

6.19. Impeachment by Conviction

(1) The credibility of a witness may be impeached:

(a) in a civil proceeding, by asking the witness in good faith on cross-examination whether the witness has been convicted of a crime or by introducing into evidence a certified copy of the judgment of conviction for a crime.

(b) in a criminal proceeding:

(i) except as provided in subparagraph two, by asking the witness in good faith on cross-examination whether the witness has been convicted of a specified offense;

(ii) when the witness is the defendant, by asking the defendant in good faith on cross-examination about a prior conviction of a specified offense to the extent authorized by the court prior to trial;

(iii) if a witness denies the conviction or answers in an equivocal manner, the conviction may be proved by introducing into evidence a certified copy of the judgment of conviction.

(2) A witness's adjudication as a youthful offender under article 720 of the Criminal Procedure Law or an adjudication as a juvenile delinquent under article 3 of the Family Court Act is not admissible to impeach the witness's credibility; the conduct underlying the adjudication may, however, be used to cross-examine the witness, subject to rule 6.17 (1) (Impeachment by Instances of Misconduct).

(3) When a witness is impeached pursuant to subdivision one, the party who offered that witness may in rebuttal present evidence of that witness's character for truthfulness pursuant to rule 6.23 (2).

Note

Subdivision (1). The rule set forth in subdivision (1) governs impeachment of a witness in civil and criminal proceedings by evidence of a conviction of a crime. The rule is derived from CPLR 4513 and CPL 60.40 (1). The underlying premise of this rule is that “[e]vidence of conviction thus impeaches the general character for [the witness’s] truth and veracity.” (*Derrick v Wallace*, 217 NY 520, 525 [1916]; *see also People v Sandoval*, 34 NY2d 371, 377 [1974] [conviction of a crime shows a “demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others (which) goes to the heart of honesty and integrity”].)

In both civil and criminal proceedings, the method of impeachment by conviction is subject to the discretion of the court, exercised in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974] [defendant in a criminal proceeding as witness]) and of *People v Ocasio* (47 NY2d 55 [1979] [non-criminal defendant witness]).

The Court of Appeals has stressed that a good faith basis for the impeaching question is required. (*See People v D'Abate*, 37 NY2d 922, 923 [1975] [“it was improper for the prosecutor here on cross-examination to question defendant as to three out-of-State convictions with respect to which the prosecutor . . . had no certificates of conviction”].)

As to what convictions are admissible for purposes of the rule, CPLR 4513, governing civil proceedings, provides:

“A person who has been convicted of a *crime* is a competent witness; but the conviction may be proved, for the purpose of affecting the weight of his testimony, either by cross-examination, upon which he shall be required to answer any relevant question, or by the record. The party cross-examining is not concluded by such person's answer.” (Emphasis added.)

Impeachment by conviction of a “crime” includes only “a misdemeanor or a felony” (Penal Law § 10.00 [6]) and thus excludes a “violation” and a “traffic infraction.” (*See also Vehicle and Traffic Law § 155* [“A traffic infraction is not a crime and the punishment imposed therefor shall not be deemed for any purpose a penal or criminal punishment and shall not affect or impair the credibility as a witness or otherwise of any person convicted thereof”].)

By its terms, CPLR 4513 permits the judgment of conviction to be admitted into evidence even if the witness admits the conviction. (*See Moore v Leventhal*, 303 NY 534, 538 [1952].) However, extrinsic proof other than the judgment of conviction is not permitted. (*See People v Cardillo*, 207 NY 70, 71-71 [1912] [interpreting former Penal Law § 2444 from which CPLR 4513 is derived].)

CPL 60.40 (1) provides:

“If in the course of a criminal proceeding, any witness, including a defendant, is properly asked whether he was previously convicted of a specified offense and answers in the negative or in an equivocal manner, the party adverse to the one who called him may independently prove such conviction. If in response to proper inquiry whether he has ever been convicted of any offense the witness answers in the negative or in an equivocal manner, the adverse party may independently prove any previous conviction of the witness.”

The term “offense” includes violations as well as felonies and misdemeanors. (Penal Law § 10.00 [1] [“ ‘Offense’ means conduct for which a sentence to a term of imprisonment or to a fine is provided by any law of this state or by any law, local law or ordinance of a political subdivision of this state, or by any order, rule or regulation of any governmental instrumentality authorized by law to adopt the same”].) As in civil proceedings, convictions of traffic infractions may not be used for impeachment purposes. (Vehicle and Traffic Law § 155.)

Unlike a conviction being used to impeach a witness in a civil proceeding, in a criminal proceeding extrinsic evidence of the judgment of conviction is not authorized by CPL 60.40 to prove the conviction unless the witness has denied the conviction or is equivocal in answering the question about the conviction. Furthermore, this statutory provision recognizes that, unlike in civil proceedings, the permissible extrinsic evidence is, in the discretion of the court, not limited to the judgment of conviction.

For the purposes of the rule, in both civil and criminal proceedings a conviction includes a plea of guilty entered pursuant to *North Carolina v Alford* (400 US 25 [1970]). (*People v Miller*, 91 NY2d 372, 378 [1998]; *see also People v Serrano*, 15 NY2d 304 [1965].) In an *Alford* plea, the defendant enters a plea of guilty without admitting factual guilt of the offense but in the face of strong evidence of guilt, often to avoid the consequences of a conviction of a more serious offense. (*Matter of Silmon v Travis*, 95 NY2d 470, 472, 475 [2000].) The Court of Appeals held such a plea is not constitutionally proscribed, and “may generally be used for the same purposes as any other conviction.” (*Id.* at 475.) New York recognizes the validity of an *Alford* plea, and the Court of Appeals has held that it has the same consequences as a plea that admits factual guilt. (*Id.*)

Subdivision (1) (b) (ii) is derived from *People v Sandoval* (34 NY2d 371 [1974]) and its progeny. *Sandoval* requires a pretrial determination as to whether any of the defendant's criminal convictions or prior instances of misconduct may be used for impeachment purposes. The defendant has the burden "of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion." (*Id.* at 378.)

Sandoval also set forth the various criteria a court may consider in exercising its discretion as follows:

"Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . , may have lesser probative value as to lack of in-court veracity

"Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted." (*Sandoval*, 34 NY2d at 376-377; *see also People v Williams*, 12 NY3d 726 [2009]; *People v Smith*, 18 NY3d 588 [2012].)

The *Sandoval* procedure is discretionary, rather than mandatory, for a witness who is not the defendant in a criminal proceeding. As stated by the Court of Appeals: "we take the opportunity presented by this case to make explicit that it is inapplicable to witnesses who are not defendants. That is not to say, with respect to a witness who is not a defendant, that a trial court is precluded, in its sound

discretion, from either entertaining an application for a ruling *in limine* on the permissible scope of cross-examination concerning a nonparty's prior misdeeds, or, if it believes it best, from refusing to do so in advance of the time when the question presents itself in regular course." (*Ocasio*, 47 NY2d at 59.)

Subdivision (2). The rule set forth is derived from *People v Duffy* (36 NY2d 258, 264 [1975] ["Although it would be impermissible to use a youthful offender adjudication to impeach, the illegal and immoral acts underlying the adjudication may be employed for such a purpose" (citations omitted)]) and *People v Gray* (84 NY2d 709, 712 [1995] ["It is . . . impermissible to use a youthful offender or juvenile delinquency adjudication as an impeachment weapon, because these adjudications are not convictions of a crime"]). Whether the underlying acts may be used for impeachment is subject to a pretrial *Sandoval* determination pursuant to rule 6.17.

Subdivision (3). See commentary in the Note to rule 6.23 (2).