GUDE TO NEW YORK EVIDENCE

ARTICLE 6: WITNESSES & IMPEACHMENT

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WITNESSES

IMPEACHMENT

6.01. Competency to Testify

Every person is competent to be a witness unless the court determines that the person does not have the capacity to warrant the reception of the person's evidence. A person may be competent to be a witness but may not be competent to testify to specific matters as a result of the application of other rules of evidence.

Note

The rule is derived from the New York State Constitution, statutory provisions and Court of Appeals precedent. (*See e.g.* NY Const, art I, § 3 ["no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief"]; CPLR 4512 ["Except as otherwise expressly prescribed, a person shall not be excluded or excused from being a witness, by reason of his interest in the event or because he is a party or the spouse of a party"]; CPLR 4513 ["A person who has been convicted of a crime is a competent witness"]; CPL 60.20 [1] ["Any person may be a witness in a criminal proceeding unless the court finds that, by reason of infancy or mental disease or defect, he does not possess sufficient intelligence or capacity to justify the reception of his evidence"]; *People v Parks*, 41 NY2d 36, 45 [1976] ["The traditional rule still followed in this State, is that all adults are presumed to be competent to testify . . . ."]; *People v Fuller*, 50 NY2d 628, 636 [1980] ["Age alone is no testimonial infirmity"]; *Matter of Brown v Ristich*, 36 NY2d 183, 188 [1975] ["All adults are presumed competent to testify"]; *People v Rensing*, 14 NY2d 210, 213 [1964] ["The capacity of a person to be a witness is presumed"].)

The Court of Appeals has rejected arguments that a person is incompetent as a matter of law to testify as a witness when the person has been declared incompetent under the Mental Hygiene Law (*see Brown*, 36 NY2d at 188); has been adjudicated not responsible by reason of mental disease or defect (*see Rensing*, 14 NY2d at 213); or has received an "excessive" fee to testify (*see Caldwell v Cablevision Sys. Corp.*, 20 NY3d 365 [2013]). On the other hand, a person is incompetent as a matter of law to testify to matters that the witness recalled after being hypnotized (*People v Hughes*, 59 NY2d 523, 545 [1983]); and a judge is not competent to testify at a proceeding over which the judge is presiding (*People v Dohring*, 59 NY 374 [1874]).

As to the issue of a witness's competency generally, the Court of Appeals stated in *Brown* that a person is competent to be a witness, if the person

> "has the ability to observe, recall and narrate, i.e., events that he sees must be impressed in his mind; they must be retained in his memory; and he must be able to recount them with sufficient ability such that

> the presiding official is satisfied that the witness understands the nature of the questions put to him and can respond accordingly, and that he understands his moral responsibility to speak the truth."

(*Brown*, 36 NY2d at 189.)

When a person's ability to perceive, recall, narrate or understand the nature of an oath is challenged, the Court of Appeals has charged the court with the responsibility of determining whether the person "has sufficient intelligence to understand the nature of an oath and to give a reasonably accurate account of what he has seen and heard vis-à-vis the subject matter about which he is interrogated." (*Rensing*, 14 NY2d at 213.) When the court is so satisfied, the person may testify. (*Brown*, 36 NY2d at 189.) In making that determination, the court may properly consider the testimony of physicians or other persons with information that would shed light on the capacity and intelligence of the prospective witness. (*Parks*, 41 NY2d at 46.) As the Court stated in *People v Washor* (196 NY 104, 109-110 [1909]): "There is no rule by which the extent of the intelligence of an adult who is called as a witness can be measured. It must necessarily be left to the good judgment of the trial court to determine whether such a witness offered by a party to an action shall be sworn. The determination of the trial court should be sustained particularly where the testimony is received and the weight to be given to it is left to the jury, unless there is a clear abuse of discretionary power."

Deficiencies in a witness's testimonial qualities that are not of such a nature to render the witness incompetent to testify may be admissible for impeachment purposes. (*See e.g. People v Freeland*, 36 NY2d 518, 525-526 [1975]; *People v Webster*, 139 NY 73, 87 [1893].) The witness may be questioned about such deficiencies on cross-examination, and, as such deficiencies are considered to be non-collateral matters, extrinsic evidence is admissible to establish them. (*See e.g. Badr v Hogan*, 75 NY2d 629, 634 [1990]; *Freeland*, 36 NY2d at 526.)

Statutory provisions rendering a person incompetent to testify as a witness or as to certain matters include CPL 60.20 (2) ("Every witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath. A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath"), incorporated in Guide to New York Evidence rule 6.05; CPLR 4502 (a) ("A husband or wife is not competent to testify against the other in an action founded upon adultery, except to prove the marriage, disprove the adultery, or disprove a defense after evidence has been introduced tending to prove such defense"); and CPLR 4519 (historically known as the dead man's statute) which, in substance, provides that a person or party interested in the event, or a predecessor in interest, is incompetent to testify to a personal transaction or communication with a deceased or a mentally ill person when such testimony is offered against the representative of the deceased or mentally ill person.

6.03. Exclusion of Witnesses

(1) Subject to subdivision two, a court may exclude a witness from a courtroom prior to the time the witness is anticipated to testify in that proceeding.

(2) A court may not exclude from the courtroom:

(a) a party in a civil trial and a defendant in a criminal trial, unless the party or defendant has waived or forfeited the right to be present;

(b) when a party is not a natural person, an officer or employee of the party designated as its representative by its attorney; or

(c) a person whose presence is shown by a party to be essential to the presentation of the party's case.

Note

Subdivision (1). The Court of Appeals has approved the exclusion of witnesses from the courtroom prior to their testimony. (*People v Cooke*, 292 NY 185, 190-191 [1944] ["It is hard for us to understand . . . why such a motion (to exclude witnesses) should not be granted as of course"]; *see also Levine v Levine*, 56 NY2d 42, 49 [1982].) As further explained by the Appellate Division, First Department, in *Philpot v Fifth Ave. Coach Co.* (142 App Div 811, 813 [1st Dept 1911]): "While such an application is in the discretion of the court, it is often extremely important that witnesses testifying to an [occurrence] of this character should be examined without having heard the testimony of other witnesses. What is important is that each person's impression of the occurrence should be stated—not suggested or colored by what he has heard others testify to, and for the court to refuse a request by counsel on either side to exclude all witnesses from the court room except the one under examination closely approaches an abuse of discretion."

The Court of Appeals has not addressed the corollary issues of whether a court may direct an attorney not to give a prospective witness a transcript of the testimony of a witness who has testified, or whether a court may direct a witness who has testified not to discuss his or her testimony with a prospective witness.

Subdivision (2). Subdivision (2) covers three classes of witnesses.

Subdivision (2) (a) recognizes that a defendant in a criminal proceeding has a statutory right (as well as a constitutional right) to be present at "trial" unless that right has been waived or forfeited. (CPL 260.20; *People v Dokes*, 79 NY2d 656, 659-660 [1992] ["A defendant's presence at trial is required not only by the Confrontation and Due Process Clauses of the Federal and State Constitutions (*see*, US Const 6th, 14th Amends; NY Const, art I, §6), but also by CPL 260.20"]; *People v Byrnes*, 33 NY2d 343, 349 [1974] ["the right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom"].) The statutory term "trial" incorporates "both any 'material stage' of the trial [*People v. Turaine*, 78 N.Y.2d 871, 872, 573 N.Y.S.2d 64, 577 N.E.2d 55 (1991)], as well as any 'ancillary proceeding' for which the defendant's presence is 'substantially and materially related to the ability to defend,' including proceedings at which the defendant 'can potentially contribute,' or at which the defendant's presence would ensure 'a more reliable determination' of the proceeding. *People v. Roman*, 88 N.Y.2d 18, 25-26, 643 N.Y.S.2d 10, 665 N.E.2d 1050 (1996)." (William C. Donnino, Practice Commentaries, McKinney's Cons Laws of NY, Book 11, CPL 260.20.)

The Appellate Division, Second Department, has recognized a party's constitutional right to be present in a civil trial. (*Carlisle v County of Nassau*, 64 AD2d 15, 18 [2d Dept 1978] ["(T)he fundamental constitutional right of a person to have a jury trial in certain civil cases includes therein the ancillary right to be present at all stages of such a trial, except deliberations of the jury . . . . Such right is basic to due process of law"].) The civil party's right to be present may be waived or forfeited. (*See Ajaeb v Ajaeb*, 276 App Div 1094 [2d Dept 1950], *affd* 301 NY 605 [1950].)

Mental Hygiene Law § 81.11 (c) provides that a hearing to determine whether the appointment of a guardian is necessary for an alleged incapacitated person "must be conducted in the presence of the person alleged to be incapacitated," with only limited exceptions provided.

Subdivision (2) (b) is derived from long-established decisional law. (*See e.g. Perry v Kone, Inc.*, 147 AD3d 1091, 1094 [2d Dept 2017]; *Sherman v Irving Mdse. Corp*., 26 NYS2d 645, 645 [App Term, 1st Dept 1941] ["Great caution should be exercised in considering an application to exclude the officers of corporations, or a representative in charge of the matters litigated"].)

Subdivision (2) (c) is derived from Court of Appeals precedent which holds that " 'a person whose presence is shown by a party to be essential to the presentation of the party's cause' " is generally exempt from the exclusion requirement. (*People v Santana*, 80 NY2d 92, 99-101 [1992]; *see also Perry*, 147 AD3d at 1094; *Carlisle*, 64 AD2d at 20.) An example of a person whose presence is shown by a party to be essential to the presentation of the party's cause would be an expert of a party who needs to hear the testimony of the other party's expert in

order to present rebuttal testimony. (*See Santana*, 80 NY2d at 99-101; *R.J. Cornelius, Inc. v Cally*, 158 AD2d 331, 332 [1st Dept 1990].)

6.04. Interpreter

A court shall appoint an interpreter when necessary for a witness or a party to communicate or be understood or for a party to understand the proceedings, and, upon appointment, the interpreter must give an oath or affirmation to make a true translation.

Note

The portion of the rule dealing with the appointment of an interpreter is in part derived from the Uniform Rules for Trial Courts, which require that a court appoint an interpreter "[i]n all civic and criminal cases, when a court determines that a party or witness, or an interested parent or guardian of a minor party in a Family Court proceeding, is unable to understand and communicate in English to the extent that he or she cannot meaningfully participate in the court proceedings." (Uniform Rules for Trial Cts [22 NYCRR] § 217.1 [a].)

A court through its administrative arm may employ qualified interpreters for assignment as necessary and, upon doing so, have them take an oath or affirmation to make a true translation. (*See* Judiciary Law §§ 386-390.) If the interpreter is not an employee of the court and has not been given the oath or affirmation to make a true translation, the court must swear the interpreter. See *People v Fisher* (223 NY 459, 464-466 [1918]), wherein the Court of Appeals noted that an interpreter upon his or her appointment by the court must be sworn to interpret accurately. Nothing, including this rule or rule 6.02, requires or permits the interpreter to be sworn as a witness.

A court has the discretion to determine whether the interpreter is qualified to serve and whether an interpreter, once appointed, is biased in favor of a party or witness, is not effectively communicating with a witness, or is not accurately conveying what a witness is saying, thereby necessitating removal. (*See People v Lee*, 21 NY3d 176, 179 [2013]; *People v Pavao*, 59 NY2d 282, 293 [1983].)

6.05. Oath or Affirmation

(1) Except as otherwise provided in subdivision two and subdivision three, before testifying, a witness must declare that he or she will testify truthfully by oath or affirmation administered in a form calculated to awaken the conscience and impress the mind of the witness in accordance with that witness's religious or ethical beliefs.

(2) In a criminal proceeding:

(a) A witness more than nine years old may testify only under oath unless the court is satisfied that such witness cannot, as a result of mental disease or defect, understand the nature of an oath.

(b) A witness less than nine years old may not testify under oath unless the court is satisfied that he or she understands the nature of an oath.

(c) A witness understands the nature of an oath if he or she appreciates the difference between truth and falsehood, the necessity for telling the truth, and the fact that a witness who testifies falsely may be punished.

(d) A witness ineligible to testify under oath pursuant to paragraph (a) or (b) may nevertheless be permitted to give unsworn evidence if the court is satisfied that the witness possesses sufficient intelligence and capacity to justify the reception thereof.

(3) In a Family Court proceeding, a judge may dispense with the formality of placing a minor under oath before taking the minor's testimony.

Note

Subdivision (1). This rule is derived from Court of Appeals precedent that holds that requiring a witness to take an oath or make an affirmation is a "traditional safeguard[ ] to truthfulness" (*Matter of Hecht v Monaghan*, 307 NY 461, 474 [1954]). The requirement of an oath or affirmation, the Court has observed, serves two functions: "(1) to awaken the witness to his moral duty to tell the truth, and (2) to deter false testimony by providing a legal ground for perjury prosecutions" (*see Matter of Brown v Ristich*, 36 NY2d 183,189 [1975]). The form of the oath or affirmation as stated in this rule is taken substantially verbatim from CPLR 2309 (b).

The choice whether to take an oath or affirmation rests with the witness. As to this choice, the Court of Appeals has observed that as a general proposition "any attempt to discredit or otherwise penalize a witness because of his . . . exercise of his right to affirm the truth of his testimony is improper" (*People v Wood*, 66 NY2d 374, 378 [1985]).

Whether the witness has sufficient intelligence to understand the nature of an oath or affirmation raises an issue of competency to be decided by the court before the witness is sworn (*see* Guide to NY Evid rule 6.01 and Note).

Subdivision (2). This rule restates verbatim CPL 60.20 (2). Of note, CPL 60.20 (3) provides a defendant may not be convicted of an offense solely upon unsworn evidence given pursuant to CPL 60.20 (2).

Subdivision (3). This rule is taken substantially verbatim from Family Court Act § 152 (b). Appellate Division decisions hold that this statutory provision applies to Family Court proceedings that are civil in nature (*see e.g. Matter of Danielle M.*, 151 AD2d 240 [1st Dept 1989]; *Matter of Elizabeth D.*, 139 AD2d 66 [4th Dept 1988] [child protective proceedings]). In quasi-criminal proceedings in Family Court, however, the Appellate Division has held that CPL 60.20 (3)'s requirement of corroboration of an unsworn witness applies (see *Matter of Wade H.*, 41 AD2d 817 [1st Dept 1973]; *Matter of Steven B.*, 30 AD2d 442, 444 [1st Dept 1968] [juvenile delinquency proceedings]).

6.07. Personal Knowledge

Except for an expert witness giving an expert opinion, a witness may testify to a matter only if the witness has personal knowledge of the matter. Personal knowledge is knowledge based on the exercise of the witness's own senses. Evidence of a witness's personal knowledge may be apparent from the testimony of the witness or may be attested to by the witness.

Note

This rule sets forth New York's well settled law that a witness is incompetent to testify to a specific matter when the witness lacks personal knowledge of the matter. The definition of personal knowledge stated in the rule's second sentence is drawn from *Hallenbeck v Vogt* (9 AD2d 836 [3d Dept 1959]).

The rule's first sentence is derived from decisions of the Court of Appeals and the Appellate Divisions and states a fundamental proposition of the law of evidence (*e.g. People v Regina*, 19 NY2d 65, 68-70 [1966] [witness's testimony that he saw perpetrators during a five second time period fire two shots properly admitted]; *Senecal v Drollette*, 304 NY 446, 448-449 [1952] [witness's testimony as to the make of the car that struck him should have been admitted as the witness said he "got a glance at it just before it hit him"]; *Matter of Rios v Selsky*, 32 AD3d 632, 633 [3d Dept 2006] [hearing officer properly denied request of respondent to call certain witnesses as the witnesses had no personal knowledge of the incident]; *Overseas Trust Bank v Poon*, 181 AD2d 762, 763 [2d Dept 1992] [testimony of husband concerning wife's overseas trips during a relevant time period properly excluded as it was "clear" the husband lacked personal knowledge]).

The trial court is charged with making the determination of whether the witness has personal knowledge. In essence, this rule of personal knowledge is an application of Guide to New York Evidence rules 4.01 (Relevant Evidence) and 4.05 (Conditional Relevance).

The rule's third sentence is derived from *Regina* (19 NY2d at 68-70) and *Senecal* (304 NY at 448-449).

The expert witness exception is derived from *Cassano v Hagstrom* (5 NY2d 643, 646 [1959] [expert opinion may be based on the expert's personal knowledge or upon facts in evidence made known to the expert]) and *Hambsch v New York City Tr. Auth.* (63 NY2d 723, 726 [1984] [expert opinion can be based in part on inadmissible evidence if it is "of a kind accepted in the profession as reliable in forming a professional opinion" and the evidence is established to be reliable]).

It must also be noted that the rule's requirement of personal knowledge does not prohibit a witness from testifying to an out-of-court statement that is not barred by the hearsay rules set forth in article 8 of this Guide, provided the witness heard or read the statement. In such circumstances, the witness has the requisite personal knowledge of the "matter," i.e., the out-of-court statement.

6.09. Refreshing Recollection

(1) A witness may use any writing or other matter to refresh the witness's memory while testifying.

(2) If a witness, while testifying, uses a writing or other matter to refresh the witness's memory, an adverse party is entitled to inspect the writing or other matter and to cross-examine the witness about the writing or other matter.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *Huff v Bennett* (6 NY 337, 339 [1852] [A witness "is permitted to assist his memory by the use of any written instrument, memorandum or entry in a book, and it is not necessary that such writing should have been made by the witness himself, or that it should be an original writing, provided after inspecting it he can speak to the facts from his own recollection"]); *Howard v McDonough* (77 NY 592, 593 [1879] ["A witness may, for the purpose of refreshing his memory, use any memorandum, whether made by himself or another, written or printed"]); and *People v Ferraro* (293 NY 51, 56 [1944] ["These statements were regarded as more strongly indicative of defendant's guilt than the statements given by the witnesses on the trial. It was proper to use such statements to refresh the recollection of the witness"]).

As the writing is only being used to refresh recollection, the writing is not admitted nor are its contents disclosed to the jury except as provided by subdivision (2). (*Howard*, 77 NY at 593 [noting that when the witness's "memory has thus been refreshed, he must testify to facts of his own knowledge, the memorandum itself not being evidence"]; *see also* CPL 60.35 [3].) Whether the writing may be used for substantive evidence will turn upon whether it is otherwise admissible, e.g., admissible under Guide to New York Evidence rule 8.25, as a past recollection recorded.

The foundation for invoking this rule is a showing that the witness is having difficulty recalling a fact that the witness had perceived. (*See People v Gezzo*, 307 NY 385, 390 [1954] [police inspector testified he had "no independent recollection" of his interview of the defendant]; *People v Oddone*, 22 NY3d 369, 377 [2013] ["When a witness, describing an incident more than a year in the past, says that it 'could have' lasted 'a minute or so,' and adds 'I don't know,' the inference that her recollection could benefit from being refreshed is a compelling one"].)

Whether objects or matters other than a writing can be used to refresh a witness's recollection has not been addressed by the Court of Appeals. The First

and Second Departments have upheld the use of sound recordings to refresh a witness's recollection. (*See People v Reger*, 13 AD2d 63, 70 [1st Dept 1961]; *Seaberg v North Shore Lincoln-Mercury, Inc.*, 85 AD3d 1148, 1151 [2d Dept 2011].)

The court retains discretion to control the refreshing recollection process. (*See McCarthy v Meaney*, 183 NY 190, 193-194 [1905].) This discretion is to be exercised in determining whether the witness's recollection has in fact been refreshed and whether the witness is not just relating what he or she has just read or perceived. (*Id*. at 193-194.)

Subdivision (2). The rule stated in subdivision (2) is derived from *People v Gezzo* (307 NY at 393-394 [" 'The right of a party to protection against the introduction against him of false, forged or manufactured evidence, which he is not permitted to inspect, must not be invaded a hair's breadth. It is too valuable to be trifled with, or to permit the court to enter into any calculation as to how far it may be encroached upon without injury to the party'. . . . 'The defendant had the right to see, and to use on cross-examination, any memorandum or writing which had served to refresh the memory of the witness on his direct examination. . . . As the conversation was material, the defendant might possibly have been prejudiced by this limitation upon his cross-examination' " (quoting *Tibbetts v Sternberg*, 66 Barb 201, 203 [Sup Ct, NY County 1870], and *Schwickert v Levin*, 76 App Div 373, 375 [2d Dept 1902])]).

Whether, as provided in Federal Rules of Evidence rule 612 (a), this production rule extends to writings used by the witness to refresh the witness's recollection before testifying has not been addressed by the Court of Appeals, albeit relevant writings of a witness are subject to pretrial disclosure in criminal proceedings. (*See* CPL 240.44, 240.45; *People v Rosario*, 9 NY2d 286 [1961], and its progeny.) Appellate Division decisions consistently hold that the right of inspection extends to writings or objects used by a witness prior to testifying. (*See e.g. Merrill Lynch Realty Commercial Servs. v Rudin Mgt. Co.*, 94 AD2d 617 [1st Dept 1983]; *Doxtator v Swarthout*, 38 AD2d 782 [4th Dept 1972].)

The Court of Appeals has also not addressed the issue of whether the use of a privileged writing for refreshing recollection purposes affects a waiver of the privilege otherwise applicable to the writing. Appellate Division decisions addressing this issue are conflicting. (*Compare Grieco v Cunningham*, 128 AD2d 502 [2d Dept 1987] ["any" privilege waived], *with Beach v Touradji Capital Mgt., LP*, 99 AD3d 167, 171 [1st Dept 2012] [attorney work product privilege not waived].)

For a discussion of the issues relating to the application of the refreshing recollection rule to writings used by a witness to refresh the witness's recollection before testifying, and privilege waiver resulting from the use of a privileged writing to refresh recollection, either while testifying or before testifying, see Michael J.

Hutter, *Review by Witness of Privileged Documents At and Before Trial and Deposition in New York, When, If Ever, Will the Privilege Be Lost* (38 Pace L Rev __ [2018]).

6.10. Scope & Manner of Examination of Witnesses

(1) Subject to subdivisions two and three, as well as rule 4.01 (Relevant Evidence) and a defendant's rights to confrontation and to present a defense in a criminal proceeding, the scope and manner of examining witnesses is committed to the sound discretion of the court.

(2) Cross-examination of a witness should ordinarily be limited to the subject matter of the direct examination and matters affecting credibility. The court may in its discretion, however, permit examination into additional matters and may be required to do so in a criminal case.

(3) Redirect and re-cross-examination of a witness is limited to the matters covered on the witness's cross-examination or redirect examination, respectively.

(4) Leading Questions.

(a) A court should not permit leading questions during the direct examination of a witness, except a court may permit leading questions, for example, with respect to introductory matters; examination of a child; expediting a proceeding as to matters that are not in dispute; when necessary to clarify a witness's testimony; when examining a witness about a prior inconsistent statement; or as provided in paragraph (b).

(b) When a party calls (i) an adverse party, (ii) a witness identified with an adverse party, or (iii) a witness who is hostile or becomes hostile during examination, the court may permit leading questions in conducting the direct examination.

(c) A court shall permit leading questions during the cross-examination of a witness.

(d) When on cross-examination, a court permits inquiry into matters that were not covered on direct examination, the cross-examination is subject to the provisions of subdivisions (4) (a) and (b).

Note

Subdivision (1) restates a rule often referred to by the Court of Appeals (*Bernstein v Bodean*, 53 NY2d 520, 529 [1981] ["(W)ith respect to the examination of all witnesses, the scope and manner of interrogation are committed to the Trial Judge in the exercise of his responsibility to supervise and to oversee the conduct of the trial"]; *Matter of Friedel v Board of Regents of Univ. of State of N.Y.*, 296 NY 347, 352 [1947] ["Once the right has been accorded, the extent of cross-examination rests largely in the discretion of the tribunal, whose exercise thereof is not reviewable unless abused"]; *People v Schwartzman*, 24 NY2d 241, 244 [1969] ["The nature and extent of cross-examination is subject to the sound discretion of the Trial Judge"]).

The scope of the trial court's discretion includes the responsibility to protect a witness from harassment, undue embarrassment, or physical danger (*People v Stanard*, 42 NY2d 74, 84 [1977] [There is a duty to protect a witness from questions which "harass, annoy, humiliate or endanger him"]).

In a criminal proceeding, the trial court in its exercise of sound discretion must respect the boundaries drawn by a defendant's constitutional right to present a defense (*e.g*. *Davis v Alaska*, 415 US 308, 316 [1974] ["Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner is not only permitted to delve into the witness' story to test the witness' perceptions and memory, but the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." Trial court erred in not permitting the defense to cross-examine a witness about possible bias]; *California v Trombetta*, 467 US 479, 485 [1984] ["Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness. We have long interpreted this standard of fairness to require that criminal defendants be afforded a meaningful opportunity to present a complete defense"]; *Crane v Kentucky*, 476 US 683, 687 [1986] [An evidentiary ruling may not deprive a defendant "of his fundamental constitutional right to a fair opportunity to present a defense." Thus, it was error for the trial court to preclude the jury from considering the credibility of a confession that the trial judge found to be voluntary]; *People v Carroll*, 95 NY2d 375, 385 [2000] ["A court's discretion in evidentiary rulings is circumscribed by

the rules of evidence and the defendant's constitutional right to present a defense"]; *People v Robinson*, 89 NY2d 648, 650 [1997] [Defendant's "constitutional right to due process requires the admission of hearsay evidence consisting of Grand Jury testimony when the declarant has become unavailable to testify at trial," and "the hearsay testimony is material, exculpatory and has sufficient indicia of reliability"]; *People v Hudy*, 73 NY2d 40, 56 [1988] [While the ex post facto part of the decision was abrogated by *Carmell v Texas* (529 US 513 [2000]), the Court "also conclude(d) that defendant was improperly denied the right to present his case by the trial court's ruling foreclosing examination of the two investigating officers about the manner in which the child-witnesses were first questioned"]).

Subdivision (2) in its first sentence restates New York law that cross-examination should ordinarily be limited to an examination into matters affecting the witness's credibility and matters testified to on direct examination (*e.g. People v Chin*, 67 NY2d 22, 28 [1986] ["(C)ross-examiner may delve deep in order to attack credibility and present an alternate view of the facts"]; *People v Giblin*, 115 NY 196, 199 [1889] ["It is an office of cross-examination to exhibit the improbabilities of the witness' story"]; *People ex rel. Phelps v Court of Oyer & Terminer of County of N.Y.*, 83 NY 436, 460 [1881] ["As a general rule the range and extent of such an examination is within the discretion of the trial judge, subject, however, to the limitation that it must relate to matters pertinent to the issue, or to specific facts which tend to discredit the witness or impeach his moral character"]).

A trial court's discretion should ordinarily be exercised to preclude examination into matters that were not elicited on direct examination (*see e.g. Goff v Paul*, 8 AD3d 971, 972 [4th Dept 2004]; *Hall v Allemannia Fire Ins. Co. of Pittsburgh*, 175 App Div 289, 292 [4th Dept 1916]). This rule exists primarily "to prevent the cross-examiner from cluttering up the direct examiner's case with unfavorable and extraneous facts when he could make the witness his own" (*People v Hadden*, 95 AD2d 725, 725-726 [1st Dept 1983]). The courts have, however, cautioned that cross-examination is not strictly limited "to the precise details brought out on direct examination" (*Crawford v Nilan*, 264 App Div 46, 51 [3d Dept 1942], *revd on other grounds* 289 NY 444 [1943]). Rather, the examination may seek an explanation and clarification of matters that were not fully disclosed on direct (*People v Ayala*, 194 AD2d 547, 547 [2d Dept 1993]). Thus, cross-examination into inferences, implications, and explanations suggested by or arising from the direct examination is permitted (*see* Barker & Alexander, Evidence in New York State and Federal Courts § 6:72 at 628 [2d ed]).

The second sentence of subdivision (2) restates New York law that nonetheless permits a court in an appropriate case to allow inquiry into matters that were not at all the subject of direct examination (*Neil v Thorn*, 88 NY 270, 275-276 [1882]; *see White v McLean*, 57 NY 670 [1874] [abstract; text at 47 How Prac 193, 198 (1874) ("It makes no difference that the witness under examination

was the opposite party to the action. He is but a witness, and the general rules applicable to adverse witnesses govern the case. Though a broader range of cross-examination than is usual is allowable, it is still subject to the discretion of the court")]).

In a civil proceeding, a court's exercise of discretion to permit a cross-examination to go beyond direct examination may be proper only when it relates to an issue in the case and examination into that issue does not frustrate the orderly presentation of a party's proof (*cf. American Motorists Ins. Co. v Schindler El. Corp.*, 291 AD2d 467, 468-469 [2d Dept 2002]; *Grcic v City of New York*, 139 AD2d 621, 626 [2d Dept 1988]).

In a criminal proceeding, the Appellate Division has indicated that a trial court should exercise its discretion to permit inquiry into a relevant issue, regardless whether the issue was raised on direct (*see People v Casiano*, 148 AD3d 1044, 1046 [2d Dept 2017] [The "defense is permitted to exceed the scope of a direct examination in order to prove a relevant proposition such as the justification defense"]; *People v Joslyn*, 103 AD3d 1254, 1256 [4th Dept 2013] ["(I)n a criminal case, a party may prove through cross-examination any relevant proposition, regardless of the scope of direct examination"]; *People v Kennedy*, 70 AD2d 181, 186 [2d Dept 1979] ["(I)t is well settled that in a criminal case a party may prove through cross-examination any relevant proposition, regardless of the scope of the direct examination"]).

Where cross-examination of the witness on matters not raised on direct is permitted, the court also has the discretion to rule that the cross-examiner has made the witness the cross-examiner's own witness to that extent. In that situation, the rules governing direct examination, including the restriction on leading questions set forth in subdivision (4) (a) and the rule limiting impeachment of one's own witness set forth in rule 6.11 (3) of the Guide to New York Evidence, apply (*see Bennett v Crescent Athletic-Hamilton Club*, 270 NY 456, 458 [1936]; *People ex rel. Phelps*, 83 NY at 459-460).

Subdivision (3) is derived from *People v Buchanan* (145 NY 1, 24 [1895] [A "witness may be re-examined by the party calling him upon all topics on which he has been cross-examined, for the purpose of explaining any new facts which came out; but the re-examination must be confined to the subject-matter of the cross-examination"]; *People v Zigouras*, 163 NY 250, 256 [1900] ["While the range in details to which the re-examination may extend should rest largely in the discretion of the court, to the end that immaterial issues may not arise, enough should be permitted to prevent a part of the truth from conveying a false impression"]; *People v Regina*, 19 NY2d 65, 78 [1966] ["(T)he prosecution's question on redirect examination was properly within the scope of matters gone into on cross-examination and did no more than to explain, clarify and fully elicit a question only partially examined by the defense"]; *accord People v Ochoa*, 14

NY3d 180, 186-187 [2010]; *Feblot v New York Times Co.*, 32 NY2d 486, 498 [1973]).

Subdivision (4) governs the use of leading questions in examining witnesses. The New York courts have traditionally considered a question to be leading if it suggests to the witness the answer the examiner wants (*see e.g. People v Mather*, 4 Wend 229, 247 [Sup Ct of Judicature 1830] ["A question is leading which puts into a witness' mouth the words that are to be echoed back, or plainly suggests the answer which the party wishes to get from him"]). Whether a leading question may be used in examining a witness is committed to the court's discretion (*see Downs v New York Cent. R.R. Co.*, 47 NY 83, 88 [1871] ["It was within the discretion of the judge at the trial to suffer a question, leading in form, to be put"]).

Subdivision (4) (a) restates New York's rule that leading questions are ordinarily not permitted on direct examination (*see e.g. People v Blauvelt*, 156 AD3d 1333, 1335 [4th Dept 2017]; *People v Cuttler*, 270 AD2d 654, 655 [3d Dept 2000]).

> "The general rule is that leading questions may not be used during the direct examination of a witness. This rule is explained by the likelihood that a witness will be friendly, or at least nonhostile, toward the party who called her and therefore susceptible to mouthing the version of events sought to be proved by that party. Thus, to help ensure that the fact-finder hears the facts as they are known by the witness, not by counsel, leading questions are generally prohibited on direct" (Barker & Alexander § 6:70 at 622).

A court may allow leading questions, however, when appropriate in particular circumstances, e.g., examination on introductory matters (*Mather*, 4 Wend at 247); examination of a child (*People v Martina*, 48 AD3d 1271, 1272 [2008] [sexual abuse case]; *People v Graham*, 171 AD3d 1566, 1570 [4th Dept 2019]); expediting a trial as to matters that are not in dispute (*Cope v Sibley*, 12 Barb 521, 524-525 [Sup Ct General Term 1850]); when necessary to clarify a witness's testimony (*People v Brizen*, 118 AD3d 590, 590-591 [2014]; *People v Williams*, 242 AD2d 469, 469 [1st Dept 1997] [clarify testimony of person who had displayed a difficulty with the language]); and when examining a witness about an inconsistent statement (*Sloan v New York Cent. R.R. Co*., 45 NY 125, 127 [1871]). A court may also permit leading questions to avoid having the witness testify to matters the court has ruled inadmissible.

Subdivision (4) (b) restates New York law when the witness is an adverse party or closely identified with an adverse party or has demonstrated hostility to the party or the party's attorney. Leading questions may be used during the examination of such witnesses (*Becker v Koch*, 104 NY 394, 401 [1887]; *Jordan*

v Parrinello, 144 AD2d 540, 540 [2d Dept 1988]), but the court may disallow the use of leading questions when the witness shows no sign of hostility (*Matter of Argila v Edelman*, 174 AD3d 521, 524 [2d Dept 2019]; *Matter of Giaquinto*, 164 AD3d 1527, 1530-1531 [3d Dept 2018]; *Jackson v Montefiore Med. Ctr.*, 109 AD3d 762, 763 [1st Dept 2013]). Factors suggestive of hostility include reluctance to testify and evasiveness in answering questions (*e.g. Matter of Ostrander v Ostrander*, 280 AD2d 793, 793-794 [3d Dept 2001]).

Subdivision (4) (c) restates familiar New York law that permits leading questions during the cross-examination of a witness (Barker & Alexander § 6:70 at 622 ["(O)n cross-examination a witness usually is of an uncooperative frame of mind and is more likely to resist the suggestions of the cross-examiner. Therefore, leading questions ordinarily are allowed on cross-examination"]). When in a civil proceeding, however, one party on its direct case calls an adverse party, the court may preclude the attorney for that party-witness from asking leading questions on the "cross-examination" (*id.* § 6:70 at 622 n 6).

Subdivision (4) (d) restates New York law recognizing cross-examination into matters not the subject of direct examination, as permitted under subdivision (2), is in effect direct examination and therefore is subject to the rules governing leading questions on direct examination, as set forth in subdivision (4) (a) and (b) (*see People ex rel. Phelps*, 83 NY at 459).

6.11. Impeachment in General

(1) The credibility of a witness may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) Evidence of impeachment may be used in the cross-examination of a witness. The party examining the witness is bound by the witness's answer unless the evidence of impeachment is not collateral. Evidence is not collateral when it is directly relevant to one or more issues in the action, or to the capacity of the witness to testify pursuant to rule 6.01 (Competency to Testify) and rule 6.03 (Oath or Affirmation) or is evidence admissible pursuant to rule 6.13 (Impeachment by Bias, Hostility, Interest) or rule 6.15 (Impeachment by Prior Inconsistent Statement). Evidence of impeachment which is not collateral may be proved by extrinsic evidence.

(3) Except as set forth in rule 6.15 (Impeachment by Prior Inconsistent Statement), a party may not impeach its own witness. A party may, however, through examination, elicit testimony that an adverse party is expected to argue impeaches the witness's credibility, and a party is not precluded from presenting a witness whose testimony is not consistent with one of that party's other witnesses.

Note

Subdivision (1). The rule stated in this subdivision is derived from Court of Appeals precedent. Impeachment evidence is designed "to discredit the witness and to persuade the fact finder that the witness is not being truthful." (*People v Walker*, 83 NY2d 455, 461 [1994].) It may be accomplished on cross-examination or in particular instances by extrinsic evidence.

The Court of Appeals has commented that the credibility of a witness is "a many faceted concept, of course, requiring a careful assessment of a number of subtle factors before testimony can be labeled as believable or unbelievable."

(*People v Wise*, 46 NY2d 321, 325 [1978].) The Court has explained that whether particular facts or matters are a proper subject of impeachment is an issue of relevance, namely, whether "[a]s a matter of reason and common experience" they bear on the witness's credibility. (*See Walker*, 83 NY2d at 462.)

Subdivision (2). Subdivision (2) sets forth the general rule that permits the use of evidence of impeachment to cross-examine a witness and that the party examining the witness is bound by the witness's answers unless the evidence of impeachment is not collateral. (*See e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990]; *People v Pavao*, 59 NY2d 282, 288-289 [1983]; *Halloran v Virginia Chems.*, 41 NY2d 386, 390, 393 [1977]; *People v Schwartzman*, 24 NY2d 241, 245 [1969]; *Potter v Browne*, 197 NY 288, 293 [1910].) Impeaching evidence is not collateral when directly relevant to one or more issues in the case (*see People v Cade*, 73 NY2d 904 [1989]); or independently admissible to impeach the witness, e.g. show the witness's bias, hostility or impaired ability to perceive or understand the nature of an oath or affirmation. (*See Badr*, 75 NY2d at 635; *Schwartzman*, 24 NY2d at 245.)

Thus, if the matter is collateral, the cross-examiner may inquire into it, but must take the witness's answer and is not free to put in independent proof about the collateral matter. (*Wise*, 46 NY2d at 328.) "This rule," the Court of Appeals has observed, "is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness' answers. The resulting length of the trial would by far outweigh the limited probative value of such evidence." (*Pavao*, 59 NY2d at 289.)

Impeachment is subject to the control of the trial court's exercise of sound discretion. (*See Schwartzman*, 24 NY2d at 245; *Langley v Wadsworth*, 99 NY 61, 63 [1885] [noting when the object of cross-examination "is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review"].) While the Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the defendant in a criminal trial an opportunity for cross-examination, it does not guarantee a cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v Fensterer*, 474 US 15, 20 [1985]; *People v Burns*, 6 NY3d 793, 795 [2006].) Thus, it is generally within the court's sound discretion to limit the scope of cross-examination of the criminal defendant when questions are irrelevant, concern collateral issues, or risk misleading the jury. (*Ibid.*).

Subdivision (3). The first portion of subdivision (3) is derived from Court of Appeals precedent that sets forth a rule against a party impeaching the party's own witnesses upon any credibility ground, except as the rule has been statutorily

modified with respect to impeachment by use of the witness's prior inconsistent statement. (*See e.g. People v Fitzpatrick*, 40 NY2d 44, 49-53 [1976]; *Carlisle v Norris*, 215 NY 400, 408-409 [1915]; *Cross v Cross*, 108 NY 628, 629 [1888] [rule is applicable when a party calls an adverse party]; *Becker v Koch*, 104 NY 394, 401-402 [1887].) This rule "descends to us from the ancient time when a party's witnesses were brought into court not to swear to facts in a case but rather to a party's own credibility. Not surprisingly, it then was considered ill befitting for a party to question the veracity of his own witnesses." (*Fitzpatrick*, 40 NY2d at 49; *see also People v Minsky*, 227 NY 94, 99-100 [1919] ["A party should not be permitted, after having unsuccessfully taken a chance to secure favorable testimony, to attack his own witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed from the general character of the witness"]; *Carlisle*, 215 NY at 409 [by calling a witness the party "vouched for his reliability and credibility"].)

The remaining portions of the subdivision are also derived from Court of Appeals precedent. Thus, the Court has cautioned that the party is not bound by the testimony of a witness the party calls and that the party may always contradict the witness's testimony on a relevant issue by proof from other sources. (*See Spampinato v A.B.C. Consol. Corp*., 35 NY2d 283, 287 [1974]; *Carlisle*, 215 NY at 410 [rule does not prevent the party from asking to have the "truthfulness or accuracy" of the witness's testimony submitted to the jury].) The Court has also held the rule against impeaching the party's own witness does not prohibit a party from preemptively bringing out on direct examination facts to take the "sting" out of an expected cross-examination. (*See Minsky*, 227 NY at 98 ["The law does not . . . compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury"].)

6.13. Impeachment by Bias, Hostility, Interest

The credibility of a witness may be impeached by asking the witness on cross-examination about the witness's bias, hostility, or interest for or against any party to the proceeding and by extrinsic evidence of such bias, hostility, or interest.

Note

This rule is derived from decisions of the Court of Appeals that recognize that a witness's partiality for or against a party in the proceeding may be shown to impeach the witness's credibility. (*See e.g. Coleman v New York City Tr. Auth.*, 37 NY2d 137, 142 [1975] [noting "the relevancy of all facts which bear on the probable partiality" of a witness for impeachment purposes]; *Schultz v Third Ave. R.R. Co.*, 89 NY 242, 248-249 [1882] ["It is always competent to show that a witness produced upon the trial of an action is hostile in his feelings toward the party against whom he is called to testify or that he entertains malice toward that party, and so it has been held in many cases"].) Illustrative examples of partiality recognized by the Court include a witness's bias in favor of the party calling the witness (*see People v Webster*, 139 NY 73, 85 [1893] ["bias is always of importance in determining credibility" and noting that bias may arise from family, business or close social relationships]; *People v Brown*, 26 NY2d 88, 94-95 [1970]); hostility to the party against whom the witness testifies (*see Brink v Stratton*, 176 NY 150, 152 [1903] ["it was competent to prove the hostility of any or all of these witnesses towards the defendants"]; *People v Brooks*, 131 NY 321, 325-326 [1892]); or the witness's interest in the case, personal, financial or other (*see People v Jackson*, 74 NY2d 787, 790 [1989] [witness who cooperated with prosecutor only after receiving a reduced sentence on a pending charge had an "obvious interest"]; *Coleman*, 37 NY2d at 142 ["an interest in a cause being a circumstance available for impeachment"]).

The rule as stated reflects the Court of Appeals holdings that evidence of partiality may be brought out on cross-examination and, as partiality is not a collateral matter, by extrinsic evidence. (*See People v Chin*, 67 NY2d 22, 31 [1986] ["interest or bias is not collateral"]; *Potter v Browne*, 197 NY 288, 293 [1910] ["The well-settled rule invoked by counsel for the plaintiff is that which permits a party to show the hostility of a witness toward him. This may be done by proving the hostile acts or declarations of the witness, either out of his own mouth or from the lips of others"]; *Brink*, 176 NY at 152 [hostility of witnesses may be shown "by their cross-examination or by other testimony"].) Extrinsic evidence of partiality may be admitted without first cross-examining the witness about the matter. (*See e.g. People v Michalow*, 229 NY 325, 331 [1920] ["It is not necessary to first examine the witness as to his hostility"]; *Brink*, 176 NY at 152.)

The Court of Appeals has noted that the trial court has discretion to control the presentation of evidence of partiality. (*See People v Corby*, 6 NY3d 231, 234-237 [2005]; *Brooks*, 131 NY at 325-327.) While such discretion may be exercised to limit the extent of the evidence admitted, the trial court may not completely exclude the offered evidence unless the inference of impartiality is remote or speculative, or the party who seeks to impeach the witness lacks a good faith basis for the question, or the evidence would be cumulative. (*See People v Hudy*, 73 NY2d 40, 57 [1988]; *People v Chin*, 67 NY2d 22, 28-29 [1986]; *People v Thomas*, 46 NY2d 100, 105 [1978]; *People v McDowell*, 9 NY2d 12, 15 [1961].) In essence, the court must weigh the probative value of the evidence against the danger that its admission would unduly prejudice a party, confuse an issue, or be cumulative. (*See* Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence).

In criminal proceedings, both the United States Supreme Court and the Court of Appeals have cautioned that the exercise of discretion to limit or exclude evidence of partiality of witnesses testifying against defendants must be exercised in light of the Sixth Amendment's right of confrontation guaranteed to the defendant. (*Davis v Alaska*, 415 US 308, 318 [1974] ["While counsel was permitted to ask (the witness*)* whether he was biased, counsel was unable to make a record from which to argue why (the witness) might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial"; thus, defendant's right of confrontation was denied]; *Hudy*, 73 NY2d at 57 ["both the constitutional and the evidentiary rules" were breached when the trial court precluded defense counsel from questioning the police officers in the manner proposed; defendant had been prevented from cross-examining them about their questioning of complaining witnesses that may have shown possible fabrication by those witnesses].)

6.15. Impeachment by Prior Inconsistent Statement

(1) A witness's credibility may be impeached by evidence that the witness has made a statement, whether written or not, inconsistent with the witness's present testimony.

(2) In examining a witness concerning a prior inconsistent statement, the examining party must first show the statement or disclose its contents to the witness before asking the witness to affirm or deny the statement.

(3) If the witness denies making the prior inconsistent statement or is unable to recall making the statement, extrinsic evidence of the statement is admissible. If the witness admits making the prior inconsistent statement, whether to admit extrinsic evidence of the statement is committed to the discretion of the court.

(4) A party may not impeach its own witness by evidence of the witness's prior inconsistent statement, except as follows:

(a) In a civil proceeding, any party may introduce proof that any witness has made a prior statement inconsistent with the witness's testimony if the statement was made in a writing signed by the witness or was made under oath.

(b) In a criminal proceeding, when a witness, upon examination by the party who called the witness, gives testimony upon a material issue of the case which tends to disprove the party's position, the party may introduce evidence that the witness has previously made either a written statement signed by the witness or an oral statement under oath contradictory to the witness's testimony.

(5) The credibility of a witness may be impeached by showing that the witness omitted to state a relevant fact or to state it more fully prior to testifying, at a time when the witness's attention was called to the matter and the witness was specifically asked about the facts embraced in the question asked at a hearing or trial. Even though the matter was not called to the attention of the witness, the credibility of the witness may be impeached by showing that the circumstances surrounding the omission made it most unnatural for the witness to have omitted the information from what the witness said.

(6) Except in a civil case, as provided in rule 8.33 (1), an inconsistent statement is not admissible for the truth of the contents of the statement; rather, it is admissible solely for the purpose of determining the credibility of the witness.

Note

Subdivision (1). The rule set forth in subdivision (1) is derived from the seminal decision on the subject, *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 268-269 [1912]), wherein the Court of Appeals held:

> "Any statement of a witness made out of court, orally or in writing, if contradictory of a material part of his testimony, may be, if properly proven, introduced in evidence, not as substantive proof of the truth of such statement, but as tending to discredit him. If it is sought to prove the expression of an opinion inconsistent with the testimony, it is enough if the opinion is so incompatible with the facts testified to by the witness that an honest mind knowing the facts would not be likely to entertain the opinion. Repugnant statements or contraries cannot be true and the fact that the witness has made them tends to show that he is untrustworthy through carelessness, an uncertain memory or dishonesty." (*See also Sloan v New York Cent. R.R. Co.*, 45 NY 125, 127 [1871] [prior inconsistent statement "is competent, for the purpose of impeachment, to prove that a witness has made statements out of court in conflict with his evidence in court upon a material question in the case"].)

Those holdings are embedded in a statute governing a criminal case: "Evidence concerning a prior contradictory statement . . . may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury." (CPL 60.35 [2].)

Thus, as the relevance of the prior inconsistent statement is predicated upon the fact that it was made, and not for its truth, the hearsay rule does not bar the statement.

In the limited circumstance set forth in rule 8.33, however, decisional law permits a prior inconsistent statement to be admitted for its truth. (*See* rule 8.33 and the Note thereto.)

For a prior statement to be inconsistent for purposes of the rule, it is not necessary that "there be a direct and positive contradiction. It is enough that the testimony and the statements are inconsistent and tend to prove differing facts." (*Larkin*, 205 NY at 269.) In *People v Wise* (46 NY2d 321, 327 [1978]), the Court of Appeals noted that where there is some doubt as to whether a statement is "inconsistent," the "balance should be struck in favor of admissibility, leaving to the jury the function of determining what weight should be assigned the impeachment evidence. Applied in this fashion, the law of previous contradictory statements will advance rather than impede the truth-seeking process."

Where a prior inconsistent statement of a defendant in a criminal proceeding is involved, a statement made in violation of the defendant's federal or state right to counsel or the pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may, if otherwise voluntarily made, be used to impeach a defendant who testifies on his or her own behalf. (*People v Maerling*, 64 NY2d 134, 140 [1984]; *People v Wilson*, 28 NY3d 67 [2016]; *People v Harris*, 25 NY2d 175 [1969], *affd* 401 US 222 [1971].) It must be noted that the statement must be voluntary; an involuntary statement may never be used for impeachment. Similarly, evidence seized in violation of the Fourth Amendment may be used to impeach a defendant who testifies on his or her own behalf. (*United States v Havens*, 446 US 620 [1980]; *People v Maerling*, 64 NY2d 134 [1984].)

Subdivision (2). Subdivision (2) recites the foundation warning required for inquiring of a prior inconsistent statement, as derived from *Larkin v Nassau Elec. R.R. Co.* (205 NY 267, 269 [1912] [citations omitted]):

> "In case the statements are oral, the warning is given by asking the witness, in substance and effect, if he did not at a given time and place in the presence of or to a person or persons specified make the alleged contradictory statements. In case the statements are in writing and unsubscribed, the paper must be shown or read to the

> witness and marked for identification, and, if subscribed, the signature and in case he so demands the paper must be shown to him." (*See also Wise*, 46 NY2d at 326 ["To set the stage for the prior inconsistency, the questioner must first inform the witness of the circumstances surrounding the making of the statement, and inquire of him whether he in fact made it"].)

The foundation requirement does not apply where the witness who made the prior statement is a party to the proceeding. (*Blossom v Barrett*, 37 NY 434, 438 [1868] ["The (foundation) rule insisted on does not apply when the admission sought to be proved is that of a party to the suit. The party's confessions are competent without interrogating him at all in regard to it"].)

Subdivision (3). The rule set forth in subdivision (3) is also derived from *Larkin v Nassau Elec. R.R. Co.*:

> "The attention of a witness having been thus called to the contradictory statements, they may be proven and introduced in evidence in the regular course of the trial. They may, of course, be proved by the admissions of the witness made at the time his attention was called to them. If he fully and clearly admits the making of them as provable by the impeaching party, further proof of them is unnecessary." (205 NY at 269-270; *see also Hanlon v Ehrich*, 178 NY 474, 480 [1904] ["If . . . the witness denies having made the statement, or does not remember having made it, he may then be contradicted by any person who heard him make it (or) documentary evidence"].)

Whether to admit the extrinsic evidence when the witness has admitted the inconsistency is committed to the sound discretion of the trial court. (*See People v Piazza*, 48 NY2d 151, 163-165 [1979]; *People v Schainuck*, 286 NY 161, 165 [1941].) In deciding on the admissibility of a prior inconsistent statement a court may consider whether the statement relates to a collateral matter and would not be admissible pursuant to rule 6.11 (Impeachment in General). (*Cf. People v Knight*, 80 NY2d 845, 847 [1992] ["the rule prohibiting the use of extrinsic evidence to impeach a witness on a matter that is merely collateral . . . has no application where the issue to which the evidence relates is material in the sense that it is relevant to the very issues that the jury must decide"].)

Subdivision (4) (a) and (b) are taken virtually verbatim from CPLR 4514 and CPL 60.35, respectively. They were enacted "to correct the inequities occasioned by the fact that in many cases both sides were unfairly hampered by their inability to impeach unreliable witnesses upon whom they were compelled to rely." (*People v McCormick*, 278 App Div 410, 413 [1st Dept 1951], *affd* 303 NY 403 [1952].)

Subdivision (5). This subdivision is derived from two Court of Appeals decisions that address whether an omission in a prior statement may render the statement inconsistent, *People v Bornholdt* (33 NY2d 75, 88 [1973]) and *People v Savage* (50 NY2d 673, 679 [1980]). The Court of Appeals has instructed that "a witness may not be impeached simply by showing that he omitted to state a fact, or to state it more fully at a prior time." (*Bornholdt*, 33 NY2d at 88.) Impeachment by omission in a prior statement, however, is permissible where it is shown that "at the prior time the witness' attention was called to the matter and that he was specifically asked about the facts embraced in the question propounded at trial." (*Bornholdt*, 33 NY2d at 88.) This rule, the Court observed, "accords with human experience recognizing that unless asked directly about a matter a person may quite normally omit it from a narrative description." (*Ibid.* at 89.) The Court has also held that impeachment by omission in a prior statement is permissible "when given circumstances make it most unnatural to omit certain information." (*People v Savage*, 50 NY2d 673, 679 [1980]; *see also People v Chery*, 28 NY3d 139, 145 [2016] [where defendant testified at trial that the complainant assaulted him, his failure to relate an exculpatory fact in a statement to police at the time of his arrest in which he described the complainant's conduct as relatively minor misconduct was an "unnatural omission"].) In such circumstances, the witness's attention need not have been drawn to the matter at the time the statement was made. This rule, too, as the Court stated, "is firmly imbedded in behavioral expectations." (*Savage*, 50 NY2d at 679.) As to the application of *Savage* and *Bornholdt* to grand jury testimony, see *People v Dismel* (16 Misc 3d 1120[A], 2007 NY Slip Op 51519[U] [Sup Ct, Kings County 2007]).

Subdivision (6). See the commentary for subdivision (1).

6.17. Impeachment by Instances of Misconduct

(1) Subject to paragraph (c),

(a) the credibility of a witness may be impeached on cross-examination by asking the witness about prior specific criminal, vicious, or immoral conduct of the witness; and

(b) the credibility of a witness who gives evidence of a person's character also may be cross-examined about whether the witness has heard of prior specific criminal, vicious, or immoral conduct of the witness who was the subject of the character testimony.

(c) Cross-examination authorized by paragraphs (a) and (b) is permissible only if:

(i) the nature of the conduct or the circumstances in which it occurred bear logically and reasonably on the witness's credibility;

(ii) the question has a good faith basis;

(iii) the question does not relate to conduct underlying a criminal charge of which the witness was acquitted; and

(iv) in a criminal case, the question about prior criminal, vicious, or immoral conduct of the defendant was authorized by the court prior to trial.

(2) Except for the admission of a criminal conviction pursuant to rule 6.19, extrinsic evidence is not admissible to prove prior criminal, vicious, or immoral conduct.

(3) A defendant in a criminal proceeding does not, by the act of testifying, waive the privilege against self-incrimination with respect to questions concerning pending unrelated criminal charges.

(4) 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 in subdivision (1) (a) regarding cross-examination of the witness regarding prior instances of misconduct committed by the witness is derived from substantial Court of Appeals precedent. (S*ee e.g. People v Smith*, 27 NY3d 652, 660, 662 [2016] ["witnesses—and indeed, even a testifying defendant—may be cross-examined on 'prior specific criminal, vicious or immoral conduct,' provided that 'the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility' " and "a good faith basis for inquiring" is established]*; People v Sorge*, 301 NY 198, 200 [1950] ["A defendant, like any other witness, may be 'interrogated upon cross-examination in regard to any vicious or criminal act of his life' that has a bearing on his credibility as a witness"]; *People v Webster,* 139 NY 73, 84 [1893] ["It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life"].) Whether the specific instance of conduct in issue logically and reasonably relates to the witness's credibility is committed to the sound discretion of the court. (*See People v Coleman*, 56 NY2d 269, 273 [1982].) It should be noted that misconduct that demonstrates an "untruthful bent," even though perhaps falling outside the "conventional category of immoral, vicious or criminal acts," may be a proper subject of impeachment. (*People v Walker*, 83 NY2d 455, 461 [1994] [impeachment by defendant's use of alias].)

Subdivision (1) (b) states New York's rule permitting the cross-examination of a character witness about whether the witness had heard about prior specific instances of conduct at odds with the reputation attributed to the person who was the subject of the character testimony. (*See People v Kennedy,* 47 NY2d 196, 206 [1979] ["Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant's reputation, and should not have extended to her personal knowledge of the underlying acts"]; *People v Kuss*, 32 NY2d 436, 443 [1973] [when the credibility of character witnesses is at issue, "it is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him. However(,) as the defendant indicates, there are certain

limitations. The inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant's reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions" (citation omitted)]; *see also People v Alamo*, 23 NY2d 630 [1969].) Of note, both *Kuss* and *Alamo* cite with approval *Michelson v United States* (335 US 469 [1948]), with the Court in *Alamo* stating that *Michelson* is the

> "leading modern case on character testimony and the cross-examination of a character witness . . . There, the policy problem of allowing this type of evidence at all was examined exhaustively by Justice Jackson, including a number of New York cases, and it was held that when a defendant introduces the subject of his good character it 'throw[s] open the entire subject' of his good name through cross-examination of the witnesses called as to contrary reports and rumors and by independent proof adversely affecting the reputation of defendant. The court felt that the archaic disadvantages of the rule could be overcome by 'discretionary controls in the hands of a wise and strong trial court.' " (*Alamo*, 23 NY2d at 634 [citation omitted].)

Since use of this impeachment method has the potential for unfair prejudice, especially to a defendant in a criminal proceeding, and may confuse or mislead the jury, the nature and extent of the cross-examination are subject to the sound discretion of the court. (*Smith*, 27 NY3d 652.)

When exercising its discretion regarding the potential cross-examination of a defendant in a criminal proceeding, whether with respect to a prior criminal conviction or any other criminal, vicious or immoral conduct, the trial court must, upon a request of the defendant, prior to trial, exercise its discretion in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974]), and *People v Kennedy* (47 NY2d at 205-206). *Sandoval* explained that "regarding the potential cross-examination of a defendant in a criminal proceeding, whether with respect to a prior criminal conviction or any other criminal, vicious or immoral conduct, the trial court must, upon a request of the defendant, prior to trial, exercise its discretion in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974]), and *People v Kennedy* (47 NY2d at 205-206). *Sandoval* explained that

> "[t]o the extent . . . 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." (*Sandoval*, 34 NY2d at 377.)

And, the Court of Appeals has added that in the court's exercise of discretion "there are no per se rules requiring preclusion because of the age, nature, and number" of crimes or acts of misconduct sought to be examined about. (*People v Walker*, 83 NY2d at 459.)

Subdivision (1) (c) (i) restates the Court of Appeals holdings in *People v Smith* (27 NY3d at 662) and *People v Coleman* (56 NY2d 269, 273 [1982]) that the specific instance of conduct must logically and reasonably relate to the witness's credibility and that whether it does is committed to the sound discretion of the court.

Subdivision (1) (c) (ii) is derived from *People v Smith* (27 NY3d at 662).

Subdivision (1) (c) (iii) is derived from *People v Santiago* (15 NY2d 640, 641 [1964] ["prejudicial error was committed when the prosecutor on cross-examination questioned defendant about a criminal charge on which he had been acquitted"]). A witness may, however, be subject to impeachment by the underlying facts of a charge dismissed by the grand jury. (*People v Alamo*, 23 NY2d 630 [1969] [dismissal by the grand jury].)

Subdivision (1) (c) (iv) is derived from *People v Sandoval* (34 NY2d 371 [1974]) and CPL 240.43. *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. CPL 240.43 requires the prosecutor, upon the defendant's request, to notify the defendant before jury selection of "all specific instances of a defendant's prior uncharged criminal, vicious or immoral conduct of which the prosecutor has knowledge and which the prosecutor intends to use at trial for purposes of impeaching the credibility of the defendant."

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." (*Sandoval* at 378.)

Sandoval 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. . . .
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> "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* at 376–377.)

Subdivision (2). The rule stated in subdivision (2) is derived from substantial Court of Appeals precedent. (*See e.g. Badr v Hogan,* 75 NY2d 629, 635 [1990] ["Unlike material facts in dispute, or matters such as a witness's bias, hostility, or impaired ability to perceive which may be proved independently for impeachment, plaintiff's alleged prior misconduct had no direct bearing on any issue in the case other than credibility. If proven, it would show only that plaintiff had acted deceitfully on a prior *unrelated* occasion. The matter was, therefore, collateral and, under the settled rule, could not be pursued by the cross-examiner with extrinsic evidence to refute plaintiff's denial" (citation omitted)]; *People v Zabrocky*, 26 NY2d 530, 535 [1970]*; Sorge*, 301 NY at 200). In *Sorge*, the Court noted that this rule barring the admissibility of extrinsic evidence did not preclude further questioning of the witness when the witness denied committing the act, stating: "[A] negative response will not fob off further interrogation of the witness himself, for, if it did, the witness would have it within his power to render futile most cross-examination. The rule is clear that while a witness'[s] testimony regarding collateral matters may not be refuted by the calling of other witnesses or by the production of extrinsic evidence, there is no prohibition against examining the witness himself further on the chance that he may change his testimony or his answer." (*Id.* at 200-201 [citations omitted]; *compare* rule 8.35 [Prior Judgment of Conviction].)

Subdivision (3). The rule stated in subdivision (3) is derived from *People v Betts* (70 NY2d 289, 295 [1987] ["The policy of protecting the defendant's opportunity to testify, while allowing the prosecution a balanced evidentiary response, is well served by the rule that the defendant's choice to testify in the case on trial does not, by itself, effect a waiver of the privilege against self-incrimination as to pending unrelated charges. This rule will not, on the other hand, preclude prosecutors from inquiry into pending criminal charges if a defendant, in taking the

stand, makes assertions that open the door and render those charges relevant for contradiction and response"]); and *People v Cantave* (21 NY3d 374, 381 [2013] ["We hold that the prosecution may not cross-examine a defendant about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility"]); *People v Smith* (87 NY2d 715, 721 [1996] ["a prospective defendant who elects to testify before the Grand Jury does not waive the privilege against self-incrimination as to credibility questioning regarding unrelated pending charges"]; *compare People v Brady*, 97 NY2d 233, 235 [2002] [defendant in a criminal proceeding may be cross-examined regarding his "admissions at the guilty plea allocution" to an unrelated charge for which he was awaiting sentencing]).

Subdivision (4). See commentary in the note to rule 6.23 (2).

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 . . . .
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> "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).

6.21. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to impeach or support the witness's credibility.

Note

This rule is derived from substantial Court of Appeals precedent. (*See e.g. Matter of State of New York v Andrew O.*, 16 NY3d 841, 844 [2011]; *People v Wood*, 66 NY2d 374, 379 [1985]; *Brink v Stratton*, 176 NY 150, 154-156 [1903].) As stated by the Court in *Wood*: "[A]ny attempt to discredit . . . a witness because of his religious beliefs or for the exercise of his right to affirm the truth of his testimony is improper, because those factors are irrelevant to the issue of credibility." (*Wood*, 66 NY2d at 378; *see also Saunders v Champlain Bus Corp.*, 263 App Div 683, 684 [3d Dept 1942] ["The basic principle of our jurisprudence is that every citizen regardless of his position, his property, his race or his creed, is entitled to equal and exact justice"].)

This rule does not prevent the admission of evidence of religious beliefs or opinions when such evidence is relevant for a purpose other than attacking or supporting the witness's credibility. (*See e.g. Toomey v Farley*, 2 NY2d 71, 82 [1956] ["This . . . is that rare case in which proof of plaintiffs' piety and devotion to the tenets of their religion and of their prominence and activity in their church was pertinent to show the circumstances surrounding (plaintiffs), and as bearing upon the hurtful tendency of the libel, and the general damage to which (they were) exposed" (internal quotation marks omitted)]; *United States v Teicher*, 987 F2d 112, 118 [2d Cir 1993] [inquiry into a witness's religious beliefs " 'for the purpose of showing interest or bias because of them' " is not barred].)

6.23. Impeachment by Reputation for Untruthfulness and Rebuttal

(1) The credibility of a witness who has given substantive evidence may be impeached by evidence of the witness's reputation for untruthfulness in the community. A witness who testifies to another witness's reputation for untruthfulness may be asked whether the witness has heard of prior specific conduct that bears on the truthfulness of the witness who was the subject of the character testimony.

(2) When a witness's character for truthfulness is impeached by reputation evidence or otherwise, the party who called the witness may, in the discretion of the court, introduce evidence, in rebuttal, of that witness's reputation for truthfulness in the community. In the exercise of its discretion, the court may consider whether permitting the rebuttal evidence may result in confusion or cause the trial to be unduly extended in length. On cross-examination of the rebuttal witness, the witness may be asked whether the witness has heard of prior specific conduct that bears on the untruthfulness of the witness who was the subject of the character testimony.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *People v Hanley* (5 NY3d 108, 112 [2005]) and *People v Pavao* (59 NY2d 282 [1983]), where the Court of Appeals explained that " 'a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for the purposes of impeachment, has a bad reputation in the community for truth and veracity' " (*Hanley* at 112, quoting *Pavao* at 290; *see also People v Fernandez*, 17 NY3d 70, 76 [2011]; *People v Hinksman*, 192 NY 421, 432 [1908]). The purpose of this rule is to "ensure[ ] that the jury is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses." (*Hanley*, 5 NY3d at 112; *see also Pavao*, 59 NY2d at 290 [the rule provides "an effective means of testing and assessing the credibility of witnesses and reaching a proper verdict"].) The Court has noted that this form of impeachment is limited to a "key witness" or "key prosecution witness." (*Pavao*, 59 NY2d at 290-291.)

The Court of Appeals has instructed that proof of a witness's untruthful character must be confined strictly to reputation evidence, rather than opinion testimony. (*Hanley*, 5 NY3d at 112; *Carlson v Winterson*, 147 NY 652, 656 [1895].) In this connection, the character witness may not testify to specific acts of untruthful character by the witness being impeached. (*Pavao*, 59 NY2d at 290.) Furthermore, the reputation evidence must also be confined strictly to reputation for "truth and veracity." (*Hanley*, 5 NY3d at 112; *Hinksman*, 192 NY at 435 ["We think that evidence of general bad character**,** which is nothing but evidence of general reputation, should not be considered competent to decide the issue whether a defendant who testifies in his own behalf is worthy of belief . . . ."].)

Guide to New York Evidence rule 8.39 (Reputation Evidence) sets forth the rule on the evidence authorized to prove reputation.

The reputation evidence need not refer to the witness's reputation for untruthfulness at the time of the trial but may refer to a time prior to trial, provided that time is not so remote as to negate the probative value of an inference of a reputation of untruthfulness at the requisite time. (*See* Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence; *Dollner v Lintz*, 84 NY 669, 669 [1881] ["General reputation is not usually the growth of a day or month, but results in most cases from a course of life or conduct for a period of time. . . . The trial judge may control the range of the inquiry"].)

The Court of Appeals in dictum has approved the practice of asking witnesses called to impeach another whether, from their knowledge of the testified to bad reputation for truthfulness, they would believe the witness about whom they testified under oath. (*See Carlson*, 147 NY at 656; *Elmendorf v Ross*, 221 App Div 376, 377 [3d Dept 1927]; *Spira v Holoschutz*, 38 Misc 754, 755 [App Term 1902].)

The instant rule is simply one specific form of impeachment of a witness for untruthfulness. It doesn't exclude using any other rule of evidence to impeach the untruthful witness. For example, untruthful character can be shown by prior acts of misconduct; criminal convictions; as well as by an untruthful reputation.

Subdivision (2). The rule stated in subdivision (2) is derived from Court of Appeals decisions which hold that when a witness's character for truthfulness is impeached, the party calling the witness may, in the discretion of the court, seek to support the witness's credibility by evidence of the witness's character for truthfulness in the community. (*See e.g. Pavao*, 59 NY2d at 290 ["Whether the opposing party may call witnesses to rebut the impeaching witness' statement is a question best left to the discretion of the Trial Judge for it is he who can best assess whether doing so may result in confusion or cause the trial to be unduly extended in length"]; *Derrick v Wallace*, 217 NY 520, 525 [1916] [rebuttal evidence of good reputation]; *Stape v People*, 85 NY 390, 393 [1881].) This rule permits such character witness to testify that the witness has never heard the impeached witness's veracity questioned (*see People v Van Gaasbeck*, 189 NY 408, 419-420 [1907];

People v Davis, 21 Wend 309, 315 [Sup Ct of Judicature 1839]) and that the witness would believe the impeached witness under oath. (*See Adams v Greenwich Ins. Co.*, 70 NY 166, 170-171] [1877].)

The Court of Appeals has emphasized that the "court's discretion arises only when a party seeks to rebut [the testimony of untruthfulness]. It is at that point that the judge may determine whether the admission of further testimony or the calling of additional witnesses is proper. This assures that the court will not be inundated with competing witnesses that will cause undue delay in bringing a trial to conclusion." (*Hanley*, 5 NY3d at 114 [citation omitted]; *see also Pavao*, 59 NY2d at 290.)

Reasons for the introduction of rebuttal evidence of reputation evidence for truthfulness include not only when a witness is impeached by reputation for untruthfulness (*Stape*, 85 NY at 393) but also when a witness is impeached by criminal conviction or other instances of misconduct (*Derrick*, 217 NY at 525 ["Evidence of conviction thus impeaches the general character for truth and veracity and may be met by evidence of general good character"]).

Impeachment by proof of prior inconsistent statements, however, does not permit the admission of evidence of the witness's reputation for truthfulness. (*See Frost v McCarger*, 29 Barb 617, 620, 621 [Sup Ct, Gen Term 1859].) Similarly, the New York courts have held that evidence contradicting a witness's factual testimony does not permit evidence of the witness's reputation for truthfulness. (*Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577, 584 [2d Dept 1985] ["contradictions and improbabilities . . . did not constitute an attempt to prove bad character"]; *People v Rector*, 19 Wend 569, 586 [Sup Ct of Judicature 1838]; *see Derrick*, 217 NY at 525.)