

## NY CLS CPLR § 4543

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*New York*

*Consolidated Laws Service* >  
*Civil Practice Law And Rules (Arts. 1 — 100)* >  
*Article 45 Evidence (§§ 4501 — 4551)*

### **§ 4543. Proof of facts or writing by methods other than those authorized in this article.**

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Nothing in this article prevents the proof of a fact or a writing by any method authorized by any applicable statute or by the rules of evidence at common law.

### **History**

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Add, L 1963, ch 538, § 2, eff Sept 1, 1963.

Annotations

### **Notes**

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#### **Prior Law**

Earlier statutes: CPA §§ 344, 374–b, 398–a, 398–d; CCP § 962.

#### **Advisory Committee Notes:**

This section is a restatement of former §§ 344, 398-d and the last sentence of § 374-b. It obviates the need for subd 2 of § 387, subd 3 and 4 of § 394 and the second paragraph of subd 1 of § 398-a. With CPLR rule 4518(a) it eliminates the need for subd 3 of § 387.

### **Notes to Decisions**

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## **I.Under CPLR**

### **1.Generally**

## **II.Under Former Civil Practice Laws**

### **2.Generally**

### **3.Insured's books to determine loss**

### **4.Proof by copy**

## **I. Under CPLR**

### **1. Generally**

In action by guardian of plaintiff who sustained irreversible brain damage due to oxygen deprivation following surgery, trial court did not err in precluding testimony by plaintiff's cousin regarding alleged conversation in which 17-year-old high school intern who was present during incident told her that plaintiff was "blue" but nobody paid any attention until anesthesia technician who was also present asked "is this supposed to be this way" and asked if "something [was] wrong"; such testimony, offered to establish that plaintiff's hypoxia was result of inattention by defendant anesthesiologist and hospital staff, constituted inadmissible hearsay even though intern and anesthesia technician were available for cross-examination, where intern denied making such statements, they were not made in writing or under oath, they were made several days after incident, they were reported by plaintiff's cousin who may have had strong motive to shade her testimony, some statements involved double hearsay, and intern had no medical training and was not agent of defendant hospital such that her statements could be considered declaration against interest. *Nucci v Proper*, 95 N.Y.2d 597, 721 N.Y.S.2d 593, 744 N.E.2d 128, 2001 N.Y. LEXIS 103 (N.Y. 2001).

For purpose of determining constitutionality of salary disparities under CLS Jud §§ 221-d and 221-e, census data from New York State Statistical Yearbook was proper subject of judicial notice because it was taken from public record. *Affronti v Crosson*, 95 N.Y.2d 713, 723 N.Y.S.2d 757, 746 N.E.2d 1049, 2001 N.Y. LEXIS 544 (N.Y.), cert. denied, 534 U.S. 826, 122 S. Ct. 66, 151 L. Ed. 2d 32, 2001 U.S. LEXIS 5664 (U.S. 2001).

Pedigree testimony of decedent's alleged issue, in which they stated that decedent openly and notoriously acknowledged them as his own on numerous occasions, was admissible in their wrongful death action as established exception to hearsay rule; defendants' reliance on Dead Man's Statute was misplaced because defendants, as parties not interested in outcome of decedent's estate, could not invoke protections afforded by statute (CLS CPLR § 4519). *Lancaster v 46 NYL Partners*, 228 A.D.2d 133, 651 N.Y.S.2d 440, 1996 N.Y. App. Div. LEXIS 12417 (N.Y. App. Div. 1st Dep't 1996).

In order to demonstrate the reliability of a breathalyzer test in a prosecution for operating a motor vehicle while under the influence of alcohol or drugs, a document, consisting of a photocopy of a calibration test result, an original certification that the record of the test result was made in the regular course of business, and an original certification as to the copy's accuracy sworn to by the acting director, qualifies under CPLR 4543 which provides in part that a writing may be proven by any method authorized by the rules of evidence at common law, which recognizes a copy sworn to as accurate by a witness who compared it and a copy certified by a public officer, and, therefore, the photocopy is not subject to objection; however, CPLR 4543 merely obviates the objection to the best evidence rule, so the original document itself must be admissible under the exception to the hearsay rule. *People v Hoats*, 102 Misc. 2d 1004, 425 N.Y.S.2d 497, 1980 N.Y. Misc. LEXIS 2050 (N.Y. County Ct. 1980).

In action by plaintiff who allegedly sustained debilitating low back pain as result of automobile collision, court granted defendant's motion in limine for order precluding evidence of plaintiff's spinoscope test results, as plaintiff failed to prove that discipline of spinoscopy (which utilizes spinoscope machine to collect and analyze movement measurements in determining back pain)

has gained general acceptance in scientific community; fact that spinoscope's inventor and other practitioners had recently published their work in peer-reviewed journals was relevant to particular reliability of their technique but was not, without more, determinative of general acceptance criterion. *Castrichini v Rivera*, 175 Misc. 2d 530, 669 N.Y.S.2d 140, 1997 N.Y. Misc. LEXIS 648 (N.Y. Sup. Ct. 1997).

Diagnosis of MCS (multiple chemical sensitivity) has not gained general acceptance in relevant scientific community, and thus opinion testimony in support of MCS diagnosis was not admissible in personal injury action; however, plaintiff's claim of bronchial injury caused by chemical fumes and dust, attributable to defendants' alleged negligent performance of roofing work, was viable if supported by competent evidence at trial. *Collins v Welch*, 178 Misc. 2d 107, 678 N.Y.S.2d 444, 1998 N.Y. Misc. LEXIS 429 (N.Y. Sup. Ct. 1998).

Counsel's failure to offer into evidence foreign police documents indicating that a prisoner was in the Dominican Republic on the day of a murder that occurred in New York constituted ineffective assistance of counsel because (1) the alibi documents were probably admissible under the public records exception to the hearsay rule under N.Y. C.P.L.R. § 4520 and the common law, but counsel did not even attempt to lay a proper foundation; (2) counsel likely could have met the foundational requirements of the business record exception under N.Y. C.P.L.R. § 4518 by calling an expert in Dominican law enforcement; (3) counsel could have argued that the documents were admissible under the residual hearsay exception; (4) pursuant to N.Y. C.P.L.R. § 4542(b) and N.Y. C.P.L.R. § 4543, the documents could have been authenticated even if counsel could not obtain final certifications; and (5) there was a reasonable probability that the prisoner would have been acquitted if counsel had done his job competently. *Garcia v Portuondo*, 459 F. Supp. 2d 267, 2006 U.S. Dist. LEXIS 91894 (S.D.N.Y. 2006).

## **II. Under Former Civil Practice Laws**

### **2. Generally**

§ 4543. Proof of facts or writing by methods other than those authorized in this article.

Admissibility of parol evidence as to contents of instrument in a foreign jurisdiction considered. *Rosenbaum v Podolsky*, 162 N.Y.S. 227, 97 Misc. 614, 1916 N.Y. Misc. LEXIS 1285 (N.Y. App. Term 1916).

Writings contemporaneous with conflicting oral testimony, of which the parties intended them to be confirmatory, have great probative value. *Segall v Finlay*, 213 N.Y.S. 540, 126 Misc. 625, 1925 N.Y. Misc. LEXIS 1052 (N.Y. Sup. Ct. 1925), *aff'd*, 218 A.D. 723, 218 N.Y.S. 895, 1926 N.Y. App. Div. LEXIS 6284 (N.Y. App. Div. 1926).

CPA § 344 preserved evidence admissible at common law. *Jacobi v Order of Germania*, 26 N.Y.S. 318, 73 Hun 602 (1893).

### **3. Insured's books to determine loss**

In action on an insurance policy which required that insured keep such books as would enable insurer to accurately determine any loss, the loss could not be established by oral testimony. *Licht v New York Indem. Co.*, 250 N.Y. 211, 164 N.E. 910, 250 N.Y. (N.Y.S.) 211, 1928 N.Y. LEXIS 1004 (N.Y. 1928).

### **4. Proof by copy**

Proof of an instrument by proving a copy is merely one form of parol testimony as to its contents, and production of a copy cannot be compelled as the "best secondary evidence." *Rosenbaum v Podolsky*, 162 N.Y.S. 227, 97 Misc. 614, 1916 N.Y. Misc. LEXIS 1285 (N.Y. App. Term 1916).

## **Research References & Practice Aids**

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### **Federal Aspects:**

Congressional journals as evidence, 28 USCS § 1736.

§ 4543. Proof of facts or writing by methods other than those authorized in this article.

## **Law Reviews:**

Evidence symposium. 52 Cornell L.Q. 177.

The CPLR and the trial lawyer. 9 N.Y.L. Sch. L. Rev. 269.

Scientific and medical evidence: a symposium. 13 N.Y.L. Sch. L. Rev. 607.

Scientific evidence and the law: identification, verification of verbal testimony and physiological proof. 13 N.Y.L. Sch. L. Rev. 612.

Evolving methods of scientific proof. 13 N.Y.L. Sch. L. Rev. 679.

Civil jury trial: your proof. 42 NYSB J 52.

## **Treatises**

### **Matthew Bender's New York Civil Practice:**

Weinstein, Korn & Miller, New York Civil Practice: CPLR Ch. 4543, Proof of Facts or Writing by Methods Other Than Those Authorized in This Article.

### **Matthew Bender's New York Practice Guides:**

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.08. CHECKLIST: Authenticating ESI.

LexisNexis Practice Guide New York e-Discovery and Evidence § 15.09. Authenticating Various Types of ESI.

### **Matthew Bender's New York AnswerGuides:**

LexisNexis AnswerGuide New York Civil Litigation § 10.01. Procedural Context-Trial Evidence.

### **Warren's Weed New York Real Property:**

Warren's Weed: New York Real Property § 4.79.

§ 4543. Proof of facts or writing by methods other than those authorized in this article.

### **Matthew Bender's New York Evidence:**

Bender's New York Evidence § 115.03. Authentication of Public and Official Documents.

1 Bender's New York Evidence § 117.01. General Principles of Ancient Documents.

3 Bender's New York Evidence § 149.01. History and Rationale of the Business Records Rule.

### **Forms:**

Bender's Forms for the Civil Practice Form No. CPLR 4543:1.

LexisNexis Forms FORM 75-CPLR 4543:1.—Notice to Admit Genuineness of Paper or Document.

### **Texts:**

2 New York Trial Guide (Matthew Bender) §§ 30.10, 30.11, 30.12, 30.31.

### **Hierarchy Notes:**

NY CLS CPLR, Art. 45

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