julia Marter

Gerald Lebovits is a judge of the New York City Civil Court, Housing Part, and an adjunct professor at St. John's University School of Law. Julia Marter is a second-year student at Fordham University School of Law. The authors wrote this article for a New York State Judicial Institute seminar Judge Lebovits co-presented for Housing Court judges in July and August 2009. This article will be published in a forthcoming issue of the New York Real Property Law Journal.

I. Introduction

New York State rules of evidence apply in all summary proceedings in the New York Civil Court Housing Part, commonly called the New York City Housing Court.[1] Housing Court judges, like all judges, often have great discretion over whether to admit evidence presented to them at hearings and trials.[2] Housing Court judges base their decision to allow or exclude evidence on whether the proponent of the evidence has laid a proper foundation, whether the content is relevant,[3] whether the evidence is accurate and authentic, and whether the probative value of the evidence substantially outweighs any prejudice.[4]

Evidence comes in several forms: testimony, exhibits, admissions, stipulations, and facts judicially noticed.[5]

Direct evidence directly supports the truth of an assertion.[6] Eyewitness testimony recounting the actual event, for example, is direct evidence. Indirect, or circumstantial, evidence is direct evidence of a collateral fact from which the court may infer a fact in issue.[7] Expert testimony is an example of circumstantial evidence. Courts proceed cautiously when a case rests solely on circumstantial evidence.[8]

After evidence is marked or deemed marked for identification, a petitioner's exhibit is called Petitioner 1 (and then 2, 3, and so on) for identification and, if admitted, Petitioner's 1 (and then 2, 3, and so on) in evidence. A respondent's exhibit is called Respondent's A (and then B, C, and so on) for identification and, if admitted, Respondent's A (and then B, C, and so on) in evidence. A court exhibit is called Court's 1 for identification or Court's 1 in evidence.

Before evidence is admitted, the opposing party may conduct a voir dire—question the witness to ascertain whether the evidence may be admitted. A voir dire is different from cross-examination. A voir dire tests the admissibility of the evidence, not its weight. Cross-examination, on the other hand, occurs after direct examination and tests the reliability and truthfulness of the testimony offered on direct examination.[9] Cross-examination must be directed to matters raised on direct examination. If not, the cross-examination is deemed outside the scope of the direct-examination.

Anything that will help prove or disprove a material fact in dispute should be introduced into evidence—on direct or cross—including written agreements, deeds, leases, registration statements, violation reports, bills, receipts or other proof of payment, photographs, and witness testimony.[10] Lawyers and unrepresented litigants should anticipate evidentiary issues to ensure that their proof is accepted, admitted, credited, and given the appropriate weight—and to assure that inadmissible evidence is excluded or discredited.

This article discusses the admissibility of documents and testimony commonly offered into evidence during Housing Court hearings and trials.

II. Motions in Limine

Since the 1997 Housing Court Initiative, Housing Court comprises two branches: resolution parts and trial parts.[11] Resolution parts handle issues related to settlement, orders to show cause, disclosure, and motions. Trial parts conduct hearings and trials.[12] In conducting hearings and trials, trial parts resolve trial evidentiary issues and motions in limine,[13] which are pretrial requests to allow the introduction of evidence or to prevent evidence from being referred to or offered at trial.[14] Resolution parts faced with an evidentiary issue filed as a motion in limine should deny the motion without prejudice to renew before a trial part.[15]

A ruling on a motion in limine does not preserve evidentiary error for appellate purposes.[16] To raise an error on appeal, an opponent should formally object when the evidence is offered or excluded during the trial.[17]

III. Relevance and Prejudice

Housing Court trials are bench trials. Cases requiring a jury are referred to the Civil Court's Plenary Part. Because there are no juries in Housing Court, Housing Court judges will often admit evidence in a close case and give the evidence the weight it deserves—sometimes none at all.

For evidence to be relevant in New York, it must tend to make the existence of a relevant fact more probable than it would be without that evidence.[18] Determining relevancy is more a question of experience and logic than of law.[19] The same can be said for deciding whether, on balance, the danger of unfair prejudice of a piece of evidence substantially outweighs its probative value.[20]

Even relevant evidence will be excluded if it is remote, misleading, or substantially prejudicial.[21] In Housing Court, where there is no jury to be confused, misled, or prejudiced, judges rarely reject evidence as unfairly prejudicial.

IV. A Word About Prima Facie Evidence

Prima facie evidence is given significant weight in Housing Court. It is "[e]vidence that

will establish a fact or sustain a judgment unless contradictory evidence is produced."[22] Prima facie evidence is treated as a rebuttable presumption that shifts the burden of production to the opponent.[23] A judge who accepts a document as prima facie evidence assumes that the contents of that document are true unless the opponent provides evidence to the contrary. The opponent must be given an opportunity to rebut.[24]

As opposed to prima facie evidence, some documents are admissible as mere demonstrative evidence. Demonstrative evidence explains or illustrates oral testimony. It is not real evidence.[25] Videotapes, photographs, and other visual aids are often considered demonstrative evidence.[26] Housing Court judges will admit demonstrative evidence that is relevant, non-prejudicial, and not misleading.[27]

V. Burdens of Proof and Objections

Petitioners bringing summary claims to Housing Court (nonpayment, holdover, HP (repair), Article 7A, illegal lockout, and harassment proceedings)[28] have the burden to prove their prima facie cases. Petitioners prove their prima facie cases if they prove the elements of a petition that states a cause of action. The petitioner's goal in submitting persuasive evidence to the court is to satisfy this burden.[29] If a litigant forgets to prove an element of the prima facie case, the judge might, in the court's discretion, let the party reopen the proceeding if the opposing side is not prejudiced. Once petitioners establish their prima facie cases, the burden of proof shifts to the respondent to assert defenses and affirmative defenses.[30]

If the respondent proves an affirmative defense, then the burden reverts to the petitioner to rebut, during its rebuttal case, that affirmative defense with evidence of its own.

A litigant must object to evidence it deems inadmissible to prevent its admission into evidence and to preserve for appeal the matter of its admissibility.[31] The objection must specifically state the grounds for objection—for example, hearsay.[32] If the court rejects a piece of evidence, the proponent of that evidence should make an offer of proof to protect the record on appeal.[33] An objection that is "sustained" means that the judge will not allow the question to be asked or will not admit the evidence. An objection that is "overruled" means that the witness must answer the question or that the judge will allow the evidence.

VI. Public Documents and Records

Public records are easy to introduce into evidence. Because public agencies must keep their original work, most public documents submitted to the court will technically be copies.[34] To be accepted into evidence, all copies of public documents must be certified by the agency producing the documents.[35] A certification is a statement or signature by the agency head or a designated employee that the documents are true copies of an agency's records.[36] That certification must be authenticated. Authentication provides minimum assurances that the evidence is what it purports to be and what its proponent claims it to be.[37] Most public documents contain an official seal that authenticates them.[38]

Once a public record has been certified, it is prima facie evidence of its contents.[39] If a copy of a public record is unsigned, someone at the public agency should be able to tell the litigant how to certify the record.[40] If a record cannot be certified, a living witness who recognizes the document may testify that it was made in the regular course of business contemporaneous with the event it records.[41]

Some examples of public documents that require certification and which are commonly brought to Housing Court are deeds to a building, Division of Housing and Community Renewal (DHCR) rent registrations, Multiple Dwelling Registration (MDR) statements, and New York City Housing Authority (NYCHA) Board determinations.[42]

The certification rule has some exceptions. Several public documents commonly introduced in Housing Court need not be certified. For example, MDR statements can be accessed on the court's computer and, if accessed this way, are admissible under Multiple Dwelling Law § 328(3) without certification as a judicially noticed fact.[43] It is in the judge's discretion whether to access the court's computer to look at an online MDR statement; landlords are advised to bring certified MDR statements to court in case the judge will not or cannot do so. Similarly, Department of Buildings (DOB) and Department of Housing Protection and Development (HPD) inspection or violation reports, which are available on government Web sites,[44] need not be certified. A printed, computerized record of a violation is prima facie evidence of the violation's existence; the absence of that record is prima facie evidence that no violation exists.[45]

All public records affecting real property, like maps or surveys, on file with the government for more than 10 years need no additional certification.[46] These "ancient documents" are prima facie evidence of their contents.[47]

Litigants not in possession of a relevant public record may subpoena it. A subpoena duces tecum is a legal document that directs someone, including a City, State, or Federal agency, to produce a written document or record in court.[48] Section 8, DOB, DHCR, Police Department, Fire Department, and Department of Social Service (DSS) records, among many others, can be subpoenaed.[49]

VII. Personal and Business Records

Litigants must be careful about hearsay evidence. Hearsay is evidence that cannot be cross-examined because it relies on the credibility of someone other than a witness or the document's proponent.[50] Many personal records fall into this category. Hearsay evidence is inadmissible to prove the truth of its contents[51] but admissible to prove its own existence.[52] For example, a tenant's personal record of apartment conditions is inadmissible to prove the conditions, but it might be admissible if offered to prove that the tenant notified the landlord to complain about the conditions.

There are many exceptions to hearsay. The business-record rule is a frequently raised exception in Housing Court. The business-record rule provides that business records, such as reports or memorandums, may be admitted into evidence in exception to the hearsay rule if they were prepared in the ordinary course of business.[53] The rule is designed to eliminate the requirement that those who entered, recorded, or compiled the information must testify. Instead, the record may be introduced through any responsible person from the same business or organization.

An electronic business record[54] is also admissible in the form of a tangible exhibit that is a true and accurate representation of the electronic record.[55] In determining whether the exhibit is a true and accurate representation, the court will consider how the electronic record was stored, maintained, and retrieved.[56] Many rent breakdowns or ledgers are computerized records created in the regular course of business and thus admissible under the business-record rule.[57] A rent breakdown is admissible if the landlord printed it or verified it as a true and accurate representation of the electronic version.[58]

The rationale to admit business records is that they are generally trustworthy.[59] Businesses depend on accurate record-keeping to function effectively.[60] The reliability of business records is enhanced by the routine, systematic, and repetitive circumstances under which they are made.[61]

Laying the foundation for a document as a business record does not relieve the proponent from authenticating it.[62] Determining a document's authenticity requires a holistic assessment of the record's reliability. Testimony, signature verification, and comparison to like documents are some of the ways to authenticate a business record.[63]

The business-record exception will not apply if there is good reason to doubt the record's reliability.[64] Here are eight common reasons to object to a document offered as a business record: (1) if the document is attributable to a non-employee and thus cannot be cross-examined;[65] (2) if the record was written in anticipation of litigation;[66] (3) if the document is a personal (non-business) record; (4) if the writing is a business record but received from another business entity; (5) if the document is an occasional memorandum that the business does not usually make; (6) if the record was not made contemporaneously with—meaning around the same time as—the event; (7) if the record is not intelligible on its face; and (8) if the record contains information not germane to the business.[67] All eight scenarios violate the requirement that a business record be made in the ordinary course of business.

Police reports are often offered as business records. In most cases, police reports do not qualify as business records; the witness providing the underlying information is either unidentifiable or not a Police Department employee.[68] If this is the case, the report loses its reliability as a business record; it cannot be cross-examined. A police report considered hearsay, even if certified, cannot prove the truth of its contents, but it can still be used as evidence of its own existence—to deflect a claim of recent fabrication, for example.

Tenants often bring money-order receipts to court to prove rent payments. These receipts

themselves are not proof of payment. They merely prove that the money order was purchased. Money order receipts are not business records. To prove payment, tenants should trace their money orders to see whether they were cashed and who cashed them.

VIII. Leases

A debate in the Housing Court community has arisen over whether a lease counts as a business record. Some argue that leases fit under the business-record exception to hearsay evidence because they are made in the normal course of business.[69] Others argue that a lease is a contract, not a record, and accordingly is neither hearsay nor a business record.[70] According to the latter position, the lease as contract is the very agreement of the transaction at issue, not an account of it. The latter position also posits that evidence, documentary or testimonial, is not hearsay when offered to establish that a promise or other statement was made.[71]

This debate is often academic. Regardless whether a lease is considered a business-record or a contract, original, authenticated leases are always admissible.

Whether a lease is a business record or a contract, it must be authenticated, meaning established as genuine.[72] A contract's proponent may authenticate it by (1) observing it being signed; (2) being familiar with the signature; (3) comparing it to an authenticated signature; or (4) proving its genuine character by circumstantial evidence (*e.g.*, the proponent sends the contract to the party to be bound and that party returns it signed, or the party to be bound relies on the contract). Only the signature of the party to be bound (the opponent) must be authenticated.[73] It is unnecessary for a handwriting expert to compare the signature to a prototype or exemplar. Any witness may authenticate a signature and express an opinion.

Housing Court judges disagree over whether a witness may authenticate a tenant's signature simply by reviewing and comparing other signatures in the tenant's file. Some judges allow that testimony, subject to the tenant's good-faith denial and cross-examination over whether the signature is the tenant's. Others allow that testimony only when the witness can successfully compare the signature at issue to an authenticated signature.

An old lease may be authenticated by the ancient-documents rule: "When a writing is thirty or more years old, is shown to be in the possession of the natural custodian, and is itself free from indications of fraud or invalidity, 'it proves itself;' that is, no other evidence of authenticity is necessary."[74]

Litigants may not say whatever they wish about the terms of a lease. The parol evidence rule forbids testimony that might add to or vary the terms of a written agreement intended to embody the parties' entire agreement.[75] Leases fall under this rule.

IX. Reproductions

For documents or pictures to be submitted into evidence successfully, litigants are

advised to bring the original and two copies to trial.[76] Originals[77] are always recommended due to the best-evidence rule, which provides that when the contents of a document are disputed, the original document must be introduced. This rule protects against perjury, fraud, inaccuracies, or mistakes in copying.[78] The best-evidence rule applies only when the contents of the writing are material to the issues in the case and when the proponent must prove the contents of the writing to establish a claim.[79]

Many exceptions to the best-evidence rule exist. A copy may be substituted for an original if the original's absence is sufficiently explained.[80] The proponent of the copy is under a "heavy burden" to prove good faith if the original was lost or destroyed.[81] Proof of a diligent search where the document was last known to have been kept and testimony of the person who last had custody of the original will prove good-faith loss.[82] The more important the document is to the case, the more strictly the court will require proof of good-faith destruction or loss.[83]

Several rules surround the proper submission of copies. To submit a copy as prima facie evidence, the copy's proponent must establish that it was made (1) in the regular course of business and (2) by a reliable reproduction process.[84] These copies will suffice as evidence, even if the original copy is unavailable.[85] A reliable reproduction process is one that does not permit additions, deletions, or modifications without leaving a record of the changes.[86] Copies prepared specifically for litigation are inadmissible. They are not made in the regular course of business.[87] Also, "[a]n admission as to the correctness of a copy or a concession that the contents of a writing are as the opponent claims them to be, when made by the adversary on the witness stand, dispenses with the need for producing the original regardless of its availability."[88]

Tenants should bring to court copies of correspondence with landlords, superintendents, or government agencies regarding problems with their apartments.[89] When correspondence has been exchanged, tenants should, if they can, bring proof that the correspondence was mailed and received.[90]

Electronic data are admissible as evidence with the proper foundation.[91] Reproductions and copies like facsimiles and computer-generated records are admissible without the original if the reproduction process did not alter the record and if the record is authenticated.[92] For example, a computer printout is admissible into evidence "so long as the original entry of the data was at least in part for a purpose other than to prepare for litigation."[93] Internet printouts such as printed e-mails or monitor displays are admissible into evidence as electronic records.[94] Electronic records like facsimiles and e-mails are authenticated if they include electronic receipts from a reputable source (date, time, and telephone/fax number or e-mail address).[95] Or a proponent may authenticate a facsimile or e-mail by showing that it contains information known only to the sender, that it responds to prior communication from the recipient to the sender, or that the sender took action consistent with the content of the document after it was sent.[96]

Copies of copies qualify as prima facie evidence if the originals or qualifying reproductions are available for the court's inspection.[97] The same is true for enlargements and facsimiles.[98]

X. Photographs

Photographs can be excellent evidence in Housing Court. Tenants often submit photographs of their apartment's condition. Landlords often submit photographs of people entering and leaving apartments in illegal sublet, nonprimary-residence, and drug-holdover proceedings, among others.

Photographs taken during the regular course of business and contemporaneous to the event they record are admissible under the business-record rule.[99] Otherwise, to admit a photograph or other picture into evidence, someone must verify that it is a fair and accurate representation of the scene or object depicted.[100] The proponent of the photograph may attest to its accuracy,[101] or any other witness familiar with the scene depicted may lay the necessary foundation. The witness need not have taken the photograph or even have been present when the photograph was taken.[102] A photograph's proponent must also show that it is unlikely that the photograph is distorted, technically inaccurate, or portrays a different scene.[103]

When a witness can verify that a photograph accurately represents the scene as it appeared on the given day, the photograph is considered demonstrative evidence. It is a visual aid that assists in presenting and interpreting the testimony.[104] The burden of proof to verify the photograph is low for mere demonstrative evidence. Housing Court judges will use their discretion to assess the sufficiency of the foundation laid.[105]

If a verifying witness can attest only vaguely to the accuracy of the scene portrayed or if no verifying witness is available, the photograph is considered substantive evidence. The photograph is its own witness for the scene being depicted. In this scenario, the photograph is entered into evidence on the silent-witness theory: The photograph is authenticated by showing—through written evidence or testimony—the reliability of the process of producing the evidence and by proof that the evidence was not altered.[106] An appropriate witness would be an operator, installer, or maintainer, expert or otherwise, of the recording equipment used.[107] Proper testimony for laying the foundation on the silent-witness theory includes (1) the manner of loading the film into the camera, (2) how the camera system works and is activated, (3) how the film was removed, (4) how the film was handled afterward, and (5) whether the process produces reliable results.[108]

When a photograph is submitted as substantive evidence, the burden of proof is much higher than for demonstrative evidence. The reason is that the photograph stands on its own as evidence—there is no corroborating testimony. A photograph should not be admitted as substantive evidence unless the Housing Court judge is "relatively certain" or "convinced" of its accuracy and authenticity.[109] If possible, the photograph's date should be established.[110]

XI. The Photoshop Era

Many computer programs can change the appearance of a captured image.[111] Using a

software program like Adobe Photoshop, a photograph's proponent can focus the court's attention on a particular area of a photograph or enhance or modify a detail not otherwise noticeable.[112]

The law surrounding the admissibility of digitally enhanced or modified photographs is unsettled.[113] To be safe, proponents of a digitally enhanced or modified photograph should follow Rule 901 of the Federal Rules of Evidence.[114] Rule 901 requires proof that

> (1) the computer equipment is accepted in the field as standard and competent and was in good working order, (2) qualified computer operators were employed, (3) proper procedures were followed in connection with the input and output of the information, (4) a reliable software program was utilized, (5) the equipment was programmed and operated correctly, and (6) the exhibit is properly identified as the output in question.[115]

To satisfy these evidentiary requirements, proponents of a digitally modified photograph in Housing Court should (1) give opposing counsel notice of the enhanced photograph, (2) maintain an original version of the enhanced photograph, (3) keep a log of any enhancement made to the photograph, (4) employ qualified personnel, (5) use reliable software, and (6) preserve the equipment used.[116]

XII. Video/Audio

The admissibility of videotapes and audiotapes is within the court's discretion based on whether the proponent has laid a proper foundation.[117] Proponents of video and audiotapes must "show that the tape is a true, authentic and accurate representation of the event taped without any distortion or deletion before the videotape is admissible."[118] Authentication may be proven two ways: (1) by testimony about the accuracy of the recording by an eyewitness who both saw the event and viewed the recording or (2) under the silent-witness theory by proving that the recording was made a reliable process and was not altered. Both methods are described more fully above in section X (Photographs).[119]

In determining admissibility, the judge will also consider whether the content is relevant, whether the probative value substantially outweighs any prejudice, whether the recording duplicates evidence already admitted, and whether the video contains hearsay.[120] The issue of the video's chain of custody goes to the weight of the evidence, not to its admissibility.[121]

The testimony of a person who watched a tape when the tape itself is unavailable is inadmissible under the best-evidence rule.[122] Given the complex and detailed nature of videotape footage, the testimony of witnesses who merely watched a tape would only be a summary of this interpretation of the tape and not a reliable and accurate portrayal of the tape.[123]

XIII. Witness Testimony

In Housing Court as elsewhere, litigants may testify or call witnesses to testify on their behalf. Sworn testimony, including the litigant's, is admissible as evidence.[124] Witnesses may testify in person before the court if they can remember and report in a reasonably accurate manner the events about which they testify.[125]

Witnesses must have observed relevant events with their five senses (seeing, hearing, smelling, tasting, and touching) or be experts whose special knowledge and experience qualify them to offer their opinion.[126] The basis for an expert's opinion must reflect a reasonable degree of certainty and a low measure of speculation or guesswork.[127] In New York State courts, an expert witness's testimony is admissible if (1) the fact-finder needs the expert to understand the evidence or determine a disputed fact,[128] (2) if the proponent shows that the witness is an expert in a particular area, (3) if the opposing party has an opportunity to conduct a voir dire to contest the proposed expert's qualifications, and (4) if the judge declares the witness an expert.[129] Expert-opinion evidence must be based on facts in the record, personally known to a witness, derived from a professionally reliable source, or from a witness subject to cross-examination.[130] Admitting expert opinion testimony falls within a trial judge's sound discretion.[131] The judge need not accept the expert's testimony.[132] The credibility of the expert's testimony, the accuracy of the expert's testimony, and what weight should be given to the expert's testimony are for the Housing Court judge to decide.

An opponent may impeach a witness by proving that the witness made a prior inconsistent statement orally, in writing, or under oath.[133] The inconsistent statement must "afford some indication that the fact was different from the testimony of the witness whom it sought to contradict."[134] The opponent must lay the same proper foundation for the prior inconsistent statement as for any other piece of evidence.[135] Prior inconsistent statements are admissible only for witness credibility. They are otherwise inadmissible as evidence.[136]

Similar to prior inconsistent statements are extrajudicial admissions. An extrajudicial admission is a statement made outside of testimony that, unlike a prior inconsistent statement, is admissible on its own as evidence. If the extrajudicial admission contradicts sworn testimony, the fact-finder may choose to believe the authorized admission over the testimony.[137]

Some litigants will want to submit copies of personal documents like journal entries of an apartment's condition or dates and times of complaints filed to corroborate their testimony. These prior consistent statements are inadmissible; they cannot be cross-examined. They can, however, be used to contradict a claim of recent fabrication.

Testifying witnesses may briefly look at a document to refresh their recollection, as long as they do not read from it.

An opponent may object when the witness's proponent asks leading questions, which, with exceptions, are prohibited on direct examination.[138] A leading question is one that assumes a fact not in evidence or which suggests facts in an answer.[139] Often these questions are long or

require a "yes" or "no" answer.[140] Sometimes a question may suggest an answer merely by the tone of voice in which it is asked.[141] Leading questions are permitted on direct examination for preliminary matters, examining an adverse or hostile witness, and questioning children, the elderly, and the mentally impaired.[142] Trial judges have substantial discretion to allow leading questioning.[143] Taking together these exceptions, the lack of a jury, the judge's ultimate discretion, and the number of pro se litigants, Housing Court judges are more apt than some other judges to allow leading questioning.[144]

An opponent may object if a question has already been asked and answered.[145] Repeating a question is permissible if doing so does not unnecessarily prolong a trial.[146] But if the repetition badgers the witness or encourages inconsistent answers, the Housing Court judge might sustain the objection.[147] In addition, an opponent may object if counsel argues with or badgers a witness.[148]Arguing with or badgering a witness is an improper attempt to change the witness's testimony[149] and an improper attempt to give unsworn testimony.[150]

The Dead Man's Statute[151] prevents interested parties from testifying at trial against an estate.[152] Parties should not be allowed to testify about their version of a communication or transaction when their adversary can no longer speak due to death or mental illness.[153] The party raising the Dead Man's Statute objection has the burden to prove that the witness's testimony would violate Statute's strict parameters.[154]

Some communications are confidential and legally protected from disclosure.[155] Privileged communications recognized in New York include those between attorney and client,[156] physician and patient,[157] social worker and client,[158] priest and penitent,[159] and spouses,[160] among others. Although the privilege extends protection to communications, it does not protect facts; the court may compel laypersons to testify about facts they know, even if they were stated during a privileged communications.[161] To protect documents from disclosure, litigants may compile a privilege log to aid the court to assess a privilege claim.[162] As the Court of Appeals has explained, "[t]he log should specify the nature of the contents of the documents, who prepared the records and the basis for the claimed privilege."[163]

New York courts permit, but do not require, the trier of fact to draw an adverse, or negative, inference against a party who exercises a privilege. An inference is a conclusion a judge may draw from facts admitted in evidence about a matter material to the case.[164] An adverse inference allows a judge to presume, as much as the record allows, that the missing testimony would be unfavorable to the side claiming the privilege.[165] Adverse inferences may be drawn from a party's asserting the Fifth Amendment privilege against self-incrimination in a civil action[166] or from a party's refusal to testify absent any privilege.[167] A negative inference can also arise when a party fails to call a relevant or important witness within its control.[168] The court will refuse to draw an adverse inference if there is a compelling reason why the party did not testify, such as a mental or physical infirmity.[169]

In Housing Court, evidence of character or reputation is inadmissible to prove that witnesses acted in conformity with their character on a particular occasion.[170] Character evidence

may be used, however, to establish something other than conforming conduct, such as when the character of the witness is itself an essential element of the accusation or defense.[171] In Housing Court, character evidence may also be admitted if it pertains to the witness's reputation for truthfulness.[172] Likewise, testimony about extrinsic acts is admissible only for purposes other than proving the witness's propensity to commit similar acts.[173]

A signed and notarized statement cannot replace live testimony[174] except in specific circumstances.[175] Litigants unable to convince a witness to appear voluntarily may ask the court to sign a subpoena before the trial date.[176] A subpoena ad testificandum is a legal document that commands the person named in the subpoena to appear in court to testify.[177] An expert witness cannot be compelled to testify by subpoena, but a litigant may pay the expert witness to come to court to testify.[178]

XIV. Pro Se Litigants

Most tenants in Housing Court and many landlords, too, are unrepresented, pro se litigants.[179] Many pro se litigants do not even understand the adversary system,[180] let alone the rules of evidence, and are at a great disadvantage litigating against experienced attorneys.[181] A debate exists about whether and to what extent Housing Court judges should take an active role to assist pro se litigants. Scholars have noted the judge's dilemma:

> If the judge does *not* intervene on behalf of the unrepresented litigant, the party may be unable to present evidence supporting its position and manifest injustice may result. If the judge *does* intervene, he or she may be violating the duty of impartiality and denying the represented party the benefit of retained counsel.[182]

A growing number of professionals believe that judges must assist pro se litigants to level the playing field and assure equal access to justice for all.[183] Proponents of this view argue that Housing Court judges must help pro se litigants introduce evidence by explaining the necessary foundational elements and by telling them how witnesses can testify about the contents of that evidence.[184] Before trials or hearings, the judge might ask pro se litigants whether they have the evidence they need and help them get the evidence or a subpoena.[185] This might require adjourning the proceeding to give the pro se litigant time to obtain and review evidence.[186]

To assist pro se litigants, most Housing court judges allow pro se litigants to testify in narrative form[187] and then ask them questions to navigate their story.[188] Although lawyers should not let their witnesses testify in the narrative, witnesses not questioned by lawyers may testify in the narrative. So long as a pro se litigant's narrative is mostly relevant and not abusive, the judge will accept the narrative for what it is worth, even if some portions of the pro se litigant's testimony are inadmissible.[189]

Most judges will also use their discretion to adjust courtroom procedure to stop a lawyer from engaging in a barrage of interruptions or objections.[190]

Housing Court judges must follow the rules of evidence for reliability, but they may use their discretion to overrule objections on technical matters.[191] If judges sustain a represented party's evidentiary objections, they can explain to the pro se litigant the objection and articulate the reason for and the consequences of their ruling.[192]

Housing Court judges often raise and sustain their own objections if a lawyer on the other side offers inadmissible evidence or asks inadmissible questions to which the pro se litigant does not object.

The goal for all Housing Court judges, regardless how they handle cases involving pro se litigants, is to ensure that the process produces for all litigants a consistent, honest outcome based on the law, the facts, and the merits, whether or not a party has a lawyer.[193]

XV. Final Thoughts About Admissibility and Weight

Even if a litigant is unable to lay the proper foundation to admit documents, the litigant should still bring the documents to court. Inadmissible evidence can be used at different phases of a case, such as during settlement discussion with an adversary. Questionable foundational elements like missing proof of authenticity can affect the document's weight, but not its admissibility.[194] Even when a proper foundation is laid and documents or testimony are admitted into evidence, the court need not give any more weight to that evidence than it deems proper.[195] Reversal for evidentiary error on appeal is rare due to the harmless-error rule, "which provides that appeals from evidentiary rulings will fail 'unless a substantial right of the party is affected.'"[196] Under the harmless-error doctrine, a trial judge's decision will be affirmed if the judge made only a small mistake that did not affect the correctness of the ultimate ruling. Appellate courts often defer to trial judges because evidentiary rulings are usually case-specific and often involve assessing a witness's demeanor or tone. Appellate deference also limits appellate issues and prevents parties from re-litigating their cases in their entirety on appeal.

VII. Conclusion

Housing Court is a court of law. Judges and attorneys who practice there must follow all New York State rules of evidence. Housing Court litigants should familiarize themselves with these evidentiary rules before arriving in court for a hearing or trial. Laying the proper foundation for a piece of evidence will ensure that proof is accepted, admitted, credited, and given the appropriate weight. Learning when to object to evidence will ensure that inadmissible evidence is excluded. Housing Court judges have great discretion in admitting or denying evidence presented to them, but litigants must do their part to offer evidence that is relevant, accurate, authentic, and non-prejudicial.

---

[1] Uniform Rules for N.Y. St. Trial Courts, Pt. 208: Uniform Civil Rules for the N.Y. City Civ. Ct., *available at* http://www.nycourts.gov/rules/trialcourts/208.shtml#43 (last viewed July 10,

2009).
[2] Helen E. Freedmen, New York Objections: Trial Practice, Tips, and Cases § 9:30, at 9-2 (James Publishing Inc. 2008).
[3] Robert A. Barker & Vincent C. Alexander, Evidence in New York State and Federal Courts § 4:2, at 142 (West Publishing 2001) ("'In New York, the general rule is that all relevant evidence is admissible unless its admission violates some exclusionary rule. . . . Evidence is relevant if it has any tendency in reason to prove the existence of any material fact, i.e., it makes determination of the action more probable or less probable than it would be without the evidence.' . . . Thus, there are two broad factors to consider: probability and exclusionary factors.") (quoting *People v. Scarola*, 71 N.Y.2d 769, 525 N.E.2d 728, 530 N.Y.S.2d 83 (1988)).
[4] Freedmen, *supra* note 2, at § 9:70, at 9-4; Harold Baer, Jr., Federal Rules of Evidence and their New York State Parallels § 403, at 8 (Practicing L. Inst. 1986).
[5] A judicially noticed fact is one not subject to reasonable dispute. It may be accepted at any stage of the action or proceeding. David M. Epstein & Glen Weissenberger, New York Evidence: 2009 Courtroom Manual 27 (LexisNexis 2009).
[6] Richard T. Farrell, Prince, Richardson on Evidence § 4-301, at 155 (11th ed., Brooklyn Law School 1995).
[7] *Id.* at 156.
[8] *Id.* An example is direct evidence is the testimony of a witness who saw drops of water falling from the sky toward earth. An example of indirect evidence is the testimony of a witness who saw people walking around with umbrellas and saw puddles on the ground. A proponent of either form of evidence will argue in summation that it was raining.
[9] Epstein & Weissenberger, *supra* note 5, at § 15:20, at 15-3.
[10] Magaret Cammer, *How to Prepare for a Landlord-Tenant Trial* 2-3 (N.Y. City Civ. Ct., May 2006), *available at* http://www.courts.state.ny.us/publications/L&TPamphlet.pdf (last viewed July 10, 2009).
[11] *Spigel v. Gonzalez*, 6 Misc. 3d 564, 566, 789 N.Y.S.2d 840, 840 (Civ. Ct. Kings Co. 2004). Only Richmond County has a combined trial and resolution part: Part Y. All other counties distinguish between resolution and trial parts.
[12] *Id.*
[13] *Id.*
[14] *Black's Law Dictionary* 1038 (8th ed. 2004).
[15] *Spigel*, 6 Misc. 3d at 566, 789 N.Y.S.2d at 840.
[16] *Black's Law Dictionary* 1038 (8th ed. 2004).
[17] *Id.*
[18] Epstein & Weissenberger, *supra* note 5, at 49.
[19] *Id.*
[20] *See id.* at 59-60.
[21] *Id.* at 49.
[22] *Black's Law Dictionary* 595 (8th ed. 2004).
[23] *See Powers v. Powers*, 86 N.Y.2d 63, 69, 653 N.E.2d 1154, 1157, 629 N.Y.S.2d 984, 987 (1995) (holding that respondent failed to meet his burden of going forward to rebut his ex-wife's prima facie case); Barker & Alexander, *supra* note 3, at § 3:5, at 82, and § 3:18, at 105; Michael

M. Martin, Daniel J. Capra & Faust R. Rossi, *New York Evidence Handbook* § 8.3.3.8, at 780 (2d ed. 2003).
[24] Warren A. Estis & William J. Robbins, *Evidentiary Issues in Landlord-Tenant Proceedings* 9 (unpublished outline for Summer Jud. Sem., N.Y. St. Jud. Inst. 2005).
[25] Freedmen, *supra* note 2, at § 9:20, at 9-2.
[26] *Id.* at § 9:20, at 9-2, and § 11:10, at 11-1.
[27] *Id.* at § 13:30, at 13-2.
[28] Fern A. Fisher, *A Landlord's Guide to the New York City Housing Court*, N.Y.C. Civ. Ct. 3-4 (Oct. 2003), *available at* http://www.nycourts.gov/courts/nyc/housing/pdfs/Landlordbooklet.pdf (last viewed July 10, 2009).
[29] Paul F. Rothstein, Myrna S. Raeder & David Crump, Evidence in a Nutshell: State and Federal Rules 47 (3d ed. West Publishing Co. 1997).
[30] *Id.*
[31] Epstein & Weissenberger, *supra* note 5, at 9.
[32] *Id.*
[33] *Id.*
[34] *See* Edith L. Fisch, Fisch on New York Evidence § 89, at 55, and § 108, at 66 (Lond Publications 1977) (1959).
[35] Cammer, *supra* note 10, at 2; *see also* N.Y. C.P.L.R. 4518(c).
[36] Cammer, *supra* note 10, at 2; Fisch, *supra* note 34, at § 109, at 67; *see* N.Y. C.P.L.R. 4518(c)
[37] Rothstein et al., *supra* note 29, at 619.
[38] Estis & Robbins, *supra* note 24, at 7.
[39] N.Y. C.P.L.R. 4538 & R. 4518(c); *e.g.*, *Barcher v. Radovich*, 183 A.D.2d 689, 690, 583 N.Y.S.2d 276, 278 (2d Dep't 1992) (finding that Department of Housing Preservation and Development certified records are admissible as business records in tenant's suit for breach of warranty of habitability and that no separate authenticating witness is necessary to prove that documents are business records kept in the regular course of business); *Story v. Brady*, 114 A.D.2d 1026, 1026, 495 N.Y.S.2d 464, 465 (2d Dep't 1985) (finding that copy of separation agreement is admissible to prove terms of agreement, when husband acknowledged he executed separation agreement, the original of which was on file with the county clerk's office).
[40] Cammer, *supra* note 10, at 2.
[41] Freedmen, *supra* note 2, at § 11:30, at 11-10.
[42] *Id.*
[43] Gerald Lebovits, *HP Proceedings: A Primer*, Legal Update for Judges & Court Attorneys 69 (May 15, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1299746. For some Housing Court cases that allowed Internet resources into evidence, see *Schanzer v. Vendome*, 11 Misc. 3d 1061(A), 2006 WL 617978, 2006 N.Y. Slip Op. 50339(U), at*7-8 (Civ. Ct. N.Y. Co. Feb. 20, 2006) (Gerald Lebovits, J.); *Goldman v. Rosen*, 8 Misc. 3d 1020(A), 803 N.Y.S.2d 18, 2005 WL 1796479, 2005 N.Y. Slip Op. 51206(U), at*5 (Civ. Ct. N.Y. Co. July 29, 2005) (Gerald Lebovits, J.); *Glorius v. Siegel*, 5 Misc. 3d 1015(A), 798 N.Y.S.2d 709, 2004 WL 2609413, 2004 N.Y. Slip Op. 51378(U), at *4 (Civ. Ct. N.Y. Co. Sept. 15, 2004) (Gerald Lebovits, J.).
[44] *See* NYC Department of Buildings, *Building Information Search*, *available at* http://a810-

bisweb.nyc.gov/bisweb/bispi00.jsp (last viewed July 10, 2009); Department of Housing, *Preservation, and Development, Complaints, Violations and Registration Information*, *available at* http://www.nyc.gov/html/hpd/html/home/home.shtml (last viewed July 10, 2009).
[45] Lebovits, *supra* note 43, at 69-70; *see*, *e.g.*, *Hoya Saxa Inc. v. Gowan*, 149 Misc. 2d 191, 192, 571 N.Y.S.2d 179, 179 (App. Term 1st Dep't 1991) (citing MDL § 328(3) and holding that trial court erroneously refused to accept the computerized list of violations tenant proffered).
[46] N.Y. C.P.L.R. 4522.
[47] *Id.*
[48] Subpoenas, N.Y. City Civ. Ct., Hous. Part, *available at* http://nycourts.gov/courts/nyc/housing/subpoenas.shtml (last viewed July 10, 2009).
[49] *Id.*
[50] *Black's Law Dictionary* 739 (8th ed. 2004).
[51] Fisch, *supra* note 34, at § 757, at 448.
[52] *Id.* at § 757 at 449.
[53] *Black's Law Dictionary* 212 (8th ed. 2004); *see also* Fed. R. Evid. 803(6).
[54] Electronic business records are defined in section 302 of the New York State Technology Law. *See* N.Y. C.P.L.R. 4518(a).
[55] N.Y. C.P.L.R. 4518(a). The tangible version of an electronic record offered into evidence can have been specifically produced for litigation purposes if the original data was at least in part for a purpose other than to prepare for litigation. Estis & Robbins, *supra* note 24, at 5-6 (citing Martin et al., *supra* note 19, at § 8.3.3.8, at 773).
[56] N.Y. C.P.L.R. 4518(a).
[57] Examples of cases in which rent breakdowns were accepted into evidence or requested by the court: *A & E Tiebout Realty, LLC v. Johnson*, 23 Misc. 3d 1112(A), 2009 WL 1037741, 2009 N.Y. Slip Op. 50715(U) (Civ. Ct. Bronx Co. April 17, 2009); *Classon Village LP v. Bethune*, 15 Misc. 3d 139(A), 841 N.Y.S.2d 819, 2007 WL 1438731, 2007 N.Y. Slip Op. 50995(U) (App. Term 2d Dep't May 14, 2007); *Art Omi, Inc. v. Vallejos*, 15 Misc. 3d 870, 832 N.Y.S.2d 915 (Civ. Ct. N.Y. Co. 2007) (Gerald Lebovits, J.), *aff'd*, 21 Misc. 3d 129(A), 873 N.Y.S.2d 231, 2008 N.Y. Slip Op. 52012(U) (App. Term 1st Dep't Oct 8, 2008).
[58] N.Y. C.P.L.R. 4518(a).
[59] *People v. Kennedy*, 68 N.Y.2d 569, 578, 503 N.E.2d 501, 507, 510 N.Y.S.2d 853, 859 (1986).
[60] *Id.*
[61] *Id.*
[62] *See* Lucy Billings, *Frequent Evidentiary Issues in Landlord-Tenant Proceedings* 2 (unpublished outline for Summer Jud. Sem., N.Y. St. Jud. Inst. 2002). Cases in which a foundation for a business record was laid and the evidence was admissible because it also was authenticated: *Fanelli v. Lorenzo*, 187 A.D.2d 1004, 1005, 591 N.Y.S.2d 658, 658 (4th Dep't 1992); *Freeman v. Kirkland*, 184 A.D.2d 331, 332, 584 N.Y.S.2d 828, 828 (1st Dep't 1992). Cases in which a foundation for a business record was laid and the evidence was inadmissible because it was not authenticated: *People v. Michallow*, 201 A.D.2d 915, 916-17, 607 N.Y.S.2d 781, 781 (4th Dep't 1994); *Wilson v. Bodian*, 130 A.D.2d 221, 233, 519 N.Y.S.2d 126, 126 (2d Dep't 1987).
[63] *See* Fed. R. Evid. 901(7).

[64] *Black's Law Dictionary* 212 (8th ed. 2004); *see also* Fed. R. Evid. 803(6).
[65] Ralph Yachnin, The Business Record Rule—C.P.L.R. 4518(a) Worth Learning and Never Forgetting, N.Y.L.J. May 30, 1995, at 1, col. 1.
[66] *See Black's Law Dictionary* 212 (8th ed. 2004); *see also* Fed. R. Evid. 803(6).
[67] Yachnin, *supra* note 65.
[68] *E.g.*, *Johnson v. Lutz*, 253 N.Y.124, 128, 170 N.E. 517, 517 (1930); *People v. Bayard*, 63 A.D.3d 481, 481, 881 N.Y.S.2d 58, 59-60 (1st Dep't 2009) (holding that police report based entirely on information provided by unidentified officer was insufficiently reliable to be received in evidence because it was unclear which witness or witnesses provided underlying information or whether report was composite of information received from two or three witnesses); *Noakes v. Rosa*, 54 A.D.3d 317, 862 N.Y.S.2d 573 (2d Dep't 2008) (finding that the police report should not have been admitted into evidence as a business-record exception to the hearsay rule because the statement in the report that the defendant "rear-ended" the plaintiff was from an unknown source); *Behrman v. Geratowski*, 2009 WL 1587191, 2009 N.Y. Slip Op. 51110(U), at *7 (Sup. Ct. N.Y. Co. May 11, 2009) (holding that uncertified police reports are inadmissible to indicate a party's liability if the police officer who prepared the report was not an eyewitness to the accident).
[69] *See* Estis & Robbins, *supra* note 24; *see, e.g.*, *Tuscan Realty Corp. v. O'Neill*, 189 Misc. 2d 349, 351, 731 N.Y.S.2d 830, 830 (App. Term 2d Dep't 2001) ("[T]his Court is of the opinion that the lease in question, based on the testimony of the witnesses for petitioner, should have been admitted as a business record exception to the hearsay rule.").
[70] *See, e.g.*, Billings, *supra* note 62, at 1.
[71] *Id.* (citing *People v. Clark*, 95 N.Y.2d 773, 775, 731 N.E.2d 1105, 1105, 710 N.Y.S.2d 297, 297 (2000); *People v. Davis*, 58 N.Y.2d 1102, 1103, 449 N.E.2d 710, 462 N.Y.S.2d 816 (1983); *People v. Cook*, 115 A.D.2d 240, 241, 496 N.Y.S.2d 175, 175 (4th Dep't 1985)).
[72] Fisch, *supra* note 34, at § 101 at 61.
[73] *See* Billings, *supra* note 62, at 4 (internal citations omitted).
Farrell, *supra* note 6, at § 3-124, at 74; *accord* Edith L. Fisch, Fisch on New York Evidence § 84, at 52, and § 105, at 63.
[75] Freedmen, *supra* note 2, at § 12:10, at 12-1.
[76] Tips for Your Day in Court. N.Y. City Civ. Ct. Hous. Part, *available at* http://www.courts.state.ny.us/courts/nyc/housing/tips.shtml (last viewed July 10, 2009).
[77] "To a large extent the determination of what constitutes the original of a telegram depends on the parties to the action." Fisch, *supra* note 34, at § 86, at 53. The definition of "original" is broader in New York than in federal court. In New York, a duplicate made in the regular course of business is considered an original because it is sufficiently trustworthy. Baer, *supra* note 4, at 42 (citing N.Y. C.P.L.R. 4539).
[78] Freedmen, *supra* note 2, at § 11:20, at 11-2; Fisch, *supra* note 34, at § 81, at 49. New York courts have been reluctant "to indulge in technicalism in connection with proof of the contents of writings that are not genuinely disputed." Fisch, *supra* note 34, at § 97, at 60. As a consequence, the best-evidence rule is today more of a shaping principle. *Id.*
[79] Freedmen, *supra* note 2, at § 11:20, at 11-2.
[80] *Id.* (citing *Schozer v. William Penn Life Ins. Co. of N.Y.*, 84 N.Y.2d 639, 644 N.E.2d 1353, 620

N.Y.S.2d 797 (1994)).
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] N.Y. C.P.L.R. 4539(a-b); *Bell Atlantic Yellow Pages v. Havana Rio Enterprises*, 184 Misc. 2d 863, 867, 710 N.Y.S.2d 751, 751 (Civ. Ct. N.Y. Co. 2000); *People v. Roach*, 226 A.D.2d 55, 55, 649 N.Y.S.2d 607, 608 (4th Dep't 1996) (allowing copies, rather than the original documentation of a breathalyzer's accuracy, into evidence because the copies were made in the regular course of business).
[85] *Id.*
[86] N.Y. C.P.L.R. 4539(b).
[87] *Toho Bussan Kaisha, Ltd. v. Am. President Lines Ltd.*, 265 F.2d 418, 423 (2d Cir. 1959); *see* N.Y. C.P.L.R. 4539(a).
[88] Fisch, *supra* note 34, at § 94, at 59.
[89] A Tenant's Guide to the New York City Housing Court, Ass'n B. City N.Y. Hous. Ct. Public Service Projects Committee and the Civ. Ct. of the City of N.Y. 9 (Feb. 2006), *available at* http://www.nycourts.gov/courts/nyc/housing/pdfs/tenantsguide.pdf (last viewed July 10, 2009).
[90] *Id.*
[91] *See generally* Freedmen, *supra* note 2, at § 11:20, at 11-2 (citing N.Y. C.P.L.R. 4539).
[92] *Id.*
[93] Estis & Robbins, *supra* note 24, at 6 (citing Martin et al., *supra* note 19, at § 8.3.3.8, at 773).
[94] Adam Leitman Bailey & Colin E. Kaufman. Harnessing the Internet: Must-know, Useful Web Sites for Real Estate Lawyers, *available at* http://www.alblawfirm.com/news/article.php?id=180 (last viewed July 10, 2009). ("The theory of admissibility rests on Multiple Dwelling Law § 328(3), C.P.L.R. 4518(a) and on New York State Technology Law §§ 305(3) and 306, which provide for the admissibility of authenticated electronic records and printouts in New York courts. The Federal Rules of Evidence § 1001(1) also indicates that a 'writing' includes electronic data."). Cases in which Internet printouts and printed e-mails have been allowed into evidence: *Marro v. Nicholson*, 2008 WL 699506 (E.D.N.Y. Mar. 12, 2008); *United States. v. Reiner*, 468 F. Supp. 2d 393 (E.D.N.Y. 2006); *Varnelo v. Eastwind Transport Ltd.*, 2006 WL 1317026 (S.D.N.Y. May 10, 2006).
[95] Randolph N. Jonakait et al., New York Evidentiary Foundations 132-39 (Lexis Law 1998).
[96] *Id.*
[97] *See Advanced Magnetic Closures, Inc. v. Rome Fastener Corp.*, 2007 WL 1552395 (S.D.N.Y. May 29, 2007); *Ochoa v. Walton Management LLC*, 19 Misc. 3d 1131(A), 2008 WL 1991486, 2008 N.Y. Slip Op. 50960(U) (Sup. Ct. Bronx Co. May 7, 2008); *Graham v. City of N.Y.*, 14 Misc. 3d 1234(A), 836 N.Y.S.2d 499, 2007 N.Y. Slip Op. 50299(U) (Sup. Ct. Kings Co. Feb. 26, 2007).
[98] N.Y. C.P.L.R. 4539(a-b).
[99] *Corsi v. Town of Bedford*, 58 A.D.3d 225, 230-31, 868 N.Y.S.2d 258, 262 (2d Dep't 2008).
[100] 23 C.J.S. *Criminal Law* § 1408, at 381 (2009); Freedmen, *supra* note 2, at § 10:10 at 10-1; *see generally* Computer Technology in Civil Litigation, 71 Am. Jur. *Trials* 111 (2009); *People v. Clarke*, 286 A.D.2d 208, 209, 729 N.Y.S.2d 88, 88 (1st Dep't 2001) (suppressing photograph for

lack of foundation because proponent offered no proof that co-defendant had ever seen it before the homicide).
[101] 23 C.J.S. *Criminal Law* § 1408, at 381 (2009).
[102] *Id.*; Freedmen, *supra* note 2, at § 10:10, at 10-1; *accord Kleveland v. United States*, 345 F.2d 134, 137 (2d Cir. 1965).
[103] 23 C.J.S. *Criminal Law* § 1408, at 382.
[104] *Id.*
[105] *See id.*
[106] *Black's Law Dictionar*y 1416 (8th ed. 2004).
[107] Farrell, *supra* note 6, at § 4-214, at 86 (2008 Supp.) (citing *People v. Patterson*, 93 N.Y.2d 80, 84-85, 710 N.E.2d 665, 688 N.Y.S.2d 101, 1999 N.Y. Slip Op. 02770 (1999)).
[108] Jonakait et al., *supra* note 95, at 101.
[109] 23 C.J.S. *Criminal Law* § 1408, at 382.
[110] *Id.*
[111] James M. Campbell, *Evidentiary Requirements for the Admission of Enhanced Digital Photographs*, 74 Def. Couns. J. 12, 13 (Jan. 2007).
[112] *Id.* at 14.
[113] *Id.* at 20-21.
[114] *Id.* at 17.
[115] *Id.* at 17; *accord* Fed. R. Evid. 901.
[116] *Id.* at 18-20.
[117] Estis & Robbins, *supra* note 24, at 1.
[118] *Id.* at 3 (citing *City of N.Y. v. Prophete*, 144 Misc. 2d 391, 544 N.Y.S.2d 441 (Civ. Ct. N.Y. Co. 1989)).
[119] Farrell, *supra* note 6, at § 4-214, at 86 (2008 Supp.); Jonakait et al., *supra* note 95, at 92-96, 101-03.
[120] Estis & Robbins, *supra* note 24, at 1.
[121] *Id.* at 1.
[122] *See id.* at 2 (citing *People v. Jiminez*, N.Y.L.J., June 13, 2005, at 20, col. 1 (Sup. Ct. Bronx Co. 2005) ("[T]he best evidence rule precludes a witness from testifying to an altercation he observed on a surveillance videotape in the absence of the tape" because due to the nature of videotape footage the witness's testimony "would be no more than a summary of his interpretation of what he had seen on the tape and not a reliable and accurate portrayal of the original.")).
[123] *Id.* at 2.
[124] Cammer, *supra* note 10, at 2.
[125] *Id.*; Freedmen, *supra* note 2, at § 14:20, at 14-3; Baer, *supra* note 4, at 15.
[126] *Id.*
[127] Freedmen, *supra* note 2, at § 16:20 at 16-5.
[128] Baer, *supra* note 4, at Rule 702, at 24.
[129] Freedmen, *supra* note 2, at § 16:30, at 16-6; *see, e.g.*, A-*Tech Concrete Co., Inc. v. Tilcon New York, Inc.*, 60 A.D.3d 603, 603, 874 N.Y.S.2d 565, 565-66 (2d Dep't 2009) (holding that the witness must demonstrate some personal knowledge of the scientific tests used to qualify for

the professional-reliability exception to the hearsay rule); *Fraser v. 301-52 Townhouse Corp.*, 57 A.D.3d 416, 870 N.Y.S.2d (1st Dep't 2008) (disallowing expert testimony because none of the medical literature in the record supported the expert's opinion).
[130] *O'Brien v. Mbugua*, 49 A.D.3d 937, 938, 853 N.Y.S.2d 392, 394 (3d Dep't 2008).
[131] Freedmen, *supra* note 2, at § 16:10, at 16-2.
[132] Epstein & Weissenberger, *supra* note 5, at 238.
[133] *Id.* at 215; Freedmen, *supra* note 2, at § 15:60, at 15-7.
[134] *Id.* at 217 (quoting 1 McCormick § 34).
[135] *Id.* at 215.
[136] Freedmen, *supra* note 2, at § 15:60, at 15-7.
[137] *See Letendre v. Hartford Acc. & Indem. Co.*, 21 N.Y.2d 518, 522, 289 N.Y.S.2d 183, 183 (1968) (holding that an extrajudicial declaration made by an employee should be admissible as affirmative evidence against the surety if the declaration is in writing and the declarant is available for cross-examination).
[138] Freedmen, *supra* note 2, at § 15:70, at 15-9.
[139] *Id.*
[140] *Id.*
[141] Farrell, *supra* note 6, at § 6-223, at 372.
[142] Freedmen, *supra* note 2, at § 15:70, at 15-10.
[143] *Id.*
[144] *See generally Mengoni v. Lorelli*, 23 Misc. 3d 134(A), 2009 WL 1117483, 2009 N.Y. Slip Op. 50791(U) (1st Dep't Apr. 27, 2009) (reversing trial judge who sustained tenant's objections on leading grounds because, in part, the landlord's leading questions "tend[ed] to carry the witness quickly to matters material to the issue").
[145] Freedmen, *supra* note 2, at § 15:120, at 15-27.
[146] *Id.*
[147] *Id.*
[148] *Id.* at § 15:90, at 15-18.
[149] *Id.*
[150] *Id.*
[151] The Dead Man's Statute is codified at N.Y. C.P.L.R. 4519.
[152] Fisch, *supra* note 34, at § 264, at 165.
[153] *Id.*; Farrell, *supra* note 6, at § 6-121, at 235.
[154] Fisch, *supra* note 34, at § 264, at 167 (2008 Supp.).
[155] Farrell, *supra* note 6, at § 5-101, at 225.
[156] N.Y. C.P.L.R. 4503.
[157] *Id.* 4504.
[158] *Id.* 4508.
[159] *Id.* 4505.
[160] *Id.* 4502.
[161] Farrell, *supra* note 6, at § 5-101, at 226.
[162] *Id.* at § 5-101, at 118 (2008 Supp.).
[163] *Matter of Subpoena Duces Tecum*, 99 N.Y.2d 434, 442, 787 N.E.2d 618, 618, 757 N.Y.S.2d

507, 507 (2003).
[164] Epstein & Weissenberger, *supra* note 5, at 3-1, at 39.
[165] *See, e.g.*, *300 W. 106th St. Corp. v. Rosenthal*, 9 Misc. 3d 1101(A), 806 N.Y.S.2d 449, 2004 WL 3507103, 2004 N.Y. Slip Op. 518919(U), at *5 (Civ. Ct. N.Y. Co. Apr. 5, 2004), *aff'd*, 814 N.Y.S.2d 565 (App. Term 1st Dep't Dec. 29, 2005).
[166] Farrell, *supra* note 6, at § 5-102, at 226-27.
[167] *See, e.g.*, *Allen v. Rosenblatt*, 5 Misc. 3d 1032(A), 799 N.Y.S.2d 158, 2004 N.Y. Slip Op. 51666(U), at *5 (N.Y. Civ. Ct. N.Y. Co. Dec. 22, 2004) (Gerald Lebovits, J.) (applying strong adverse inference against respondents who did not testify at trial for civil and criminal contempt for violating court order requiring them to effect repairs).
[168] *Id.*
[169] *See, e.g.*, *855-79 LLC v. Salas*, 40 A.D.3d 553, 556, 837 N.Y.S.2d 631, 631 (1st Dep't 2007) (reversing Appellate Term, which drew negative inference from elderly woman's failure to testify at trial in drug-holdover case).
[170] Epstein & Weissenberger, *supra* note 5, at 4-4, at 63.
[171] *Id.* at 4-4, at 64.
[172] *Id.* at 4-4, at 65.
[173] *Id.* at 4-4, at 66.
[174] Baer, *supra* note 4, at Rule 702, at 24.
[175] One exception arises if a witness is unavailable due to death or infirmity. N.Y. C.P.L.R. 3117.
[176] Fern A. Fisher, *A Landlord's Guide to the New York City Housing Court*, N.Y.C. Civ. Ct. 8-9 (Oct. 2003), *available at* http://www.nycourts.gov/courts/nyc/housing/pdfs/Landlordbooklet.pdf (last viewed July 10, 2009).
[177] *Subpoenas*, N.Y.C. Civ. Ct. Hous. Part, *available at* http://nycourts.gov/courts/nyc/housing/subpoenas.shtml (last viewed July 10, 2009).
[178] *Id.*
[179] N.Y. Co. Lawyers' Ass'n, *Best Practices for Judges in the Settlement and Trial of Cases Involving Unrepresented Litigants in Housing Court* 2 (approved Apr. 22, 2008) [hereinafter *Best Practices*].
[180] Paris Baldacci, *Assuring Access to Justice: The Role of the Judge in Assisting Pro Se Litigants in Litigating their Cases in New York City Housing Court*, 3 Cardozo Pub. L. Pol'y & Ethics J. 659, 661 (2006).
[181] John Sheldon & Peter Murray, *Rethinking the Rules of Evidentiary Admissibility in Non-jury Trials*, 86 Judicature 227, 229 (Mar.-Apr. 2003). The New York State Unified Court System's Office of the Deputy Chief Administrative Judge for Justice Initiatives surveyed 3303 pro se litigants appearing in the New York City Family Court and New York City Housing Court in 2003. The survey revealed that the majority of self-represented litigants have low incomes, feel that they cannot afford a lawyer for their case, do not consult with a lawyer, and have relatively low levels of formal education. *See* Office of the Deputy Chief Administrative Judge for Justice Initiatives, *Self-Represented Litigants: Characteristics, Needs, Services* i (Dec. 2005), *available at* http://www.courts.state.ny.us/reports/AJJI_SelfRep06.pdf (last viewed July 10, 2009).
[182] Rebecca A. Albrecht et al., *Judicial Techniques for Cases Involving Self-Represented Litigants*, 42 Judges' Journal 16, 16 (Winter 2003) (emphasis in original).

[183] Many scholars and practitioners advocate in the interest of justice that Housing Court judges adopt practices to relax the evidentiary restraints for pro se litigants while still maintaining impartiality in the courtroom. *See generally* Baldacci, *supra* note 180, at 697-98; *Best Practices*, *supra* note 179, at 1-2. For examples of common accommodations regarding evidentiary rules, see Ann Pfau & Juanita Bing Newton, *Handling Cases Involving Self-Represented Litigants: A Bench Guide for New York Judges* chap. IV & chap VI (N.Y. St. Unified Ct. Sys., Working Draft, Sum. 2008).
[184] Explaining the rules is necessary because evidentiary rules often have the effect of silencing pro se litigants. Baldacci, *supra* note 180, at 672.
[185] *Best Practices*, *supra* note 179, at 9-10.
[186] *Id.*
[187] *Id.* at 5.
[188] Baldacci, *supra* note 180, at 683; Paris R. Baldacci, *A Full and Fair Hearing: The Role of the ALJ in Assisting the Pro Se Litigant*, 27 J. Nat'l Ass'n of Adm. Law Judiciary, 448, 475-79 (2007).
[189] *See Houghtaling v. Superior Ct.*, 17 Cal. App. 4th 1128, 1135-36, 21 Cal. Rptr. 2d 855, 859-60 (Cal. Ct. App. 4th 1993) ("In the case of inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence.").
[190] Baldacci, *supra* note 180, at 680-81.
[191] *Best Practices, supra* note 179, at 10.
[192] *Id.* at 11.
[193] Albrecht et al., *supra* note 182, at 44.
[194] N.Y. C.P.L.R. 4518(c). A party who fails to object to the introduction of a document waives the authentication requirement. Fisch, *supra* note 34, at 62.
[195] Yachnin, *supra* note 65.
[196] Sheldon & Murray, *supra* note 181, at 230 (citing Fed. R. Evid. 103(a)).