GUIDE TO NEW YORK EVIDENCE

ARTICLE 6: WITNESSES & IMPEACHMENT

TABLE OF CONTENTS

COMPETENCY OF WITNESS

EXCLUSION OF WITNESS OR DISRUPTIVE DEFENDANT

PREREQUISITES TO TESTIMONY

TESTIMONY OF A WITNESS, SCOPE, LIMITS, ETC.

MISSING WITNESS

IMPEACHMENT OF A WITNESS

6.01. Competency of a Witness 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.

6.02 Competency of a Previously Hypnotized Witness

(1) Given that statements made under hypnosis are inherently unreliable:

(a) a witness's testimony as to events the witness recalls as a result of hypnosis is inadmissible;

(b) a witness's statement made under hypnosis is, as a general rule, inadmissible for the purposes of impeachment; and

(c) a party's admission induced by hypnosis is inadmissible.

(2) A witness's testimony as to events the witness recalls prior to hypnosis is admissible when, at a pretrial hearing, the proponent of the witness establishes by clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant's right of cross-examination. In particular, the trial court must determine the extent of the witness's prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection. Evidence, testimonial and documentary, which is material to the pretrial determination should be received at the hearing, without rigid application of the hearsay rule.

(3) If the witness is held to be competent to testify, the party affected by the testimony may introduce proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness's recollections.

Note

Subdivision (1) is derived from Court of Appeals decisions.

Subdivision (1) (a) sets forth the holding of *People v Hughes* (59 NY2d 523, 545 [1983] ["the defendant is entitled to a new trial because the trial court should not have permitted the victim to testify to events recalled after the hypnotic sessions"]).

S**ubdivision (1) (b)** sets forth the holding of *People v Hults* (76 NY2d 190, 192 [1990] ["hypnotic statements are, as a general rule, also inadmissible for purposes of impeachment"]). Thus far, there has been no exception made to the "general rule."

Subdivision (1) (c) sets forth the holding of *People v Schreiner* (77 NY2d 733, 734 [1991] [a defendant's statement which had been "hypnotically induced" during a psychiatric examination "in which he confessed to the murder . . . was improperly received in evidence against him"]).

Subdivision (2) is derived from *Hughes*, which held that the "pretrial use of hypnosis does not necessarily render the witness incompetent to testify to events recalled prior to being hypnotized" (*Hughes* at 545).

A pretrial hearing, however, is required to determine "the extent of the witness's prehypnotic recollection (which would establish the boundaries of admissible testimony) and whether the hypnosis was so impermissibly suggestive as to require exclusion of in-court testimony with respect to such prehypnotic recollection" (*Hughes* at 546).

At that hearing, "evidence, testimonial and documentary, which is material to the determination thereof should be received . . . without rigid application of the hearsay rule" (*Hughes* at 547). The burden of proof rests upon the People to demonstrate by "clear and convincing proof that the testimony of the witness as to his or her prehypnotic recollection will be reliable and that there has been no substantial impairment of the defendant's right of cross-examination" (*Hughes* at 547; *see People v Tunstall*, 63 NY2d 1, 8 [1984] [the defendant was entitled to a hearing on his claim that "the victim's confidence in her prehypnotic recollections, such as her identification of defendant, may have been artificially enhanced by the hypnotic process, thereby impairing defense counsel's ability to conduct a meaningful cross-examination of her"]).

On the remand of *Hughes* from the Court of Appeals, a hearing was conducted; the hearing was, however, ultimately found to be deficient for failure to adequately explore the propriety of admitting the prehypnotic testimony of the witness. The court "heard no expert testimony whatsoever on the suggestiveness of the hypnotic procedures that had been used . . . Moreover, although the court viewed that portion of a videotape showing the victim's interview, prior to hypnosis, about

her prehypnotic recollection, the court did not view that portion covering the hypnotic session itself" **(***People v Hughes*, 72 NY2d 1035, 1037-1038 [1988]).

Subdivision (3) is based on the following holding of *Hughes*:

> "If the witness is held to be competent to testify, the defendant, of course, has the option at trial of introducing proof with respect to the hypnotic procedures followed as well as expert testimony concerning the potential effect of the hypnosis on the witness's recollections. And since there is general agreement in the scientific community that a witness who has been hypnotized usually acquires some measure of confidence in events recalled under hypnosis, the court should charge the jury to that effect if the defendant requests it" (*People v Hughes*, 59 NY2d 523, 547-548 [1983]; s*ee* CJI2d[NY] General Applicability, Witness Underwent Hypnosis).

6.02.3. Competency of Judge as Witness

The testimony of a judge shall not be admissible at a trial, proceeding, or hearing at which the judge is presiding.

Note

This rule should be self-evident and embodies the holding of *People v Dohring* (59 NY 374, 378 [1874]) that "where the judge, who is called to the witness box, is actually trying the cause, and his continuance in action as judge is necessary to the seemly and proper trial of the cause, then he may not become a witness." *Dohring* required an objection to preserve the error (*id.* at 378-379). Under the present-day "mode of proceedings" doctrine of preservation (Guide to NY Evid rule 12.01 [6]), however, an objection may no longer be necessary. *See* Federal Rules of Evidence rule 605 (Judge's Competency as a Witness), which reads: "The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue."

6.02.5 Competency of Juror as Witness or to Impeach a Verdict

(1) During a trial, a juror may not testify as a witness before the other jurors on a material issue.

(2) Except as provided in subdivision three, in an inquiry into the validity of a verdict, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

(3) In an inquiry into the validity of a verdict, a juror may present in an affidavit and testify:

(a) that extraneous prejudicial information had been brought to the jury's attention, or that any outside influence was improperly brought to bear upon a juror or the jury;

(b) that the juror or another juror acquired information directly material to a point in issue in the trial by engaging in a conscious, contrived experiment, as opposed to having gleaned information from everyday experience;

(c) that the juror or another juror engaged in misconduct that prejudiced a party, including, for example, a juror concealing or misrepresenting information about the juror that prejudiced a party, or a juror communicating to the jury that juror's professional expertise on a material issue; and

(d) that the juror or another juror had a bias that prejudiced a party.

Note

Subdivision (1) is derived from the decision in *People v Buford* (69 NY2d 290, 298 [1987]) which stated that "a juror who could be a witness on a material element of the crime charged is grossly unqualified" to be or continue as a juror, citing *People v Harris* (53 AD2d 1007, 1007 [4th Dept 1976] ["The retention of . . . a juror in a position to offer direct testimony regarding an element of the crime charged . . . served to destroy the defendant's right to a jury trial"]; *see* Fed Rules Evid rule 606 [a] ["A juror may not testify as a witness before the other jurors at the trial"]; *but see People v Dohring*, 59 NY 374, 378 [1874] [in dicta, stating the historical view that "it is settled, that a juror may be a witness on a trial before himself and his fellows"]).

Subdivision (2) incorporates the language of Federal Rules of Evidence rule 606 (b), given the Court of Appeals decision in *Sharrow v Dick Corp.* (86 NY2d 54, 61 [1995]), which stated that "[a]lthough New York has not adopted a statute similar to [Federal Rules of Evidence] rule 606 (b), our case law is consonant with its underlying principles."

The source of the "underlying principles" begins with *People v De Lucia* (20 NY2d 275 [1967]). *De Lucia* expressly modified the common-law rule that jurors may not impeach their own verdicts. That modification was prompted by the United States Supreme Court decision in *Parker v Gladden* (385 US 363, 470 [1966]), which accepted the post-verdict testimony of jurors that revealed that a defendant's right of confrontation was violated when a bailiff told a couple of jurors that the defendant was guilty and if there was any error in finding the defendant guilty, the appellate court would correct it. (*See* CPL 310.10 [1] ["Except when so authorized by the court or when performing administerial duties . . . court officers or public servants . . . may not speak to or communicate with (jurors) or permit any other person to do so"]; *People v Rukaj*, 123 AD2d 277, 280 [1st Dept 1986].)

De Lucia began by explaining that the underlying policy reasons for the common-law rule were "not . . . to encourage the posttrial harassing of jurors for statements which might render their verdicts questionable. With regard to juryroom deliberations, scarcely any verdict might remain unassailable, if such statements were admissible. Common experience indicates that at times articulate jurors may intimidate the inarticulate, the aggressive may unduly influence the docile. Some jurors may 'throw in' when deliberations have reached an impasse. Others may attempt to compromise. Permitting jurors to testify regarding such occurrences would create chaos" (*De Lucia*, 20 NY2d at 278; *see People v Friedgood*, 58 NY2d

467, 473 [1983] ["as a matter of policy, efforts to undermine a jury's verdict by systematically questioning the individual jurors long after they have been dismissed in hopes of discovering some form of misconduct should not be encouraged"]; *People v Karen*, 17 AD3d 865, 867 [3d Dept 2005] [the claim that a juror "was coerced or bullied into a compromise verdict raises no question of outside influence but, rather, seeks to impeach the verdict by delving into the tenor of the jury's deliberative processes"]; *People v Maddox*, 139 AD2d 597, 598 [2d Dept 1988] [a juror's affidavit, "in which she sought to impeach her verdict by reference to matters occurring during the deliberation process, . . . was incompetent as a matter of law"]; *People v Smalls*, 112 AD2d 173, 175 [2d Dept 1985] [juror statement that "she had been pressured and badgered by the other jurors" was not a basis for impeaching the verdict]; *People v James*, 112 AD2d 380, 382 [2d Dept 1985] [jurors may not impeach their verdict by stating what was discussed during their deliberations]).

Subdivision (3) (a). While not abrogating the common-law rule, *De Lucia* created an exception, holding that the policy reasons for the rule were outweighed when there were allegations of prejudicial " 'outside influences' on a jury" that constituted a violation of a defendant's Sixth Amendment rights. (*De Lucia*, 20 NY2d at 279; *see* Fed Rules Evid rule 606 [b] [2] ["A juror may testify about whether: (A) extraneous prejudicial information was improperly brought to the jury's attention; (or) (B) an outside influence was improperly brought to bear on any juror"]; CPL 330.30 [2] [authorizing a motion to set aside a verdict when "during the trial there occurred, out of the presence of the court, improper conduct by a juror, or improper conduct by another person in relation to a juror, which may have affected a substantial right of the defendant and which was not known to the defendant prior to the rendition of the verdict"].)

In other words: "Generally, a jury verdict may not be impeached by proof of the tenor of its deliberations, but it may be upon a showing of improper influence. . . . Improper influence, of course, embraces not merely corrupt attempts to affect the jury process, but even well-intentioned jury conduct which tends to put the jury in possession of evidence not introduced at trial." (*People v Brown*, 48 NY2d 388, 393 [1979].)

Thus, when, as alleged in *De Lucia,* several jurors made an unauthorized visit to the alleged crime scene (and there, reenacted the crime) and thereby became unsworn witnesses not subject to cross-examination by the defendant, a hearing on the allegations at which the jurors were competent to testify was authorized. (*See* CJI2d[NY] Jury Admonitions in Preliminary Instructions ["Our law also does not

permit you to visit a place discussed in the testimony. . . . (O)nce you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have an erroneous view of the scene that may not be subject to correction by either party. That is not fair"]; PJI 1:10 [Do Not Visit or View Scene].)

De Lucia concluded that "proof of the fact of the unauthorized visit is sufficient to warrant a new trial without proof of how such visit may have influenced individual jurors in their juryroom deliberations. Such a visit, in and of itself, constitutes inherent prejudice to the defendants." (*De Lucia*, 20 NY2d at 280; *accord People v Crimmins*, 26 NY2d 319 [1970]; *but see People v McKenzie*, 281 AD2d 236, 236 [1st Dept 2001] ["an inadvertent, nonprejudicial exposure of jurors to a crime scene does not warrant reversal"].) The Court of Appeals, however, has held that in a civil case, there is not "inherent prejudice" in an unauthorized visit (*Alford v Sventek*, 53 NY2d 743, 745 [1981]). In *Alford*, the plaintiff sought to vacate a verdict on the grounds that a juror visited the scene of the accident; the Court declined to vacate the verdict, finding that the juror did not communicate "observations which could harm plaintiff's case," and the juror was the only one to vote in plaintiff's favor (*id.* at 745). *Alford* concluded that while they had held in a criminal case that an unauthorized juror visit to the scene was "inherently prejudicial," "we decline to hold that such a visit would be inherently prejudicial in a civil matter" (*id.* at 745).

Prejudicial outside influences may come from a variety of sources. (*See* CJI2d[NY] Jury Admonitions in Preliminary Instructions ["our law requires that you not read or listen to any news accounts of the case, and that you not attempt to research any fact, issue, or law related to the case"]; PJI 1:11 ["do not do any independent research on any topic you might hear about in this case"]; *People v Thomas*, 184 AD2d 1069, 1069 [4th Dept 1992] [the foreperson improperly acquired prejudicial information by library research on a material issue and communicated that information to the jury]; *People v Smith*, 87 AD2d 357, 360 [1st Dept 1983] [a verdict "may be overturned" where a deadlocked jury makes use of information which they "learned from a newspaper account of the case"]; *cf. Sheppard v Maxwell*, 384 US 333, 363 [1966] [prejudicial publicity].)

While it stands to reason, as stated in the second sentence of subdivision (2), that "[t]he court may not receive a juror's affidavit or evidence of a juror's statement on" matters the juror may not testify about (*see People v Rukaj*, 123 AD2d 277, 280 [1st Dept 1986]), the converse is true for matters a juror may testify about. (*People v Ciaccio*, 47 NY2d 431, 436 [1979] ["uncontroverted" sworn

affidavits of two jurors were sufficient to find that the court clerk improperly told the jury when they seemed deadlocked that "the Judge had stated that a lot of time and money are invested in the case and they should keep on deliberating"].)

Subdivision (3) (b), dealing with a juror's testimony about an experiment to test or verify a key fact in a case, is derived from *Brown* (48 NY2d 388). In that case a juror testified to engaging in what the Court determined was a "conscious, contrived experimentation" that gained information "directly material to a point at issue in the trial" (*Brown* at 394), as opposed to gleaning the information by the "application of everyday experience" (*id*.). That information, which bolstered the identification of the defendant, was passed to the other jurors, creating a "substantial risk of prejudice to the rights of the defendant" that warranted a new trial. (*Id.*; *accord People v Legister*, 75 NY2d 832, 833 [1990] ["the juror's conduct was conscious, contrived experimentation, directly material to a critical point at issue in the trial," in that it "bolstered" the victim's identification of the defendant "with nonrecord evidence not subject to challenge by the defendant"]; *People v Stanley*, 87 NY2d 1000, 1001-1002 [1996] ["The jurors' orchestrated experiment . . . was pointedly aimed at authenticating the eyewitness's version of the crime"; "the two jurors became unsworn witnesses, incapable of being confronted by defendant, and their experiment created nonrecord evidence, which defendant could not test by cross-examination"].)

By contrast, information gleaned from common, everyday experience does not necessarily impeach a verdict. (*People v Smith*, 59 NY2d 988, 990 [1983] ["the juror's evaluation of the ability to observe the interior of an automobile through its rear window, made while walking to dinner between deliberations and again while riding in a bus with jurors to the hotel after being sequestered, is properly classified as an everyday experience and, therefore, not misconduct"].)

And "where the jurors attempt to re-enact the crime during their deliberations in accordance with their own recollection of the testimony, their conduct constitutes nothing more than an 'application of everyday perceptions and common sense to the issues presented in the trial' " (*People v Harris*, 84 AD2d 63, 105 [2d Dept1982]).

Subdivision (3) (c) permits a juror to testify to that juror's or another's "misconduct" that prejudiced a party. (*See* CPL 330.30 [2].)

"Misconduct" that a juror can testify to may take varying forms. (*See People v Neulander*, 34 NY3d 110, 114-115 [2019] [A juror's "blatant disregard for the

court's instructions (not to discuss the case with others and to avoid media reports) coupled with her purposeful dishonesty and deception (including the destruction of evidence of her misconduct) when her actions and good faith as a juror came into question vitiate the premise that (the juror) was fair and impartial"].)

"Misconduct" can stem from a juror misleading or lying to the parties and the court during a voir dire about the juror's background, and if the defendant was prejudiced thereby, a new trial will be warranted. (*See People v Southall*, 156 AD3d 111, 119 [1st Dept 2017] ["due to the juror's concealment of material information regarding her job application (to be an assistant district attorney in the same office that was prosecuting the defendant), which also demonstrated a predisposition in favor of the prosecution, defendant was deprived of an impartial jury comprised of 12 jurors"]; *cf. People v Rodriguez*, 100 NY2d 30, 33, 36 [2003] [a juror "intentionally concealed that he and (an assistant district attorney in the office prosecuting the defendant) knew each other," but given that the juror had "no contact with (the assistant) during the trial and unequivocally stated that his relationship with (the assistant) did not influence his deliberations in the slightest," the trial court's finding that the misconduct did not result in "substantial prejudice" to the defendant was "supported by the record"]; *People v Ceresoli*, 88 NY2d 925 [1996]; *People v Clark*, 81 NY2d 913 [1993].)

Another form of cognizable post-verdict misconduct was found in the testimony of jurors that "during deliberations [in a homicide case] they were informed of and influenced by two nurse-jurors' professional opinions" on the critical issue of what caused the deceased's death. (*People v Maragh*, 94 NY2d 569, 571 [2000].) *Maragh* differentiated "ordinary and professional opinions of jurors," noting that the misconduct is in jurors using "their professional expertise to insert facts and evidence outside the record with respect to material issues into the deliberation process" (*id.* at 576; *see People v Santi*, 3 NY3d 234, 249-250 [2004] ["Jurors are not, however, required to 'check their life experiences at the courtroom door' "]). In *Santi*, a juror was a "patient care associate" at a hospital who had "limited" experiences in the medical field; she was not an expert; and "she merely gave her lay opinions regarding the introduction of an I.V. line, drawing on both her life experiences and the trial evidence. This was proper" (*id.*).

Subdivision (3) (d) permits post-verdict testimony of a juror relating to that juror's or another juror's bias that prejudices the defendant (*People* v *Leonti*, 262 NY 256, 257-258 [1933] [where the defendant testified and identified himself as a Sicilian, a verdict of guilt was set aside because of uncontroverted affidavits which stated that one of the jurors "wouldn't believe a Sicilian under oath, and none of

the jurors would"]; *People v Estella*, 68 AD3d 1155, 1156 [3d Dept 2009] [a juror "had engaged in misconduct by failing to disclose, during voir dire, his prejudice and preexisting personal opinion of defendant's guilt based upon race"]; *People v Rivera*, 304 AD2d 841, 842 [2d Dept 2003] ["reversal is warranted where a juror had an undisclosed preexisting prejudice that would have resulted in his or her disqualification if it had been revealed during voir dire, such as an undisclosed, pretrial opinion of guilt against the defendant"]; *cf. People v Blyden*, 55 NY2d 73, 74 [1982] ["the trial court committed reversible error when it refused to discharge for cause a prospective juror who voiced hostility to racial minorities"]).

6.02.7. Incompetency of a Witness to Testify to a Transaction or Communication with a Deceased or Person with a Mental Illness [a/k/a Dead Man's Statute] (CPLR 4519)

(1) Upon the trial of an action or the hearing upon the merits of a special proceeding, a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest against the executor, administrator or survivor of a deceased person or the committee of a person with a mental illness, or a person deriving his [or her] title or interest from, through or under a deceased person or person with a mental illness, by assignment or otherwise, concerning a personal transaction or communication between the witness and the deceased person or person with a mental illness, except where the executor, administrator, survivor, committee or person so deriving title or interest is examined in his [or her] own behalf, or the testimony of the person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication.

(2) A person shall not be deemed interested for the purposes of this section by reason of being a stockholder or officer of any banking corporation which is a party to the action or proceeding, or interested in the event thereof.

(3) No party or person interested in the event, who is otherwise competent to testify, shall be disqualified from testifying by the possible imposition of costs against him or the award of costs to him.

(4) A party or person interested in the event or a person from, through or under whom such a party or interested person derives his [or her] interest or title

by assignment or otherwise, shall not be qualified for the purposes of this section, to testify in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest, to personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate.

(5) Nothing contained in this section, however, shall render a person incompetent to testify as to the facts of an accident or the results therefrom where the proceeding, hearing, defense or cause of action involves a claim of negligence or contributory negligence in an action wherein one or more parties is the representative of a deceased or incompetent person based upon, or by reason of, the operation or ownership of a motor vehicle being operated upon the highways of the state, or the operation or ownership of aircraft being operated in the air space over the state, or the operation or ownership of a vessel on any of the lakes, rivers, streams, canals or other waters of this state, but this provision shall not be construed as permitting testimony as to conversations with the deceased.

Note

This rule reproduces CPLR 4519, except for the title of the statute ("Personal transaction or communication between witness and decedent or person with mental illness") and the addition of subdivision numbers for easier reference. In 2021, the statue was amended to change the reference to "mentally ill person" to "person with a mental illness. L. 2021, ch. 351, effective August 2, 2021.

The statute, known as the "Dead Man's Statute," sets forth an exception to the general rule of competency described in Guide to New York Evidence rule 6.01. It provides, in substance, that a person, or party interested in the event, or, predecessor in interest is incompetent to testify to a personal transaction or

communication with a deceased or person with mental illness when such testimony is offered against the representative of the deceased or person with a mental illness.

As explained in *Matter of Zalk* (10 NY3d 669, 678-679 [2008]):

> " 'The rule of evidence popularly referred to as the Dead Man's Statute' was enacted by the New York Legislature in 1851, and is 'widely considered to be the last vestige of the common-law rule which made all interested persons and parties incompetent to testify. After the general rule barring testimony from interested persons was abolished, a new rule was adopted to prevent the living from testifying to certain "personal transactions" with the dead. One of the main purposes of the rule was to protect the estate of the deceased from claims of the living who, through their own perjury, could make factual assertions which the decedent could not refute in court' (*Matter of Wood*, 52 NY2d 139, 143-144 [1981] [citations omitted])."

"Thus, when death or mental illness seals the lips of one of the parties to a transaction, the Dead Man's Statute seeks to achieve adversarial balance by sealing the lips of the surviving party. Transactions or communications between the interested witness and the decedent or mentally ill person must therefore be proven by means other than the testimony of an interested witness, such as documentary evidence and the testimony of disinterested witnesses" (Vincent C. Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4519:1).

Subdivision (1) of the rule sets forth the basic components of the Dead Man's Statute. The remaining subdivisions address issues arising from application of the statute. For purposes of this note, CPLR 4519, as recited in subdivision (1) of the rule, is broken down into the following five parts:

- The type of proceeding to which the rule applies
- The witness whose testimony the rule precludes
- The party or person the witness is precluded from testifying against
- The substance of the forbidden testimony
- An exception to the rule

The note concludes with a discussion of procedural issues and how the protection of the statute may be waived.

The type of proceeding to which CPLR 4519 applies

CPLR 4519 does not apply in criminal proceedings.

CPLR 4519, as recited in subdivision (1) of the rule, states it applies to: "the trial of an action or the hearing upon the merits of a special proceeding."

Thus, CPLR 4519 applies in all civil actions and has been invoked in administrative hearings (*Matter of Zalk*, 10 NY3d 669 [2008]). It does not apply to pretrial discovery under CPLR article 31 or other preliminary matters that do not result in a decision on the merits (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). Admission of such testimony at these early stages does not constitute a waiver of the rule at trial. (*Id.*)

In Surrogate's Court, the words, "hearing upon the merits of a special proceeding" includes all proceedings "which have for their immediate object an affirmative determination affecting the rights of any party thereto" (*Matter of Christie*, 167 Misc 484, 487 [Sur Ct, Kings County 1938]).

CPLR article 31 applies in Surrogate's Court, but there are additional discovery proceedings specifically applicable in that court in which testimony forbidden by CPLR 4519 may be allowed without creating a waiver of the statute in future hearings and proceedings on the merits. The statute does not apply in pretrial discovery brought under SCPA 1404 (examination of the attesting witness and or attorney drafter); 2211 (examination of an accounting fiduciary); and 2102 (examination of fiduciary dealing with the assets of the estate). In a discovery proceeding under SCPA 2103 (proceeding by fiduciary to discover property withheld or obtain information) a witness's testimony about communications with a decedent is not deemed a waiver of CPLR 4519 (SCPA 2104 [6]). Once an answer asserting ownership is interposed in a discovery proceeding, the proceeding is no longer in an "inquisitorial phase," but becomes a trial on the merits to which CPLR 4519 applies (*Matter of Detweiler*, 121 Misc 2d 453 [Sur Ct, Cattaraugus County 1983]).

CPLR 4519 has been held to apply in an application for a preliminary injunction in which the court decides a party's likelihood of success on the merits (*Matter of Tschernia*, 18 Misc3d 1114[A], 2007 NY Slip Op 52510[U] [Sur Ct, Nassau County 2007]).

The affidavit of an interested person, incompetent to testify under the statute, may not be used to support a motion for summary judgment, but it may be used to defeat such a motion by raising an issue of fact (*Phillips v Kantor & Co*., 31 NY2d 307 [1972]).

The witness whose testimony the rule precludes

By CPLR 4519, as recited in subdivision (1) of the rule, "a party or a person interested in the event, or a person from, through or under whom such a party or interested person derives his [or her] interest or title by assignment or otherwise, shall not be examined as a witness in his [or her] own behalf or interest, or in behalf of the party succeeding to his [or her] title or interest."

The Court of Appeals has explained that the "true test of the interest of a witness is, that he will either gain or lose by the direct legal operation and effect of the judgment, or that the record will be legal evidence for or against him in some other action. It must be a present, certain and vested interest, and not an interest uncertain, remote, or contingent" (*Hobart v Hobart*, 62 NY 80, 83 [1875]). For example, just before testifying, an interested witness who was then incompetent to testify became disinterested and competent by transferring to his sister stock that had created his interest. He no longer had a "present" interest in the proceeding (*Friedrich v Martin*, 294 NY 588 [1945]). It has been held that the interest must be financial (*Tworkowski v Tworkowski*, 181 Misc 2d 1038 [Sup Ct, Kings County 1999]).

Generally, the executor of the estate is not disqualified from testifying under the Dead Man's Statute. An executor's commissions are fixed by statute and the fact that the executor will receive them does not make him financially interested in the outcome (*Matter of Wilson*, 103 NY 374 [1886]). If there is, however, a bequest to the executor in the will, or if he or she has a claim against the estate, the executor will be considered an interested party and barred from testifying (*Matter of Green*, 247 App Div 540 [4th Dept 1936]).

Relationship through blood or marriage to an interested party standing alone does not make the relative an interested party (*Laka v Krystek*, 261 NY 126 [1933]).

An interested person or party may not be examined "as a witness in his own behalf or interest, or in behalf of the party succeeding to his title or interest" (CPLR 4519; *Rosseau v Rous*s, 180 NY 116 [1904]). The witness may testify, however, against his or her own interest or successor's interest (*Matter of Tremaine*, 156 AD2d 862 [3d Dept 1989]). When respondents are called by their adversary, they are not testifying in their own interest and their testimony is not barred by the statute (*Matter of Hauck*, NYLJ, Dec. 23, 1992 at 25, col 3 [Sur Ct, NY County], *affd* 200 AD2d 405 [1st Dept 1994]). The predecessor in interest of the interested party is also barred from testifying by this section. (*See Abbott v Doughan*, 204 NY 223 [1912] for a discussion of the rationale behind this provision.)

The party or person the witness is precluded from testifying against

The interested person or party may not be called to testify in his or her own behalf or interest "against the executor, administrator or survivor of a deceased person or the committee of a mentally ill person, or a person deriving his [or her] title or interest from, through or under a deceased person or mentally ill person, by assignment or otherwise" (CPLR 4519 [Guide to NY Evid rule 6.02.1 (1)]). These individuals are often referred to as the "protected party." They have standing to raise the objection (and also the ability to waive it). (*See* section on waiver.)

The decedent normally is easily identified, but a missing party not yet determined to be dead may not be protected under the statute (*Jacobs v Stark*, 83

Misc 2d 605, 608 [Civ Ct, NY County 1975] ["the granting of temporary administration to conserve the estate of an absentee is an insufficient adjudication of death to satisfy application of the unambiguous exclusionary statutory rule of CPLR 4519"]).

By the statute, a witness must testify against an individual specified in the statute for the witness's testimony to be barred. As a result, for example, an attorney testifying in his own behalf in an attorney discipline hearing was not prohibited from testifying about his deceased client's instructions to retain the monies remaining in the attorney's escrow account from the sale of her property, as payment for legal services, because he was not testifying against the executor, administrator, or survivor of his client (*Matter of Zalk*, 10 NY 3d 669 [2008]). In so ruling, the Court rejected the holding of the Appellate Division that the attorney's testimony was against the decedent's surviving daughters because they stood to be deprived of the monies in the escrow account (*Matter of Zalk*, 45 AD3d 42 [1st Dept 2007]).

Historically, the Dead Man's Statute protected a person who had been declared by a court to be a "lunatic" and for whom the court had appointed a committee. In *Clark v Dada* (183 App Div 253, 262 [4th Dept 1918]), the Appellate Division held that a person for whom a committee had not been appointed was not protected from the testimony of an interested party even though he had been adjudged insane by a county judge and committed to a hospital for treatment. The Court discussed the many forms of mental illness and noted that, unlike deceased persons, the lips of persons committed to a hospital may not be forever sealed, and they may be able to dispute testimony against them. There was one dissent, arguing that it had been established, at least presumptively, that the hospitalized person was a "lunatic." While the majority's solution (no committee, no protection) is draconian and no longer the law, it presages the difficulties future courts would encounter in determining who is protected from testimony of an interested party by reason of mental illness.

The term "committee of a mentally ill person" remains in the Dead Man's Statute, although in 1993, with the enactment of article 81 of the Mental Hygiene Law (Proceedings for Appointment of a Guardian for Personal Needs or Property Management), a "guardianship system" replaced the law establishing a "committee of a mentally ill person." In its legislative findings, the legislature found that a "committee, with its judicial finding of incompetence and the accompanying stigma and loss of civil rights, traditionally involves a deprivation that is often excessive and unnecessary" (Mental Hygiene Law § 81.01). The goal of the Mental Hygiene Law is to find the least restrictive form of intervention needed for the protection of the person for whom a guardian is sought. For example, the order could restrict the guardian to handling the financial affairs for the alleged incapacitated person. It is possible for the alleged incapacitated person to consent to the appointment of a guardian. There are several provisions for the appointment of a guardian, none of which necessarily require a finding of mental illness (*see* SCPA arts 17 [Guardians

and Custodians], 17-A [Guardians of Persons Who Are Intellectually Disabled and Developmentally Disabled]; *see* CPLR 1202 [Appointment of Guardian Ad Litem]).

Thus, an objection pursuant to CPLR 4519 brought by an article 81 guardian or any guardian authorized by the law of this state may not end the inquiry into whether the incapacitated party is a protected party because of mental illness. Although the guardian should have standing to raise that objection, the question of whether or not the person is mentally ill for purposes of CPLR 4519 may *yet* have to be resolved by the court in which the objection is raised. Persons allegedly with a mental illness still may be competent to testify rather than have their lips sealed. (*See* Guide to NY Evid rule 6.01, Note, second paragraph *et seq.*, for discussion of mental illness and competency to testify; Jerome Prince, Richardson on Evidence § 6-126 at 338 [Farrell 11th ed 1995] ["The question (of the applicability of CPLR 4519) is further complicated by the fact that mental illness does not, per se, render one incompetent as a witness. See § 6-105. Perhaps the applicability of the statute should depend upon the testimonial competency of the mentally ill person. If the mentally ill person is competent to testify, there is no need to invoke the rationale of the statute, i.e., to create an equality of disadvantage by silencing one party when the other has been silenced by mental illness or death"].)

In a case decided after the enactment of article 81, *Tworkowski v Tworkowski* (181 Misc 2d 1038 [Sup Ct, Kings County 1999]), the court permitted co-guardians of the person and property appointed by Supreme Court to claim the protection of the Dead Man's Statute against a claim that the alleged protected person was not mentally ill. The court apparently did not rely entirely on the order's underlying determination of mental illness because the court made its own separate finding of mental illness. The court discussed the prior history of the "committee of a mentally ill person," noting in particular that a

> " '[c]ommittee' is not a term which has been interpreted strictly in decisions on the applicability of CPLR 4519. Courts have decided that the privilege may apply to the judicially appointed guardian ad litem of a person hospitalized for mental illness where a committee did not exist. (*Matter of Musczak*, 196 Misc 364 [Sur Ct, NY County 1949]; *Matter of Harkavy*, 184 Misc 742 [Sur Ct, NY County 1945].) In addition, Vincent C. Alexander notes that '[a]lthough expansion of the scope of CPLR 4519 probably should be resisted as a general matter, on this issue the purpose of the statute is surely served by a liberal reading of the term "committee." ' (Alexander, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C4519:3, at 173.) The husband's mental insufficiencies are well documented, including the significant impairment of his memory. The statute is designed to protect the interests of a person such as the husband and his coguardians and they are entitled to its benefit." (*Tworkowski v Tworkowski* at 1040.)

The protection from testimony by an interested party or person concerning a personal transaction or communication extends to "a person deriving his title or interest from, through or under a deceased person or mentally ill person." For example, in *Pope v Allen* (90 NY 298 [1882]), the Court held that the Dead Man's Statute protected both the deceased conveyor of title to land ("from" whom the land was conveyed to the interested party) and the deceased person who had conveyed to him ("through" whom it was conveyed) and "under" whom it was conveyed by both of the predecessors in title.

The statute has been held to protect a successor trustee from testimony by interested persons concerning transactions with the original trustee, now deceased (*Brundige v Bradley*, 294 NY 345 [1945]).

In *Ward v New York Life Ins. Co*. (225 NY 314 [1919]), the Court held that a beneficiary of an insurance policy, named by the insured, does not claim "from, through or under" the insured because the deceased insured did not have an interest in the proceeds of the policy during his lifetime and, therefore, the claim of the beneficiary was from the insurance company not the decedent. This decision prompted much criticism but has never been reversed. (*See* Alexander, Practice Commentaries, CPLR C4519:3.)

In *Poslock v Teachers' Retirement Bd. of Teachers' Retirement Sys.* (88 NY2d 146 [1996]), the Court affirmed an Appellate Division ruling that distinguished *Ward* because the retirement benefits in question (with exception of the life insurance proceeds) belonged to the decedent during his lifetime and he had the ability to manage them. The protection of the statute was therefore available to prevent an interested party from testifying about communications with the decedent about the lump sum benefits from the pension. In keeping with *Ward*, the Court also held that the protection of the statute did not apply to communications concerning the life insurance portion of the death benefits.

The substance of the forbidden testimony

Subdivision (1) dictates that the interested person or party shall not be examined "concerning a personal transaction or communication between the witness and the deceased person or mentally ill person."

In *Clift v Moses* (112 NY 426, 435 [1889]), the Court explained:

> "It has been held with general uniformity that the section prohibits not only direct testimony of the survivor that a personal transaction did or did not take place, and what did or did not occur between the parties, but also every attempt by indirection to prove the same thing, as by negativing the doing of a particular thing by any other person than the deceased, or by disconnecting a particular fact from

its surroundings and permitting the survivor to testify to what on its face may seem an independent fact, when in truth it had its origin in or directly resulted from a personal transaction."

Griswold v Hart (205 NY 384, 395 [1912]) excluded "the testimony of an interested witness to any knowledge which he has gained by the use of his senses from the personal presence of the deceased." (*See Hadley v Clabeau*, 140 Misc 2d 994 [Sup Ct, Cattaraugus County 1988], *affd* 161 AD2d 1141 [4th Dept 1990] [in a dispute over a faulty deed description, the widow of deceased-seller was barred by statute from testifying to her observation of her husband taking measurements along a natural boundary as evidence of the property he intended to convey].)

On the other hand, in an action against the representative of a deceased joint tenant of joint savings accounts the Appellate Division held that the surviving joint tenant could testify to her intent in opening the account. The Court found that her testimony was to the fact of her intent, not a communication with the decedent (*Brezinski v Brezinski*, 84 AD2d 464 [4th Dept 1982]).

An exception to the rule

Testimony is barred "except where the executor, administrator, survivor, committee or person . . . deriving title or interest is examined in his own behalf, or the testimony of the person with a mental illness or deceased person is given in evidence, concerning the same transaction or communication" (CPLR 4519; Guide to NY Evid rule 6.02.1 [1]).

Based on that exception, the Appellate Division has ruled that an interested party may introduce the testimony of the decedent given at a pretrial deposition and then testify at trial to the matters described by the decedent (*Tepper v Tannenbaum*, 65 AD2d 359 [1st Dept 1978]; *Ward v Kovacs*, 55 AD2d 391 [2d Dept 1977]).

In addition to the introduction of a pretrial deposition, the exception for the introduction in evidence of the "testimony of the mentally ill person or deceased person . . . concerning the same transaction or communication" may allow the "use of an interested witness's testimony from a former proceeding or deposition in which the witness and the decedent were adverse parties and the subject matter was essentially the same, thereby insuring that an adequate opportunity for relevant cross-examination of the witness was afforded. Such former testimony is hearsay, but it may fall within one or another hearsay exception for the testimony of a witness who has become unavailable for some reason, here the incompetency of the witness due to the adverse party's death." (Alexander, Practice Commentaries, CPLR C4519:5 [b].)

Unfortunately, a witness who is incompetent to testify pursuant to the Dead Man's Statute is not listed, among witnesses considered unavailable to testify, in

CPLR 4517, as there required for the admission of former testimony in a civil proceeding, or in CPLR 3117, as there required for the admission of depositions in a civil proceeding. Both statutes, however, allow an application to the court for a finding of "exceptional circumstances" to permit the admission of otherwise inadmissible hearsay testimony. Until 2000, CPLR 4517's list included incapacity under the Dead Man's Statute in the list, but it was inadvertently omitted when the statute was amended. Another possible route around the hearsay problem is the common-law rule on the admissibility of prior testimony of an unavailable witness, which has been held to coexist with the statutory rule (*Fleury v Edwards*, 14 NY2d 334 [1964]). No case, however, holds that incapacity under the Dead Man's Statute was part of the common law (*see* Guide to NY Evid rule 8.36, Prior Testimony in a Civil Proceeding).

Subdivision (2) of the rule exempts from application of the statute a stockholder or officer of a banking corporation that might be considered an interested party. This exemption is limited to stockholders in banking corporations. A stockholder of a corporation other than a banking corporation is considered a person interested in the event and may be barred from testifying against a protected party (*Friedrich v Martin*, 294 NY 588 [1945]; *Andrews v Reiners*, 112 App Div 378 [2d Dept 1906]).

Subdivision (3) of the rule states that the possible imposition of costs or the award of costs does not make a witness "interested" under the statute.

Subdivision (4) of the rule prohibits an "interested party," as described in the subdivision, from testifying to "personal transactions or communications with the donee of a power of appointment in an action or proceeding for the probate of a will, which exercises or attempts to exercise a power of appointment granted by the will of a donor of such power, or in an action or proceeding involving the construction of the will of the donee after its admission to probate." This 1935 addition to the Dead Man's Statute was passed by the legislature to address issues raised in *Matter of Carroll* (153 Misc 649 [Sur Ct, NY County 1934], *decree mod* 247 App Div 11 [1st Dept 1936], *mod* 274 NY 288 [1937]). As explained by Alexander in the Practice Commentaries to CPLR 4519:

> "The *Carroll* court observed that without statutory modification, persons who would take certain property under the terms of A's will in the event of B's invalid exercise of a power of appointment given by A lacked standing to bar testimony by B's appointees regarding their dealings with the now-deceased B on the issue of the validity of B's exercise of the power. The persons who would take in the case of default were deemed to derive their property from A, rather than B. This created the potential for jury confusion and inconsistent results in cases in which appointees might be named in B's will as beneficiaries of property not covered by the power of appointment. With respect to the same will, such appointee-beneficiaries could

> testify to transactions with B on the issue of the validity of the exercise of the power of appointment but not on the issue of the validity of the will in general. The statutory language changes this result by prohibiting interested witnesses from testifying in their own behalf with respect to personal transactions or communications with the now-deceased donee of a power of appointment in probate proceedings involving the will in which the power of appointment was exercised" (CPLR C4519:3).

Subdivision (5) of the rule covers the type of testimony ("facts of an accident or the results therefrom") by a witness in personal injury or wrongful death cases that does not render the witness incompetent to testify under the statute (*Rost v Kessler*, 267 App Div 686, 687 [4th Dept 1944]). In *Rost*, the "fact" was the identity of the driver of the car and the Appellate Division held that the defendant should have been permitted to testify that the decedent was the driver since the testimony did not require the recitation of a communication with the decedent.

Procedural issues

The party objecting to the competency of a witness under the Dead Man's Statute has the burden of proving incompetency (*Stay v Horvath*, 177 AD2d 897, 899 [3d Dept 1991] ["the party claiming that a witness is a person 'interested in the event' (CPLR 4519) carries the burden of proving that the witness's testimony is subject to this statutory exclusion" (citations omitted)]; *Matter of Mead*, 129 AD2d 1008 [4th Dept 1987]).

The objection must be to the competency of the witness, not to the competency of the testimony because the testimony may be relevant, but the witness not competent to give that testimony (*Hoag v Wright*, 174 NY 36, 39 [1903]; *Matter of Farley*, 91 Misc 185, 196 [Sur Ct, Clinton County 1915]).

An objection to the competency of a witness must be timely. The testimony of the witness, given without objection, will not be stricken (*Matter of Maijgren*, 193 Misc 814 [Sur Ct, Monroe County 1948]).

An objection must be made to each transaction; but failure to object to one transaction does not bar objections to subsequent transactions (*Matter of Johnson*, 17 Misc 2d 489, 490 [Sur Ct, NY County 1959] ["The fact that objection had not been made earlier in the testimony and the consequent waiver of the incompetency of the witness at that time did not extend to later testimony and did not preclude objection to further transactions"]).

CPLR 4519 does not bar documentary evidence against a deceased's estate but the evidence must be authenticated by a non-interested party (*Acevedo v Audubon Mgt.*, 280 AD2d 91, 95 [1st Dept 2001]).

By a separate statute, in a right-of-election case, while a spouse may not testify in support of his or her right of election filed against the estate, the spouse is not disqualified from testifying to his or her contribution to jointly held property that is claimed as a testamentary substitute (EPTL 5-1.1 [b] [3]; 5-1.1-A [b]).

Waiver

A "protected party" may waive the provisions of CPLR 4519 only at a trial of an action or hearing on the merits of a special proceeding (*Matter of Van Volkenburgh*, 254 NY 139 [1930]). The "protected party's" waiver may be made in any one of five ways:

1. by expressly stating a waiver;

2. by failing to object (*Ralley v O'Connor*, 71 App Div 328 [1st Dept 1902]);

3. by introducing prior testimony of the decedent or person with a mental illness about the transaction or communication (CPLR 4519);

4. by testifying in his or her behalf about the transaction or communication CPLR 4519. In this instance, however, the waiver is limited. "By introducing such testimony, the [protected party] does not 'open the door' to any or all personal transactions with the decedent. Rather, the waiver of the statute is limited to the 'personal transaction' in issue. (*Martin v Hillen*, 142 NY 140.)" (*Matter of Wood*, 52 NY2d at 145); or

5. by examining the witness regarding the transaction or communication (*Nay v Curle*y, 113 NY 575 [1889]; *Matter of Dunbar*, 139 Misc 2d 955 [Sur Ct, Bronx County 1988]; *Matter of Smith*, 84 AD2d 664 [3d Dept 1981]).

References

For further commentary on the intricacies of the Dead Man's Statute, see Alexander, Practice Commentaries CPLR 4519 and Prince, Richardson on Evidence § 6-121 *et seq*. (Farrell 11th ed 1995). For a discussion of the Dead Man's Statute as it is specifically applied in Surrogate's Court proceedings, see 2 Harris, New York Estates: Probate Administration and Litigation (6th ed Thomson-Reuters) and Warren's Heaton, Surrogate's Court Practice (7th ed LexisNexis).

6.03 Exclusion of Witnesses & Ban on Discussing Testimony[1]

(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.

(3) In a criminal proceeding, a court is not required, but may in its discretion, direct a witness, other than a defendant, not to discuss the witness's testimony with another person or persons during a recess or until the trial is completed; a court may order a testifying defendant not to consult with the defendant's attorney when a recess is taken during the defendant's testimony provided it is a brief recess; a brief recess may include a recess for lunch, but does not include an overnight recess.

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." (*See generally* Michael J. Hutter, *Revisiting New York's Witness Sequestration Rule*, NYLJ, Oct. 5, 2022.)

Once a witness testifies and is not expected to be recalled, the rationale for exclusion of the witness from the remainder of the trial no longer exists. (*See People v Spence*, 239 AD2d 218, 219 [1st Dept 1997]; *People v Lopez*, 185 AD2d 189, 190 [1st Dept 1992] [excluding a defense witness from attending the summation violated the defendant's right to a public trial].)

Neither New York's statutory or decisional law has addressed the corollary issue of whether an order of exclusion implicitly directs an attorney not to give the prospective witnesses, before they testify, a transcript of the testimony of a witness who has testified, or if not implicit in an exclusion order, whether a court can expressly so order.

The purpose of an order of exclusion would be defeated if a lawyer were permitted to show an excluded witness a transcript of a witness's testimony before the excluded witness testified. Thus, a court should, at least by a separate order, have the discretion to regulate the showing of a transcript of a witness's testimony to an excluded witness before that witness testifies. (*See* Hutter, *Revisiting New York's Witness Sequestration Rule*; *United States v Robertson*, 895 F3d 1206, 1215 [9th Cir 2018] ["The danger that earlier testimony could improperly shape later testimony is equally present whether the witness hears that testimony in court or reads it from a transcript. An exclusion order would mean little if a prospective witness could simply read a transcript of prior testimony he was otherwise barred from hearing"]; *Miller v Universal City Studios, Inc.*, 650 F2d 1365, 1373 [5th Cir 1981] ["The opportunity to shape testimony is as great with a witness who reads trial testimony as with one who hears the testimony in open court. The harm may be even more pronounced with a witness who reads trial transcript than with one who hears the testimony in open court, because the former need not rely on his memory of the testimony but can thoroughly review and study the transcript in formulating his own testimony"]; Proposed Fed Rules Evid rule 615 [b] [Oct. 19, 2022], available at https://www.uscourts.gov/sites/default/files/2022_scotus_package_0.pdf authorizing a court order prohibiting disclosure of trial testimony to an excluded witness, with a caveat in the Committee Note: "Nothing in the language of the rule bars a court from prohibiting counsel from disclosing trial testimony to a sequestered witness. To the extent that an order governing counsel's disclosure of trial testimony to prepare a witness raises questions of professional responsibility and effective assistance of counsel, as well as the right to confrontation in

criminal cases, the court should address those questions on a case-by-case basis"].)

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] ["(T)he 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, Prac Commentaries, McKinney's Cons Laws of NY, Book 11, CPL 260.20.)

Subdivision (2) (a) also recognizes that a party has a constitutional right to be present in a civil trial (*Lunney v Graham*, 91 AD2d 592, 593 [1st Dept 1982] ["In the absence of express waiver or unusual circumstances, a party has a constitutional right to be present at all stages of a trial (NY Const, art I, §6 . . .)"]; *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"]; *Ajaeb v Ajaeb*, 276 App Div 1094, 1094 [2d Dept 1950] ["While a party has an absolute and unqualified constitutional right to be present at the trial of a civil action (N. Y. Const., art. I, § 6 . . .), a party may waive that constitutional right"], *affd no op* 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].)

Subdivision (3) addresses another corollary to the rule on excluding prospective witnesses and is derived from cases primarily reviewing a trial court's order barring a testifying defendant from consulting with defense counsel during a recess.

In the context of a testifying defendant, the United States Supreme Court first held "that an order preventing petitioner from consulting his counsel 'about anything' during a 17-hour overnight recess between his direct- and cross-examination impinged upon his right to the assistance of counsel guaranteed by the Sixth Amendment" (*Geders v United States*, 425 US 80, 91 [1976].

Subsequently, in *Perry v Leeke* (488 US 272 [1989]), the Court distinguished the overnight recess in *Geders* from a brief recess (15 minutes in *Perry*) during a defendant's testimony and in the later situation approved a court order barring the defendant from consulting with his or her lawyer.

> "The distinction," the Court explained, "rests . . . on the fact that when a defendant becomes a witness, he has no constitutional right to consult with his lawyer while he is testifying. He has an absolute right to such consultation before he begins to testify, but neither he nor his lawyer has a right to have the testimony interrupted in order to give him the benefit of counsel's advice.
>
> "The reason for the rule is one that applies to all witnesses—not just defendants. *It is a common practice for a judge to instruct a witness not to discuss his or her testimony with third parties until the trial is completed.* Such nondiscussion orders are a corollary of the broader rule that witnesses may be sequestered to lessen the danger that their testimony will be influenced by hearing what other witnesses have to say, and to increase the likelihood that they will confine themselves to truthful statements based on their own recollections. The defendant's constitutional right to confront the witnesses against him immunizes him from such physical sequestration. Nevertheless, when he assumes the role of a witness, the rules that generally apply to other witnesses—rules that serve

> the truth-seeking function of the trial—are generally applicable to him as well" (*Perry* at 281-282 [emphasis added]).

Even *Geders* recognized that the trial judge's order in that case sequestering all witnesses for both prosecution and defense and the judge's order before each recess that the testifying witness not discuss his or her testimony "with anyone" when "[a]pplied to nonparty witnesses" was "within sound judicial discretion" (*Geders v United States*, 425 US 80, 87-88 [1976]).

The Court of Appeals decisions are in accord with *Geders* and *Perry* (*People v Blount*, 77 NY2d 888 [1991], *affg for reasons stated at* 159 AD2d 579 [2d Dept 1990] [barring a testifying defendant from consulting with his attorney during an overnight recess violated the defendant's right to the assistance of counsel]; *People v Joseph*, 84 NY2d 995, 997 [1994] [a court order barring the defendant from discussing his trial testimony with his attorney during a weekend recess violated the Federal and State Constitutions, but: "To be distinguished here are those cases upholding a temporary and limited ban on discussions between defendant and attorney during a brief recess (*see, Perry v Leeke,* 488 US 272 . . . ; *People v Enrique,* 80 NY2d 869 [1992], *affg for reasons stated at* 165 AD2d 13 . . .)"]).

As *People v Branch* (83 NY2d 663, 666-667 [1994]) explained:

> "There can be no question that once a witness takes the stand the truth-seeking function of a trial will most often be best served by requiring that the witness undergo direct questioning and cross-examination without interruption for counseling. Indeed, a trial court may reject a request by a defendant to speak with his or her attorney during testimony despite the defendant's conceded right to counsel. Nonetheless, in rejecting the contention that trial courts *must* allow attorney-client conferences to testifying witnesses, the Supreme Court and our Court have been careful to note that trial courts *may* allow such conferences as a matter of discretion. Though the *Perry* line of cases dealt with midtestimony conferences involving defendants, we see no reason why the rules articulated in those cases should not apply generally to other witnesses, including the prosecution witness here.
>
> "Thus, the decision to grant a recess and to allow a conference between a lawyer and a testifying witness falls within the broad discretion allowed a trial court in its management of a trial" (citations omitted).

An alternative, with respect to a testifying defendant, which was approved of in *Enrique*, is for the trial judge to permit consultation during a recess on any specific subjects requested by defense attorney, other than the defendant's

testimony. (The defense attorney in *Enrique* declined to avail himself of that offer.)

With respect to the length of a recess, *Enrique* on its facts held that the trial court did not err in barring the testifying defendant from consulting with counsel during a luncheon recess. (*Accord People v Johnson*, 267 AD2d 403, 403 [2d Dept 1999].)

Enrique also acknowledged *Perry*'s comment that " '[i]t is a common practice . . . to instruct a witness not to discuss his or her testimony with third parties until the trial is completed' " (*People v Enrique*, 165 AD2d 13, 18 [1st Dept 1991], *affd* 80 NY2d 869 [1992]; c*f. Matter of Buckten*, 178 AD2d 981, 983 [4th Dept 1991] [where the trial court barred witnesses from discussing their testimony with each other and the Appellate Division did not fault that order but rather, on the issue of the witnesses' credibility, disagreed with the court's finding that they had discussed their testimony]).

The consequences for not adhering to a court's order barring witnesses from discussing their testimony with others include an in camera proceeding to determine what was discussed, allowing cross-examination of the witness about the discussion, and allowing comment in summation on the unauthorized discussion as it may bear on the witness's credibility. (*See Geders v United States*, 425 US at 89 ["prosecutor may cross-examine a defendant as to the extent of any 'coaching' during a recess, subject, of course, to the control of the court"]; *Branch*, 83 NY2d at 667-668 [approving of an in camera inquiry, cross-examination of the witness, and appropriate comment in summation]; *People v Lloyde*, 106 AD2d 405, 405-406 [2d Dept 1984] ["Although (the defendant's mother) failed to heed the court's exclusion order, such failure did not render her testimony incompetent, especially when the jury could have considered the fact that she failed to abide by the order as a factor in determining her credibility"]; *cf. People v Rodriguez*, 225 AD2d 396, 397 [1st Dept 1996] [" '(T)he decision to grant a recess and to allow a conference between a lawyer and a testifying witness falls within the broad discretion allowed a trial court in its management of a trial' (*People v Branch,* 83 NY2d 663, 667), provided the defendant is given an opportunity to cross-examine the witness about the conference and, where appropriate, *voir dire* the other conference participants about the content of the meeting prior to cross-examination"].)

[1] In May 2023, subdivision (3) was added to the rule and the Note was amplified.

6.03.1 Exclusion of Disruptive Defendant

In a criminal proceeding, a defendant may be removed from the courtroom when the defendant acts in so disorderly and disruptive a manner that the proceeding may not be carried on with the defendant present. Before a defendant may be removed, the court must warn the defendant that the defendant will be removed if such conduct continues. Failure to provide the warning may be excused when exceptional circumstances demonstrate no practical value to, or opportunity for, a warning to the defendant to cease the disruptive conduct.

Note

This rule is derived from both CPL 260.20 ("a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct") and decisional law, beginning with *Illinois v Allen* (397 US 337, 338 [1970] [an accused cannot "claim the benefit of this constitutional right to remain in the courtroom while at the same time he engages in speech and conduct which is so noisy, disorderly, and disruptive that it is exceedingly difficult or wholly impossible to carry on the trial"]).

Following *Allen* and enactment of CPL 260.20, the Court of Appeals held that "[w]hile the right of an accused to be present at every stage of a trial is guaranteed by Constitution (U. S. Const., 6th, 14th, Amdts.; see *Illinois v. Allen,* 397 U. S. 337, 338) and statute (CPL 260.20), the right may be lost where the defendant engages in misconduct so disruptive that the trial cannot properly proceed with him in the courtroom." (*People v Byrnes*, 33 NY2d 343, 349 [1974] ["the Trial Judge acted well within his discretion in excluding the defendant from the courtroom during the testimony of the complaining witness. Four outbursts punctuated by profane and abusive language preceded defendant's removal. Each related in some way to the prospect of the complainant testifying in court. On one of these occasions, it was necessary for the defendant to be restrained by Sheriff's Deputies. The court was careful to admonish the defendant that further outbursts would be cause for removal" (*id.* at 349-350)]; *accord People v Johnson*, 37

NY2d 778, 779 [1975] ["The defendant's behavior in turning over a table and lying on the floor during the testimony of the identification witness, coupled with the defendant's clear and repeated requests to leave the courtroom and the Trial Judge's admonitions and explanation of the consequences were sufficient to constitute a waiver of his right to be present at trial"].)

A defendant's disruptive behavior in the presence of the jury does not necessarily require a mistrial. (*People v Cosby*, 271 AD2d 353, 354 [1st Dept 2000] [the court excluded the disruptive defendant from the courtroom and denied the "defendant's motion for a mistrial or for individual questioning of the jurors concerning the effect of defendant's courtroom disruptions. The court's questioning of the jurors concerning their ability to remain impartial, during which the court solicited a show of hands to specific questions, and its prompt curative instructions, were appropriate, and the court properly declined to reward defendant's violent and disruptive conduct with a mistrial"].)

It is advisable to give the requisite warning outside the presence of the jury. And the "requirement that the court issue a warning [to the defendant] must be satisfied by the court itself, and not by any inference drawn in the mind of the defendant that his directed removal from the courtroom [given by the court to court officers] is, in effect, a warning." (*People v Antoine*, 189 AD3d 1445, 1447 [2d Dept 2020].)

The failure to adhere to the statutory requirement that the defendant be warned "by the court that he will be removed if he continues such conduct" will, absent an exceptional circumstance, warrant reversal. (*People v Brown*, 192 AD3d 1603, 1604 [4th Dept 2021] ["the court erred in removing defendant from the courtroom without first warning him that he would be removed if he continued his disruptive behavior"]; *People v Burton*, 138 AD3d 882, 884 [2d Dept 2016] ["the trial court erred in removing the defendant from the courtroom without first warning him that he would be removed if he continued his disruptive behavior"].)

Exceptional circumstances that may excuse the giving of the warning include, for example, conduct that is so violent and ongoing as to necessitate the defendant's immediate removal and accordingly preclude the giving of a warning. (*E.g. People v Wilkins*, 33 AD3d 409, 410 [1st Dept 2006] ["Here, defendant's violent behavior in the courtroom went far beyond mere disruption, and created an emergency necessitating his immediate removal. Under the circumstances, the court had no practical opportunity to issue a verbal warning that defendant would

be removed if he continued to engage in such conduct, and it appears that such a warning would have served no purpose"]; *People v Hendrix*, 63 AD3d 958, 958 [2d Dept 2009] ["the defendant suddenly leapt onto the defense table, and proceeded towards the bench"].) Other exceptional circumstances may excuse the failure to give the defendant the statutory warning. (*E.g. People v Baldwin*, 277 AD2d 134, 134-135 [1st Dept 2000] ["The court properly exercised its discretion in removing defendant from the courtroom during the suppression hearing. Defendant continually disrupted the hearing despite repeated warnings to cease his outbursts. Although the court did not specifically warn defendant that continued misconduct would result in removal (*see,* CPL 260.20), such a warning was unnecessary under the circumstances," which included during the outbursts "an explicit demand to be removed"].)

As *Antoine* summarized the rule: "In *Wilkins*, the defendant needed to be restrained, because he physically charged across the floor to attack the prosecutor in close proximity to the jurors. In *Hendrix*, the defendant leapt onto the defense table and physically charged the bench. We agree that there may be emergency circumstances, such as those which occurred in *Wilkins* and *Hendrix*, where there is no practical value to, or opportunity for, the issuance of a warning that a defendant cease disruptive behavior." (*Antoine* at 1447 [citations omitted].)

While not currently required, when a defendant is excluded from the courtroom, a court "that readily possesses the means to do so should generally permit a defendant who has been excluded from the courtroom to observe the proceedings from a remote location in order to minimize the possibly of prejudice." (*People v Paige*, 134 AD3d 1048, 1053 [2d Dept 2015] ["under the particular circumstances of this case," *Paige* held, "the court did not improvidently exercise its discretion in declining defense counsel's request to permit the defendant to view the proceedings from a remote location"]; *see Allen*, 397 US at 351 [Brennan, J., concurring] ["the court should make reasonable efforts to enable (the defendant) to communicate with his attorney and, if possible, to keep apprised of the progress of his trial. Once the court has removed the contumacious defendant, it is not weakness to mitigate the disadvantages of his expulsion as far as technologically possible in the circumstances"].)

"Once lost, the right to be present can, of course, be reclaimed as soon as the defendant is willing to conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings." (*Allen*, 397 US at 343; *cf. Paige*, 134 AD3d at 1052-1053 [the record "does not support the defendant's contention that, after he was removed from the courtroom for his

profanity-ridden outburst, he was willing to 'conduct himself consistently with the decorum and respect inherent in the concept of courts and judicial proceedings' "].)

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 for a Witness to Testify (CPLR 2309; CPL 60.20 [2]; Family Court Act § 152 [b])

(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]).

6.06. 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).

6.07. Nonexpert Witness Limited to Personal Knowledge Testimony

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.

6.08. Refreshing Recollection[1]

(1) A witness may use any writing or other matter to refresh the witness's memory while testifying. Matter used to refresh a witness's recollection and not received in evidence shall not, however, be disclosed to the finder of fact, except as provided in subdivision two.

(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 finder of fact 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 245.20 [1] [b], [e]; [4] [a]); *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 effects 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 of Privileged Documents in Trial and Deposition Preparation of*

Witnesses in New York: When, if Ever, Will the Privilege be Lost?, 38 Pace L Rev 437 [2018]).

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[1] In December 2021, this rule was revised (1) to add the second sentence to subdivision (1) of the rule, which had previously just been included in the Note; and (2) to delete references to repealed sections of CPL article 240 and to insert the appropriate sections of CPL article 245.

6.09. Corroboration of Accomplice Testimony (CPL 60.22)

1. A defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense. The corroborative evidence need not, by itself, prove that a crime was committed or that the defendant is guilty. What the law requires is that there be evidence that tends to connect the defendant with the commission of the crime charged in such a way as may reasonably satisfy the finder of fact that the accomplice is telling the truth about the defendant's participation in that crime.

2. An "accomplice" means a witness in a criminal action who, according to evidence adduced in such action, may reasonably be considered to have participated in:
(a) The offense charged; or
(b) An offense based upon the same or some of the same facts or conduct which constitute the offense charged.

3. A witness who is an accomplice as defined in subdivision two is no less such because a prosecution or conviction of himself would be barred or precluded by some defense or exemption, such as infancy, immunity or previous prosecution, amounting to a collateral impediment to such a prosecution or conviction, not affecting the conclusion that such witness engaged in the conduct constituting the offense with the mental state required for the commission thereof.

Note

This rule states verbatim CPL 60.22 except for sentence two of subdivision (1). That sentence is drawn from CJI2d(NY) Accomplice as a Matter of Law and incorporates the applicable statutory and decisional law (*e.g. People v Breland*, 83 NY2d 286, 292, 294 [1994] [" 'The corroborative evidence need . . . not establish all the elements of the offense (CPL 60.22 [1])' " nor need the corroboration

evidence "lead exclusively to the inference of the defendant's guilt" (citations omitted)]; *People v Reome*, 15 NY3d 188, 192 [2010] [the " 'role of the additional evidence is only to connect the defendant with the commission of the crime, not to prove that he committed it. The accomplice testimony, if credited by the jury, may serve the latter purpose' " (citation omitted)]).

Penal Law § 20.00 defines an "accomplice" for purposes of criminal liability (*see* CJI2d[NY] Accessorial Liability). CPL 60.22 defines when a witness who gives testimony that incriminates a defendant will be deemed an accomplice for purposes of requiring corroboration of that witness's testimony. As *People v Fielding* (39 NY2d 607, 610 [1976]) explained:

> "CPL 60.22 (subds 2, 3) were enacted to broaden the rule . . . which had defined an accomplice as one who at common law might have been convicted of the offense either as a principal or as an accessory before the facts. . . . [T]his 'definition was unduly restrictive and at odds with the purpose of the accomplice doctrine: namely, preclusion of conviction solely upon the testimony of persons who are in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial.'
>
> "Thus, under the . . . statute, one would not avoid accomplice status merely because he was not a principal or an accessory. Nor would he avoid such status because a defense in bar, such as infancy, was available to him as an impediment to prosecution. But, nevertheless, to be an accomplice, he would have to be in some way criminally implicated in, and possibly subject to, prosecution for the general conduct or factual transaction on trial. Put another way, to be an accomplice, one would necessarily have to be at least potentially subject to sanctions of a penal character for his participation in the crimes of the defendant on trial" (internal quotation marks and citations omitted; *see also People v Wing*, 77 NY2d 851, 852 [1991]; *People v Jones*, 73 NY2d 902, 903 [1989]; *People v Cobos*, 57 NY2d 798, 801 [1982]; *People v Dorta*, 46 NY2d 818, 820 [1978]).

Once a witness is declared an accomplice as a "matter of law" (*see* CJI2d[NY] Accomplice as a Matter of Law) or as a "matter of fact" for the finder of fact to decide (*see* CJI2d[NY] Accomplice as a Matter of Fact) and the finder of fact decides the witness was an accomplice, CPL 60.22 (1) and this rule require that the defendant "may not be convicted of any offense upon the testimony of [the] accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense."

While the governing standard on what will satisfy that "corroborative evidence" requirement varied over the years, *Reome* (15 NY3d 188 [2010]), in

overruling *People v Hudson* (51 NY2d 233 [1980]), appeared to have settled the governing standard:

> "The text of CPL 60.22 (1), requiring 'corroborative evidence tending to connect the defendant with the commission of such offense,' need not be read, as it was in *Hudson*, to require that all corroboration that depends to any degree on the accomplice's testimony be ignored. . . . There can be corroborative evidence that, read with the accomplice's testimony, makes it more likely that the defendant committed the offense, and thus tends to connect him to it. . . .
>
> "As early as 1921, we said, in language we have repeatedly echoed since then: 'Matters in themselves of seeming indifference or light trifles of the time and place of persons meeting may so *harmonize* with the accomplice's narrative as to have a tendency to furnish the necessary connection between defendant and the crime.' . . . And we have held that some evidence may be considered corroborative even though it simply supports the accomplice testimony, and does not independently incriminate the defendant. Thus, in *Breland*, we relied on forensic evidence as to the location of a body and the gunshot wounds found in it that 'corresponded with the details' supplied by an accomplice (83 NY2d at 293). . . .
>
> "Courts may consider harmonizing evidence as well as [evidence independent of the accomplice's testimony], while giving due weight to the difference between the two. Some evidence that is not independent will obviously be worthless: If an accomplice testifies that the defendant committed a crime next to a tree in Central Park, the prosecution cannot 'corroborate' this testimony by proving the existence of the tree. But in other cases, as in this one, harmonizing evidence may provide a substantial basis for crediting accomplice testimony" (*Reome*, 15 NY3d at 194 [citations omitted]).

6.10. Missing Witness

(1) A party normally is expected to produce witnesses who are available to be called, are knowledgeable about a material issue, and would be expected to testify favorably on behalf of that party.

(2) (a) A party's failure to call a person to testify who is knowledgeable about a material issue and can be expected to testify favorably for that party may warrant an "adverse inference" that permits the finder of fact to infer that, had the witness been called to testify, the witness's testimony on the issue of which the witness possessed knowledge would not have supported the position of the party that failed to call the witness.

(b) A request for the adverse inference specified in paragraph (a) may be defeated by satisfactorily accounting for the witness's absence: by demonstrating that the witness is not knowledgeable about the issue; that the issue is not material or relevant; that, although the issue is material or relevant, the testimony would be "cumulative" of other evidence; that the witness is not "available"; or that the witness is not under the party's "control," meaning that the witness would not be expected to testify in the party's favor.

(3) A request for the adverse inference must be timely, that is, it must be made as soon as practicable. Whether a request is timely depends on when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay.

(4) The failure to request or the denial of the missing witness (adverse inference) charge does not preclude fair comment in summation on the failure of a party who presented evidence to call a witness.

(5) (a) When a witness, who may have knowledge about a material issue and would be expected to testify favorably for a party, will not be called as a witness by that party, the court may in its discretion permit that party to present evidence that purports to explain the witness's absence.

(b) Should a witness be unavailable as a matter of law to testify, the court should instruct the jury that the witness has become unavailable for reasons beyond the party's control and that, consequently, no adverse inferences may be drawn from the witness's failure to appear.

Note

Subdivision (1) is derived from decisional law about what constitutes a "missing witness" in both criminal and civil proceedings, the seminal case being *People v Gonzalez* (68 NY2d 424 [1986]), discussed in this Note. (*See DeVito v Feliciano*, 22 NY3d 159, 165-166 [2013] [the "preconditions for (a missing witness) charge (are) applicable to both criminal and civil trials"]; *see generally* PJI 1:75; CJI2d[NY] General Applicability, A Party's Failure to Call a Witness.)

Subdivision (2) draws substantially from *Gonzalez*, which has been reaffirmed repeatedly. (*See People v Smith*, 33 NY3d 454, 458-459 [2019]: *People v Hall*, 18 NY3d 122, 131 [2011]; *People v Savinon*, 100 NY2d 192, 196 [2003].) As *Gonzalez* (at 427-428) explains:

> "Once the party seeking the charge has established prima facie that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party, it becomes incumbent upon the opposing party, in order to defeat the request to charge, to account for the witness' absence or otherwise demonstrate that the charge would not be appropriate. This burden can be met by demonstrating that the

> witness is not knowledgeable about the issue, that the issue is not material or relevant, that although the issue is material or relevant, the testimony would be cumulative to other evidence, that the witness is not 'available', or that the witness is not under the party's 'control' such that he would not be expected to testify in his or her favor."

The meaning of "materiality," "control," "availability" and "cumulative testimony," as articulated by *Gonzalez*, needs to be further explained and distinguished.

"Materiality" requires an identifiable witness who can give testimony on an issue that is relevant to the case. (*Gonzalez*, 68 NY2d at 428.) The failure to identify a particular witness will preclude application of the rule. (1A NY PJI3d 1:75 at 124 [2021].)

"Control" refers to the relationship (not availability) between a party and a witness. As the Court explained in *Savinon* (100 NY2d at 200): "Where there is 'a relationship, in legal status or on the facts, as to make it natural to expect the party to have called the witness to testify in his [or her] favor,' the so-called control element is satisfied." While a witness may be "available" to both sides, one party may have a relationship to the witness that makes the witness "favorable to or under the influence of one party and hostile to the other" such that the witness would be expected to testify favorably for that party. (*Gonzalez* at 429.) It matters not that the testimony may prove not favorable; it is the relationship between the party and the witness that gives rise to the expectation that the witness's testimony would be favorable and thus the witness must be called, or the finder of fact instructed on the adverse inference. "Thus, the fact that a witness is 'equally available' to both sides, standing alone, is insufficient to defeat a timely request for the charge. Rather, it must also be demonstrated that the witness is not in the 'control' of the party who would have been expected to call him [or her]—that is, the witness, by nature of his [or her] status or otherwise, would not be expected to testify favorably to one party and adversely to the other." (*Gonzalez* at 429; *see Hall*, 18 NY3d at 131; *People v Fields*, 76 NY2d 761, 763 [1990] [a police officer would be "expected to testify favorably to the People"]; *People v Rodriguez*, 38 NY2d 95, 98 n 1 [1975] ["A spouse or relative (of a defendant) is perforce deemed to be under the defendant's control"].)

"Availability" is a "separate and distinct" consideration from "control." (*People v Keen*, 94 NY2d 533, 540 [2000].) It refers to the ability to call a witness to the stand who is competent to testify. (Guide to NY Evid rule 6.01.) "Though a genuine inability to locate a witness will foreclose a missing witness instruction, a witness may be readily accessible and even in the courtroom but still be unavailable

within the meaning of the rule. Thus, a witness who on Fifth Amendment grounds refuses to testify will be considered 'unavailable' although the witness's presence is known and apparent." (*Savinon* at 198.)

"Cumulative" testimony refers to testimony favoring the party controlling the uncalled witness; that testimony, however, is not necessarily cumulative simply because it would provide additional testimony on a material issue. If the additional testimony would serve a meaningful purpose, such as to confirm or contradict testimony on a disputed material issue, it is not cumulative. (*Gonzalez* at 430 [the missing witness's testimony on the identification of the perpetrator would not have been cumulative because the "prosecution's case rested entirely upon the complainant's testimony and identification of the defendant (and) complainant's credibility had been impeached on cross-examination such that corroboration of her testimony was crucial"]; *People v Fields*, 76 NY2d at 763 ["there was evidence that if (the detective) were called, his testimony (about the interrogation of the defendant) would have been inconsistent with (Detective) D'Ambrosio's testimony" and was accordingly not cumulative]; *DeVito v Feliciano*, 22 NY3d at 166 ["our holding is that an uncalled witness's testimony may properly be considered cumulative only when it is cumulative of testimony or other evidence favoring the party controlling the uncalled witness. . . . (A) witness's testimony may not be ruled cumulative simply on the ground that it would be cumulative of the opposing witness's testimony"]; *compare People v Macana*, 84 NY2d 173, 180 [1994] ["There is nothing in the record to indicate that the missing officer would have testified differently or in accordance with defendant's claim that the gun was retrieved from the living room hutch. It is not incumbent upon the prosecution to call at trial every witness to a crime or to make a complete and detailed accounting to the defense of all law enforcement investigatory work, and there is ample support in the record that the missing officer's testimony would have been cumulative and therefore not a proper subject of a missing witness charge" (internal quotation marks and citations omitted)].)

Notably, *People v Smith* (33 NY3d at 459) held that it is not the burden of the proponent of the adverse inference "to negate cumulativeness to meet the prima facie burden" for a missing witness instruction. "The proponent of the charge typically lacks the information necessary to know what the uncalled witness would have said and, thus, whether the testimony would have been cumulative. The party opposing the charge is in a superior position to demonstrate that the uncalled witness's testimony would be cumulative. The opposing party therefore appropriately bears the initial burden with respect to cumulativeness." (*Id.* at 459-460; *see* Hutter, *'People v. Smith': Missing Witness Charge as Applied in Criminal and Civil Actions Revisited*, NYLJ, July 31, 2019.)

In a criminal proceeding, the defense that presents evidence may, like the People, be subject to the consequences attending the failure to call a noncumulative

witness, with knowledge of a material issue, who would be expected to testify favorably for the defense. (*Rodriguez*, 38 NY2d at 98 ["Ordinarily, a court may not comment upon a defendant's failure to testify or otherwise to come forward with evidence, but, once a defendant does so, his failure to call an available witness who is under defendant's control and has information material to the case may be brought to the jurors' attention for their consideration"]; *People v Wilson*, 64 NY2d 634, 635-636 [1984] ["Although defendant had no burden to come forward with alibi evidence, once he did so, his failure to call an available witness to support the alibi could be brought to the jury's attention inasmuch as it appeared that the witness, defendant's wife, would be favorable to him and hostile to the prosecution and the testimony would not be trivial or cumulative"].)

An exception to applying the missing witness rule to the defendant "obtains where the person not called as a witness by defendant is a codefendant, an accomplice not presently on trial, or one already adjudged guilty of perpetrating the same act or offense as that for which defendant is being prosecuted" (*People v De Jesus*, 42 NY2d 519, 525 [1977]), or a witness who would invoke the Fifth Amendment. (*Macana*, 84 NY2d at 178.)

Once a prima facie showing of a "missing witness" is established, a statement by the opposing party that the witness's testimony would be cumulative or that the witness is not available, which is not supported by the record, does not rebut the prima facie showing. (*Smith*, 33 NY3d at 460 [the People's "conclusory argument" that the "missing witness" would not "be able to provide anything that wasn't provided by (the victim)" was "insufficient to satisfy the People's burden in response to defendant's prima facie showing"]; *People v Savinon*, 100 NY2d 192, 200 [2003] ["If unavailability could be established by a pro forma or unsupported assertion, a party (be it the defendant or the prosecution) might merely go through the motions of asking a witness to testify, or might ask with a 'wink and a nod.' The witness would thus be free to decline and thereby serve the party's ulterior goal of keeping the witness off the stand"]; *Macana*, 84 NY2d at 178-179 [verification may be required "when the defendant is the only source of proof of either the existence of the uncalled witness or that favorable testimony of that witness would be self-incriminating"].)

People v Paylor (70 NY2d 146, 149 [1987]) set forth the inference the finder of fact may draw from a missing witness: "if the witness had been called [the witness] would not have supported the . . . testimony [of the party who did not call the witness] on the issue of which [the witness] possessed knowledge. If the fact finder elects to draw an inference from the failure to produce a witness, it may not speculate about what the witness would have said, nor may it assume that the witness could have provided positive evidence corroborating or filling gaps in the People's proof. The inference is merely negative and allows the fact finder to infer

that the missing witness would not have supported or corroborated defendant's evidence."

For specific examples of where courts have held that the granting or denying of a "missing witness" instruction was proper, see PJI 1:75; Donnino, New York Court of Appeals on Criminal Law (ch 17, Evidence, part XII, Missing Witness [3d ed]).

Subdivision (3) is derived principally from *People v Carr* (14 NY3d 808, 809 [2010]), which held:

> "A party seeking a missing witness instruction has the burden of making the request 'as soon as practicable.' Whether such a request is timely is a question to be decided by the trial court in its discretion, taking into account both when the requesting party knew or should have known that a basis for a missing witness charge existed, and any prejudice that may have been suffered by the other party as a result of the delay" (citation omitted).

See *Gonzalez* (at 427-428), explaining that in "some instances, [the information about a 'missing witness'] may be available prior to trial; at other times, it may not become apparent until there has been testimony of a witness at trial. In all events, the issue must be raised as soon as practicable so that the court can appropriately exercise its discretion and the parties can tailor their trial strategy to avoid 'substantial possibilities of surprise' " (citation omitted). A timely request may provide the respondent an opportunity to call the "missing witness" to avoid the adverse inference.

In *Carr*, the defendant's request for the adverse inference was not timely where the "defendant knew at the outset of the trial that the People did not intend to call three of the victim's relatives who were present at the time of the alleged crime" and the defendant made the request "more than a week after the People provided their witness list, and after the People had rested their case-in-chief." (*Carr* at 809; s*ee People v Gumbs*, 195 AD3d 450, 451 [1st Dept 2021] [defendant's request, made after the People had rested their case-in-chief, was properly denied as untimely]; *People v Torres*, 169 AD3d 506, 506-507 [1st Dept 2019] ["Although defendant was made aware at the end of jury selection that the People did not plan to call this witness, defendant waited until both sides had rested to make his request. Accordingly, the request was untimely"]; *People v Pearson*, 151 AD3d 1455, 1457 [3d Dept 2017] [the defendant was "aware that the CI would not testify at the conclusion of the People's case, but did not make this charge request until after the close of proof and, thus, the request was untimely"].)

Subdivision (4) sets forth a decisional law rule that the failure to request or the denial of the missing witness (adverse inference) charge does not preclude fair comment in summation on the failure of a party who presented evidence to call a witness.

Thus, the Court of Appeals has explained that, where a defendant introduced evidence in his defense, the prosecutor's comments in summation about the defendant's failure to call "significant witnesses" who were available and had material noncumulative information relevant to the defense "did not constitute an impermissible effort to shift the burden of proof," and the People were not "obliged" to satisfy the burden required for a missing witness charge because the summation "comments were not made in bad faith and were merely efforts to persuade the jury to draw inferences that supported the People's position." (*People v Tankleff*, 84 NY2d 992, 994-995 [1994]; *see People v Floyd*, 97 AD3d 837, 837 [2d Dept 2012] [where the defendant presented an alibi defense, "his failure to call significant witnesses in support of his defense may be brought to the jury's attention by the prosecutor, provided that the prosecutor's comments are not made in bad faith and are merely efforts to persuade the jury to draw inferences supporting the People's position"]; *People v Cochran*, 29 AD3d 365, 366 [1st Dept 2006] [fair comment on missing alibi witness]; *see also People v Katzman*, 161 AD3d 770, 771-772 [2d Dept 2018] [The prosecutor's comment highlighting the defendant's failure to produce documentary evidence that he testified established the truth of his defense was not improper].)

Similarly, even though a defendant may not be entitled to a "missing witness" charge, the defendant "may nonetheless try to persuade the jury to draw inferences from the People's failure to call an available witness with material, noncumulative information about the case." (*People v Williams*, 5 NY3d 732, 734 [2005].) Thus, in *Williams*, the defendant "was entitled to argue that the jurors should consider the People's failure to call the ghost [backup] officer to corroborate the single-witness identification in support of his defense that the People's evidence was uncorroborated and 'skeletal.' " (*Id.* at 734-735; *People v Thomas*, 21 NY3d 226, 231 [2013] [defense counsel had "no obligation to make an offer of proof as a predicate for a missing witness argument (in summation). It is a premise of such an argument, as it is of a missing witness instruction, that the witness is in the control of the party that failed to call him" (citation omitted)]; *but see People v Vega*, 37 AD3d 351, 352 [1st Dept 2007] [the "court properly precluded defendant from commenting in summation on the People's failure to call the buyer (of drugs) as a witness, and properly instructed the jury to disregard the buyer's absence from the proceedings. Defendant had no good faith basis for such a comment. The buyer's sole connection with the prosecution was adversarial" (citation omitted)].)

People v Modeste (1 Misc 3d 315, 316 [Sup Ct, Kings County 2003]) is instructive. There the defendant stabbed her boyfriend (the complainant) with a knife. Neither the prosecution nor the defendant called the complainant. The court ruled that neither was entitled to a "missing witness" charge: "The boyfriend's status as a complainant would infer that he would provide testimony favorable to the prosecution's version of the events. The family and living relationship between the defendant and her boyfriend indicate control by the defendant." (*Id.* at 320 [citations omitted].) Instead, the court permitted the defense to comment on the missing complainant, and, if the defense did, the prosecutor to comment on "the boyfriend's living and familial relationship with the defendant as well as his immigration issues." (*Id.*)

Subdivision (5), paragraph (a), allows the trial court in its discretion to permit a party who may have an explanation for the absence of a favorable witness to introduce evidence of that explanation. (CJI2d[NY] General Applicability, A Party's Failure to Call a Witness; PJI 1:75.)

A witness is clearly unavailable when the witness has died or become mentally or otherwise incapacitated or is unavailable as a matter of law, for instance, when the witness will invoke the privilege against compelled self-incrimination. In contrast, where a foundational requirement for the "missing witness" charge or the inference a party on summation asks the finder of fact to draw is in dispute, the finder of fact will need to resolve that issue, and thus have the information necessary to do so. (*See Gonzalez* at 431 [The party against whom the "missing witness" charge is directed "can seek to explain the witness' absence by reference to evidence in the record"]; *People v Berg*, 59 NY2d 294, 300 [1983] [where the complainant in an assault case refused to testify, the Court held that the trial court's decision to permit the People to call the complainant was not an abuse of discretion, "given the State's strong interest both in attempting to induce this witness to testify and to avoid the unfavorable inference arising from a failure to produce the victim of the assault, coupled with the curative instruction concerning (the complainant's) refusal to testify"].) In *Keen* (94 NY2d at 539-540), the court properly granted the People a "missing witness" instruction but left it to the jury to decide whether the witness was in "control" of the defendant.

Paragraph (b) is derived from *People v Thomas* (51 NY2d 466, 473-474 [1980]). In *Thomas*, the jury became aware that a witness for the defense "might possess information that would be helpful to the defendant's case." (*Id.* at 473.) That witness, however, was prepared to invoke the privilege against compelled self-incrimination. In that instance, the Court of Appeals held that "the trial court should, upon request, give the jurors a neutral instruction advising them that the witness has become unavailable for reasons beyond the defendant's control and

that, consequently, no adverse inferences may be drawn from the witness' failure to appear." (*Id.* at 473-474.)

6.11 Impeachment, When Authorized and Provable by Extrinsic Evidence[1]

(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) (a) 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.

(b) 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 of a Witness to Testify) and rule 6.05 (Oath or Affirmation for a Witness to Testify); or is evidence admissible pursuant to rule 6.13 (Impeachment by Bias, Hostility, Interest), rule 6.15 (Impeachment by Prior Inconsistent Statement), or rule 6.20 (Impeachment by Recent Fabrication); or is otherwise clearly probative of a witness's ability to recall or observe the details of the relevant event accurately.

(c) Evidence of impeachment which is not collateral may be proved by "extrinsic evidence," meaning evidence adduced by means other than cross-examination of the witness.

(3) The collateral evidence rule set forth in subdivision (2) (a) does not bar the cross-examined party from explaining an admission made on cross-examination or offering, within reason, evidence to explain any admission.

(4) 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. Extrinsic evidence means evidence "adduced by means other than cross-examination." (Black's Law Dictionary [11th ed 2019], 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) 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); or "where evidence is clearly probative of [a] witness's ability to accurately recall or to observe the details of the relevant event, it is not collateral and it is admissible." (*People v Deverow*, 38 NY3d 157, 165 [2022] [internal quotation marks omitted].)

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; *Deverow*, 38 NY3d at 165.)

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. (*Id.*)

Subdivision (3) is derived from *People v Catalanotte* (36 NY2d 192, 195 [1975]). In *Catalanotte*, the defendant was accused of selling illegal drugs. On cross-examination, the prosecutor questioned the defendant about substantial monies purportedly in bank accounts in his name, attempting thereby to imply that the bank accounts contained the fruits of his trafficking in illegal drugs. The defendant had no explanation for the bank accounts, denying any knowledge of them. In rebuttal, however, the defendant requested permission to call a witness who could purportedly explain the money in the accounts; the trial court denied the request as constituting impermissible collateral evidence. The Court of Appeals was unanimous that the exclusion of the rebuttal witness was error, dividing only on whether the error was harmless. The majority (which found the error harmless) explained that: "the collateral issue rule bars the cross-examiner from offering evidence contradicting the cross-examined party on a collateral issue; it does not or should not bar the cross-examined party from explaining his admissions or offering, within reason, proof from others to explain his partial admissions." (*Id.*; *see People v Robinson*, 17 NY3d 868, 870 [2011] [the trial court erred "when it denied defendant an opportunity to explain fully the statements he made while in police custody" (i.e. to explain what he meant by his statements)].)

Subdivision (4). The first portion of subdivision (4) 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"].)

[1] In December 2022, the rule was amended to expand subdivision (2), add a new subdivision (3), and renumbered the former subdivision (3) to be subdivision (4); and the Note was substantially expanded."

6.12. Impeachment—By Benefit to a Witness

(1) A witness who is promised, received, or expects to receive a benefit may accordingly be examined with respect to what effect, if any, the benefit has on the witness's credibility.

(2) When a prosecutor is aware that a witness has mischaracterized or falsely denied a promised benefit, the prosecutor is obligated by further examination of the witness or otherwise to inform the court and the jury of the truth.

Note

It is well established in a criminal proceeding that the prosecution must disclose an agreement between the prosecution and a witness that grants the witness a benefit to induce the witness to testify (*People v Novoa*, 70 NY2d 490, 492-93 [1987]; CPL 245.20 [1] [k] [iv]; *see Giglio v United States*, 405 US 150, 150-151 [1972] [the Government violated due process when it "failed to disclose an alleged promise made to its key witness that he would not be prosecuted if he testified for the Government"]; *Brady v Maryland*, 373 US 83, 87 [1963].)

In turn, as set forth in **subdivision (1)**, it is equally well established in a criminal or civil proceeding that a witness may be examined and subject to impeachment when the witness has received or stands to receive a benefit for the witness's testimony. (*See People v Thomasula*, 78 NY2d 1051, 1053 [1991] ["(T)here can be no question that a criminal defendant is entitled to have the jury informed that a prosecution witness has been offered a 'favorable deal' in exchange for his testimony"]; *Zimmer v Third Ave. R.R. Co.*, 36 App Div 273, 274 [2d Dept 1899] ["Plainly the size of the fee a witness is to receive for his testimony may . . . bias his judgment, and the parties and the jury are entitled to know just what compensation an expert witness has received or is to receive"].)

With respect to a criminal proceeding, the Court of Appeals has explained:

> "It goes without saying that the existence of a promise of leniency or other consideration made to a self-confessed criminal can weigh heavily in the assessment of his credibility as a witness. The

deprivation or serious circumscription of a . . . right to cross-examine on that issue therefore can be prejudicial error." (*People v Arce*, 42 NY2d 179, 188-189 [1977]; *see People v Roth*, 30 NY2d 99, 101 [1972] [the witness's "credibility was a critical issue in the case. She testified she had been charged with selling . . . a dangerous drug . . . and that she received an unconditional discharge. The defense was entitled to know exactly what were the circumstances of that discharge as affecting the motivation and credibility of her testimony for the prosecution"]; *People v Torres*, 51 AD2d 225, 227 [1st Dept 1976] ["In light of the lenient plea afforded (the witness) . . . reasonable latitude should have been afforded defense counsel in making inquiry into the circumstances affecting or leading to the plea. Such inquiry is relevant to show the witness' interest in testifying favorably for the People"]; *People v Bryant*, 77 AD2d 603, 603 [2d Dept 1980] ["(D)efendant was entitled to attempt to show through cross-examination that the informant's motive to lie was increased because of the sentence she faced before she agreed to become an informant and to plead guilty and receive a sentence of probation"].)

It is not a ground for curtailing an examination that the examination may reveal to the jury the sentence of imprisonment that the defendant on trial faces—"the prosecutor, and not the defendant, must bear the burden that the jury would know that defendant faced the same sentence." (*People v Tyler*, 54 AD2d 723, 723 [2d Dept 1976].)

Subdivision (2) states a long established dictate of the Court of Appeals. (*Novoa*, 70 NY2d at 496-497 [1987] ["A prosecutor may not sit by silently while her witness testifies falsely that she did not receive any promise in return for testimony . . . . If a witness mischaracterizes or falsely denies a promise, the prosecutor must 'by immediate statement of his own or by further appropriate examination . . . forthrightly (expose) the lie, so that the court and jury (will know) that the witness had reason to expect lenient treatment for "continued . . . co-operation" . . . (I)f (a lie) is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth.' (*People v Savvides,* 1 NY2d 554, 556-557 [1956])"]; *People v Mangi*, 10 NY2d 86, 88 [1961] ["(I)t was not fair or frank for (the witness) to have led the jury to believe that he had been promised nothing if he did co-operate, and the Assistant District Attorney who tried the case should have acquainted the jury with what had occurred"].)

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].)

6.14 Impeachment by Evidence Improperly Obtained

(1) A voluntary statement of a defendant obtained by law enforcement in violation of (a) the required pre-interrogation warnings or (b) the defendant's right to counsel may be used to impeach the credibility of a defendant who gives testimony inconsistent with the statement.

(2) A voluntary statement or other evidence that is the product of an illegal seizure of or from a defendant may provide a basis for impeachment of a defendant who testifies in a manner inconsistent with his or her connection to the seized evidence.

(3) While the use of an inconsistent statement or other evidence taken in violation of a constitutional directive may be used to impeach the testimony of a defendant, it may not be used, directly or indirectly, to establish the People's case.

Note

Introduction. The rationale underlying this rule is that, absent the rule, a "defendant's constitutional shield against having illegally seized evidence used against him could be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances" or other evidence illegally seized from the defendant (*United States v Havens*, 446 US 620, 626 [1980] [internal quotation marks omitted]; *see People v Johnson*, 27 NY2d 119, 122 [1970] ["the constitutional privilege ought to shield a man against unfairness by the State in using such a statement in his prosecution, but should not immunize him from inquiry when he affirmatively proffers testimony as part of a strategy in contested litigation in which truth is a critical ingredient"]). The use of an inconsistent statement or other evidence taken in violation of a constitutional directive, however, is limited to impeachment of a defendant who testifies on his or her behalf and "may not be used, directly or indirectly, to establish the People's case" (*People v Ricco*, 56 NY2d 320, 323 [1982]).

Subdivision (1) is derived from both United States Supreme Court and New York Court of Appeals decisions.

The principal decisions in the United States Supreme Court are *Harris v New York* (401 US 222 [1971], *affg People v Harris*, 25 NY2d 175 [1969] [a

defendant's voluntary statement made to police that was inadmissible on the prosecution's case in chief because it was taken in violation of the required pre-interrogation warnings of *Miranda v Arizona* (384 US 436 [1966]) may be used to impeach the defendant's credibility]) and *Oregon v Hass* (420 US 714, 714-715 [1975] [the *Harris* holding was reaffirmed where the only difference between the two cases was that Harris received defective pre-interrogation warnings and Hass received proper warnings but thereafter asked to telephone a lawyer before making the statement used for impeachment]).

In *Harris*, the prior inconsistent statement was elicited during cross-examination of the defendant (*Harris*, 401 US at 223). In *Hass*, the Court held that the trial court erred in denying the prosecutor's application to call a rebuttal witness to testify to the inconsistent statement (*Hass*, 420 US at 723-724).

The Court of Appeals has long held that "[o]ur rule permits the use for impeachment not only of statements obtained in violation of a defendant's *Miranda* rights, but also of those obtained in violation of his right to counsel under the State Constitution" (*People v Maerling*, 64 NY2d 134, 140 [1984] [citations omitted]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings include: *Harris* (25 NY2d at 177 [on cross-examination of the defendant, the prosecutor properly used a statement taken from the defendant in violation of the required pre-interrogation warnings that was at "complete variance" with the defendant's direct testimony to impeach the defendant]) and *People v Wilson* (28 NY3d 67, 72 [2016] [the prosecutor properly used the defendant's statements made to police after he had invoked his right to remain silent to impeach the defendant's testimony]).

The principal decisions in the Court of Appeals on permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's right to counsel include: *People v Kulis* (18 NY2d 318, 322 [1966] [a statement was taken after the defendant requested an attorney]); *People v Boodie* (26 NY2d 779, 781 [1970] [statement taken from defendant after arraignment in the absence of counsel]); *Maerling* (statements to a jail guard made while in custody in absence of counsel); and *People v Meadows* (64 NY2d 956, 958 [1985] [statement taken after the right to counsel attached by virtue of the commencement of the action by the filing of a complaint and issuance of a warrant]).

The defendant must have given the prior statement voluntarily (*Maerling*, 64 NY2d at 140 ["If the statement was voluntary, it may be used to impeach; if it was not, it may not be admitted, even though it may be reliable"]; *People v Walker*, 67 NY2d 776 [1986] [a judicial finding that the defendant's statement was involuntary precluded its use to impeach the defendant's testimony]). The People bear the burden of showing that statements were made voluntarily, i.e., that the "statements were not products of coercion," either physical or psychological (which

includes the use of "deception" in the service of "psychologically oriented interrogation" that "eclipse[s] individual will"); in other words the statements must be given as a result of a " 'free and unconstrained choice by [their] maker' " (*People v Thomas*, 22 NY3d 629, 641-642 [2014]). Also, a statement obtained by a grant of immunity is involuntary (*New Jersey v Portash*, 440 US 450, 459 [1979] ["Testimony given in response to a grant of legislative immunity is the essence of coerced testimony"]).

Harris authorized the use of the defendant's prior statement for impeachment "provided of course that the trustworthiness of the evidence satisfies legal standards" (401 US at 224). That proviso, however, was not intended to require a judicial determination of trustworthiness; the purported inconsistent statement, as with any purported inconsistent statement, presents an issue of fact and credibility for the jury to decide (*People v Washington*, 51 NY2d 214, 221 [1980]).

The defendant opens the door to impeachment once the defendant "recounts the events to which the prior inconsistent statement relates" (*People v Wise*, 46 NY2d 321, 327 [1978]; *see* Guide to NY Evid rule 4.08, "Open Door" Evidence]). As *Wise* further explained: "where a defendant's trial testimony offers one version of the events in question, and his prior remark to a police officer suggests a contrary view of those events, the jury is entitled to hear the previous statement so that it may fully assess the witness' credibility" (*Wise* at 327-328; *compare People v Rahming*, 26 NY2d 411, 418 [1970] [in this case, the prosecutor erred in ranging "beyond the defendant's direct examination 'in order to lay a foundation for the tainted evidence (i.e., statement taken in violation of pre-interrogation warnings) on rebuttal' " (citations omitted)]; *see Havens*, 446 US 620).

Subdivision (2) is derived from the holdings of the United States Supreme Court. (*See Walder v United States*, 347 US 62, 64 [1954] [the defendant's testimony on direct examination that he had never possessed any narcotics opened the door, solely for the purpose of attacking the defendant's credibility, to evidence of the heroin unlawfully seized from him in connection with a prior case that was dismissed due to the illegal seizure of the heroin]; *Havens*, 446 US at 627-628 [holding that "a defendant's statements made in response to proper cross-examination reasonably suggested by the defendant's direct examination are subject to otherwise proper impeachment by the government, albeit by evidence that has been illegally obtained and that is inadmissible on the government's direct case, or otherwise, as substantive evidence of guilt"]; *see United States v Leon*, 468 US 897, 910 [1984] ["Evidence obtained in violation of the Fourth Amendment and inadmissible in the prosecution's case in chief may be used to impeach a defendant's direct testimony"].)

> "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which

> evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths" (*Walder* at 65).

The Court of Appeals has relied on the Supreme Court holdings in its decisions permitting impeachment of a defendant by a voluntary statement taken in violation of the defendant's pre-interrogation warnings or right to counsel (*Kulis*, 18 NY2d at 322-323; *Johnson*, 27 NY2d at 121-122; *Maerling*, 64 NY2d at 140-141). The Appellate Division has applied the holding in *Havens* to the facts of individual cases (*People v LaFontant*, 46 AD3d 840, 841-842 [2d Dept 2007] [when the defendant testified that he had not possessed a gun prior to the day of the incident, a photograph of the defendant holding a gun that was the product of an illegal search of his cell phone was properly admitted as impeachment evidence]; *People v Donnelly*, 103 AD2d 941, 941-942 [3d Dept 1984] [when the defendant testified concerning his consumption of alcohol prior to the accident, the results of a blood alcohol test that had been suppressed was properly admitted]; *see People v Dash*, 126 AD2d 737, 737 [2d Dept 1987] ["While illegally obtained physical evidence is inadmissible as substantive proof in the People's case-in-chief, it may be used for purposes of impeaching a defendant who testifies in his own behalf"]).

Method of Impeachment. The traditional requirements for proving an inconsistent statement of a defendant are to raise the statement and circumstances of its making with the defendant on cross-examination and, if the defendant denies making the statement, to introduce it through rebuttal evidence (Guide to NY Evid rule 6:15, Impeachment by Prior Inconsistent Statement).

More than a century ago, however, in *Blossom v Barrett* (37 NY 434, 438 [1868]), the Court of Appeals held that the foundation for a prior inconsistent statement "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." *Mindlin v Dorfman* (197 App Div 770, 772 [1st Dept 1921]) explained the rationale for *Blossom* as follows:

> "The reason for the difference in the rule relating to witnesses and parties is that the only object of requiring the warning is to provide a fair opportunity of explanation before the witnesses' departure, whereas a party is in theory present during the trial, and has in fact ample opportunity to protect himself by taking the stand for any explanations which he may deem necessary after hearing the testimony of his alleged admissions."

The United States Supreme Court, in *Oregon v Hass* (420 US 714 [1975]), approved the introduction of a statement, taken in violation of *Miranda*, solely in rebuttal, to impeach the credibility of the defendant's testimony. The defendant accordingly was not at first cross-examined about the statement. Consistent with the rationale of *Blossom* as explained in *Mindlin*, the defendant then "again took

the stand" (*id.* at 717) to address the rebuttal evidence, at which point the trial court instructed the jury that the statement bore only on the defendant's credibility.

Some Appellate Division decisions, without considering *Blossom*, have held that it is error not to employ the traditional foundation requirements for a statement improperly obtained from the defendant, and, upon the failure to confront the defendant on cross-examination with the statement, rebuttal evidence of the inconsistent statement is not authorized (*People v Robinson*, 267 AD2d 1031, 1031 [4th Dept 1999]; *People v Watford*, 146 AD2d 590 [2d Dept 1989]; *People v Jones*, 134 AD2d 915 [4th Dept 1987]; *People v Grainger*, 114 AD2d 285, 290 [4th Dept 1986]).

Since *Blossom,* it appears that the Court of Appeals has not been asked whether the failure to question the defendant on cross-examination about an improperly obtained inconsistent statement precludes its use as rebuttal evidence. The Court has been presented with cases in which the traditional foundation requirements were employed, and, of course, there was no error in doing so. *Wise,* for example, states that the "law pertaining to prior inconsistent statements is well developed" and then lists the traditional foundation requirements that were utilized in that case; but *Wise* also stated that "[p]rimarily at issue here is whether defendant's previous utterance was sufficiently inconsistent with his trial testimony to warrant its use on cross-examination" (*Wise* at 326).

There are, however, dicta, particularly in *People v Washington* (51 NY2d 214 [1980]), suggesting that *Blossom* still may represent current law and the presentation of an inconsistent statement improperly obtained from a testifying defendant may be admissible on rebuttal, without first confronting the defendant on cross-examination with the statement. *Washington* (at 220) states: "It is also apparent that the prosecutor may use the statements on cross-examination of the defendant (*Harris v New York*, *supra*) or on rebuttal by calling another witness to testify that the defendant made them (*Oregon v Hass*, *supra*)" (emphasis added).

Thus, *Washington* states, "or on rebuttal," and cites to *Hass*, which approved introduction of the inconsistent statement *solely* on rebuttal, with the right of the defendant to resume the stand to address the rebuttal (as authorized by *Blossom*), and with an instruction to the jury that the statement related only to the credibility of the defendant (*Oregon* at 717).

Wise also makes a point of explaining that the evidence of the statement presented in rebuttal in that case met the requirements for rebuttal evidence, not simply that the statement was admissible on rebuttal because the defendant denied making the statement on cross-examination. (*Wise* at 328; *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"]; *People v Patterson*, 194 AD2d 570, 571

[2d Dept 1993] ["Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness's general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this threshold is met, the fact that the evidence also tends to impeach the witness' credibility does not render the evidence collateral" (citation and internal quotation marks omitted)].)

Subdivision (3) states the undisputed holding of decisional law that any authorized use of evidence improperly obtained is solely for the purposes of impeachment (*People v Ricco*, 56 NY2d at 323).

6.15. Impeachment by Prior Inconsistent Statement (CPLR 4514; CPL 60.35 [2])

(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"]. *But see* Guide to NY Evid rule. 6.14, Impeachment by Evidence Improperly Obtained; Method of Impeachment.)

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]

(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 person 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, a question directed to a testifying defendant about the defendant's alleged prior criminal, vicious, or immoral conduct was authorized by the court prior to trial or during trial upon a defense objection.

(2) Except for the admission of a criminal conviction pursuant to Guide to New York Evidence 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 Guide to New York Evidence rule 6.23 (2).

Note

Subdivision (1). The rule in subdivision (1) (a) on 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

> "[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) was derived from *People v Sandoval* (34 NY2d 371 [1974]) and former CPL 240.43, which was replaced by CPL 245.20 (3). *Sandoval* set forth a procedure and criteria for a pretrial determination as to whether any of the defendant's criminal convictions or prior instances of misconduct may be used for impeachment purposes. *People v Syposs* (122 AD2d 600, 600-601 [4th Dept 1986]), however, held that *Sandoval* "neither enlarged nor diminished the court's inherent and pre-existing power to exercise general control over the range of cross-examination; consequently, a defendant retains the right to object *at trial* to prejudicial cross-examination, and when his objection challenges inquiry into his prior misconduct, he is entitled to a ruling based upon the same criteria as would have been applied had the issue been raised before trial" (internal quotation marks and citations omitted).

CPL 245.20 (3) requires the prosecution to "disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor's information, information, or simplified information, which the prosecution intends to use at trial for purposes of (a) impeaching the credibility of the defendant, or (b) as substantive proof of any material issue in the case." (*See* CPL 245.10 [1] [b] on the timing of the disclosure.) 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. . . .
>
> "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* Guide to NY Evid 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 Guide to New York Evidence rule 6.23 (2).

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[1] In December 2021, this rule was revised: (1) to substitute in the rule of subdivision (1) (b) the word "person" for "witness" in in the phrase "conduct of the person who was the subject of the character testimony"; (2) to substitute in the rule of subdivision (1) (c) (iv) the phrase "a question directed to a testifying defendant about the defendant's alleged. . ." for the phrase: "the question about"; (3) to add at the end of the rule in subdivision (1) (c) (iv) "or during trial upon a defense objection" per the holding in *People v Syposs* (122 AD2d 600, 600-601 [1986]) that is summarized in the third sentence of the Note to that subdivision; and (4) to explain in the first sentence of the Note to subdivision (1) (c) (iv) that CPL 240.43 was repealed and replaced by CPL 245.20 (3).

6.19. Impeachment by Conviction

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

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

(b) in a criminal proceeding:

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

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

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

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

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

Note

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

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

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

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

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

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

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

CPL 60.40 (1) provides:

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

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

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

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

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

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

> "Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant's credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . , may have lesser probative value as to lack of in-court veracity . . . .
>
> "Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted." (*Sandoval*, 34 NY2d at 376-377; *see also People v Williams*, 12 NY3d 726 [2009]; *People v Smith*, 18 NY3d 588 [2012].)

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

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

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

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

6.20 Impeachment by Recent Fabrication

(1) A claim of "recent fabrication" means that a party is charging a witness not with mistake or confusion, but with making up a false story to meet the exigencies of the case.

(2) Provided there is a good faith basis for introducing evidence of recent fabrication, a party may elicit the evidence from a witness on cross-examination, and present extrinsic proof tending to establish that the witness testified to a false story and the reason therefor.

(3) When a party creates the inference of, or directly characterizes the testimony of a witness as, a recent fabrication, a prior consistent statement of the witness, made at a time when there was no motive to fabricate, is admissible to aid in establishing the witness's credibility.

Note

Subdivision (1)'s definition of "recent fabrication" is drawn from *People v Singer* (300 NY 120, 124 [1949]):

> "[Recent fabrication means] that the defense is charging the witness not with mistake or confusion, but with making up a false story . . . 'Recently fabricated' means the same thing as fabricated to meet the exigencies of the case" (citation omitted; *see Nelson v Friends of Associated Beth Rivka Sch. for Girls*, 119 AD3d 536, 538 [2d Dept 2014] ["Here, the focus of the defense was not merely that the infant plaintiff was mistaken or that she was confused or could not recall her accident, but that she was coached to tell a 'false story well after the event' and, as such, it was a recent fabrication"; thus, the infant's prior statement in a medical record that was consistent with her testimony was admissible]).

"Recent fabrication" is not limited to fabrication of evidence after an event. In *People v Davis* (44 NY2d 269, 277-278 [1978]), for example, the Court noted that the "the only questions on cross-examination addressed to motive to fabricate related to a fabrication of the entire case from, and perhaps before, its very inception."

Subdivision (2) is derived from *People v Spencer* (20 NY3d 954 [2012]), and *People v Hudy* (73 NY2d 40 [1988], *abrogated on other grounds by Carmell v Texas*, 529 US 513 [2000]). Perhaps the most important aspect of the rule on "recent fabrication" evidence drawn from those cases is that evidence of recent fabrication is not collateral, because it may go to the heart of the truthfulness of a witness's testimony and the validity of a claim; as a result, regardless of whether a witness is cross-examined about a claim of "recent fabrication," competent and relevant extrinsic evidence of "recent fabrication" is admissible. (*See Spencer* at 956 [provided that counsel has a "good faith basis" for eliciting the evidence, "extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground"]; *Hudy* at 56 ["extrinsic proof tending to establish a reason to fabricate is never collateral and may not be excluded on that ground"].)

The extrinsic evidence of "recent fabrication," as with any evidence, needs to be competent and relevant. (*Cf. People v Thomas*, 46 NY2d 100, 105 [1978] [evidence of hostility (which is also not collateral) was here properly excluded as "too remote"].) At the same time, "the trial court's discretion in this area is circumscribed by the defendant's constitutional rights to present a defense and confront his accusers." (*Hudy* at 57.)

Subdivision (3) is derived from *Davis* (44 NY2d at 277) which authorized the admission of a witness's "antecedent consistent statements" when the "cross-examiner has created the inference of, or directly characterized the testimony as, a recent fabrication." For further commentary, see the Note to subdivision (2) of Guide to New York Evidence rule 8.31 (Prior Consistent Statement).

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.)

6.25 Impeachment by Silence

In a criminal proceeding when, before or after a defendant's arrest, the defendant is silent following a statement made to the defendant by a person the defendant knows to be a member of law enforcement, during the performance of his or her duties, the defendant's silence is not admissible as an admission or to impeach the defendant's testimony, except as provided in paragraphs (1) and (2).

(1) The silence of a defendant, who at the time was a law enforcement officer, in the face of an accusation of criminal conduct by a fellow officer is admissible if the defendant was under a duty to inform his or her superiors of his or her activities.

(2) A defendant who, prior to trial, makes a voluntary statement relating to the criminal transaction at issue and then provides testimony at a criminal proceeding with respect to that transaction may be impeached by the defendant's omission of critical details from the defendant's pretrial statement that would have been natural to include in that statement.

Note

This rule governs the admissibility in a criminal proceeding of a defendant's silence during police questioning. *See* Guide to NY Evidence rule 8.05 (Admission by Adopted Statement or Silence) in which this rule is incorporated.

Specifically, evidence of a criminal defendant's pre-arrest and post-arrest silence during police questioning may not be used in the People's direct case or for impeachment purposes, a rule derived from the State Constitution (*see e.g. People v De George*, 73 NY2d 614, 618 [1989] [pre-arrest silence]; *People v Von Werne*, 41 NY2d 584, 588 [1977] [post-arrest silence]; *People v Conyers*, 52 NY2d 454, 457 [1981] [post-arrest silence]).

In summing up New York law, the Court of Appeals has stated: "We hold, as a matter of state evidentiary law, that evidence of a defendant's selective silence generally may not be used by the People as part of their case-in-chief, either to allow the jury to infer the defendant's admission of guilt or to impeach the credibility of the defendant's version of events when the defendant has not testified" (*People v Williams*, 25 NY3d 185, 188 [2015]).

Subdivision (1) is derived from *People v Rothschild* (35 NY2d 355, 360-361 [1974] ["The natural consequences of his status as a law enforcement officer would require him to promptly report any bribe or attempted bribe to his superiors, and certainly protest and reveal such an alleged scheme after his arrest to them, and to his fellow officers as well"]); and *People v De George* (73 NY2d 614, 619 [1989] ["we affirmed the (*Rothschild*) conviction because under the circumstances, the evidence of silence had an unusually high probative value. The officer was under a duty to inform his superiors of his undercover activities and thus his continued silence in the face of direct accusations by his fellow officers was probative of guilt"]).

Subdivision (2) is derived from *People v Savage* (50 NY2d 673, 676 [1980] ["a defendant who, having been given the warnings required by *Miranda v Arizona* (384 US 436 [1966]) and having elected to waive his right to silence, proceeds to narrate the essential facts of his involvement in the crime, may be cross-examined about his failure to inform the police at that time of exculpatory circumstances to which he later testifies at trial"]); and *People v Chery* (28 NY3d 139, 142, 145 [2016] [it was permissible for "the People to use defendant's selective silence, while making a spontaneous postdetention statement to the police, to impeach his trial testimony," given that the "defendant elected to provide some explanation of what happened at the scene, and it was unnatural to have omitted the significantly more favorable version of events to which he testified at trial"]).

6.26. Impeachment of Alibi Testimony

(1) Neither a defendant nor a defense witness who gives testimony, inconsistent with a notice of alibi filed pursuant to statute but withdrawn before trial or disavowed at trial, may be impeached by that notice of alibi on cross-examination or by introduction of that notice in rebuttal.

(2) A defendant or witness who gives alibi testimony may be impeached by a statement the defendant or witness, as the case may be, made prior to or following the filing of a notice of alibi inconsistent with the alibi testimony.

(3) (a) A witness who testifies at trial to an alibi may be impeached for failure to have timely presented the alibi to law enforcement authorities, provided the witness's failure to do so was not pursuant to the advice of defense counsel and the court has so determined before permitting questions.

(b) The foundation for the impeachment will normally include demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory information, had a reasonable motive for acting to exonerate the defendant, and was familiar with the means to make such information available to law enforcement authorities.

Note

Subdivision (1) is derived from *People v Burgos-Santos* (98 NY2d 226 [2002] [where the notice of alibi had been withdrawn prior to trial it was error to use that notice of alibi to cross-examine the defendant in order to impeach his testimony that he was present at the crime scene but was an innocent victim of an assault rather than the perpetrator]) and *People v Rodriguez* (3 NY3d 462 [2004] [where the notice of alibi was disavowed at trial on defendant's case, it was error to introduce the notice of alibi in rebuttal to impeach the defendant's alibi witnesses who testified to an alibi other than the one in the notice]; *see also People v Gray*,

125 AD3d 1107, 1107 [3d Dept 2015] ["The Court of Appeals has unequivocally established that the People may not use a defendant's notice of alibi for impeachment purposes on cross-examination where the defendant has withdrawn such notice prior to trial"]; *see* Fed Rules Crim Pro rule 12.1 [f] ["Evidence of an intention to rely on an alibi defense, later withdrawn, or of a statement made in connection with that intention, is not, in any civil or criminal proceeding, admissible against the person who gave notice of the intention"]).

By CPL 250.20, a defendant who intends to present an alibi defense is compelled to file a notice of alibi within 20 days of arraignment. That "compulsion" is not in violation of the Federal Constitution because, "[a]t most, the rule only compelled petitioner to accelerate the timing of his disclosure, forcing him to divulge at an earlier date information that the [defendant] from the beginning planned to divulge at trial" (*Williams v Florida*, 399 US 78, 85-86 [1970]). Use of that compelled notice of alibi to impeach a defendant or the defendant's defense when it has been withdrawn or disavowed, however, raised a constitutional concern in both *Burgos-Santos* and *Rodriguez.* The Court did not decide the constitutional issue. Instead, the Court disallowed the notice as impeachment evidence, explaining that CPL 250.20 specified the remedies for a violation of the statutory requirements and those remedies did not include impeachment of the defendant or defendant's witnesses.

The facts in *Rodriguez* suggest a broad definition of what constitutes a disavowal of an alibi notice and when that disavowal is timely. In *Rodriguez*, the defendant did not withdraw the notice of alibi; instead "it became obvious from the [defense witness's] surprise testimony that defendant was presenting a new and different alibi" (*Rodriguez* at 465).

Subdivision (2) is derived from *People v McGraw* (40 AD3d 302, 302-303 [1st Dept 2007]). Absent the compulsion inherent in the filing of a notice of alibi, a defendant or defense witness who testifies to an alibi may be impeached by a statement, made prior to the filing of a notice of alibi, that is inconsistent with the testimony given at trial. As *McGraw* explained:

> "The court properly admitted the rebuttal testimony of defendant's former counsel concerning preindictment statements made by him to the District Attorney's Office with defendant's consent, regarding defendant's whereabouts at the time of the robbery, which directly conflicted with the alibi defendant presented at trial. A statement made by an agent of a party, acting within the scope of his authority, is admissible as an admission against the party. This is not a case of using defendant's withdrawn alibi notice to impeach him or his case, since there never was an alibi notice relating to the first alibi; instead, the first alibi was volunteered in an effort to forestall indictment. We reject defendant's argument that the statement made by defendant's original attorney to the prosecutor's office was the

equivalent of an alibi notice. On the contrary, counsel did not provide this statement as a form of disclosure mandated by CPL 250.20" (*McGraw* at 302-303 [citations omitted]; *see People v Johnson*, 46 AD3d 276, 278 [1st Dept 2007] [absent a notice of alibi having been filed, the defendant was properly impeached during cross-examination by her attorney's statements made at a prior bail application given "a reasonable inference that such statements were attributable to defendant, and they significantly contradicted her trial testimony"]; *cf*. Guide to NY Evid rules 8.03, Admission by Party and 6.14, Impeachment by Evidence Improperly Obtained).

Subdivision (3) is derived from *People v Dawson* (50 NY2d 311 [1980]). While permitting cross-examination of an alibi witness for failure to come forward before trial to law enforcement authorities, *Dawson* added some cautionary notes:

> "[T]he Trial Judge should inform the jurors, upon request, that the witness has no civic or moral obligation to volunteer exculpatory information to law enforcement authorities and that they may consider the witness' prior failure to come forward only insofar as it casts doubt upon the witness' in-court statements by reason of its apparent inconsistency. Finally, when such questioning begins, the Trial Judge should call a bench conference to ascertain whether the witness refrained from speaking under the advice of defense counsel, for in such a case examination on the issue of the witness' postconsultation silence would be improper and could well result in a mistrial" (*Dawson* at 322-323; *see People v Jenkins*, 88 NY2d 948, 950 [1996] [an alibi witness was properly impeached because a close relative or friend's "knowledge that defendant is incarcerated pending trial may be reasonably found to be inconsistent with the witness' failure to come forward with exculpatory evidence which might result in the accused's being freed"]; *cf. People v Burgos*, 50 NY2d 992, 993-994 [1980] ["It was error for the Trial Judge to refuse to advise the jury that defendant's alibi witnesses had no duty to volunteer exculpatory information to law enforcement authorities" and it would have been "best had the court stricken the entire line of questioning" when it was apparent that defense counsel had advised the witness that the witness had no duty to advise the authorities of the alibi]).

Dawson at 321 n 4 sets forth the foundational elements for a cross-examination:

> "In most cases, the District Attorney may lay a 'proper foundation' for this type of cross-examination by first demonstrating that the witness was aware of the nature of the charges pending against the defendant, had reason to recognize that he possessed exculpatory

> information, had a reasonable motive for acting to exonerate the defendant and, finally, was familiar with the means to make such information available to law enforcement authorities."

Impeachment of an alibi witness may include rebuttal testimony (*see People v Knight*, 80 NY2d 845, 848 [1992] [The People properly presented rebuttal evidence "to rebut the alibi witnesses' testimony about their postarrest statements to police by calling the police officer to testify that such statements were never made"]; *People v Patterson*, 194 AD2d 570, 571 [2d Dept 1993] ["Under *People v Knight*, extrinsic evidence is not admissible if offered solely on the issue of the witness's general credibility but may be admitted to the extent that it bears on the truthfulness of the alibi if it is used to challenge the validity of the alibi, a material issue in the case. If this (threshold) is met, the fact that the evidence also tends to impeach the witness' credibility does not render the evidence collateral" (citation and internal quotation marks omitted)]).

6.27. Impeachment of Hearsay Declarant

(1) Except as provided in subdivision two, when hearsay evidence has been admitted, the credibility of the declarant may be impeached by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The admission of that impeachment evidence is accordingly not conditioned on affording the declarant an opportunity to deny or explain.

(2) When hearsay evidence is admitted pursuant to rule 8.19, the trial court may in its discretion preclude evidence of impeachment. The court may consider, on the one hand, the possibility that, if impeachment is not allowed, the jury will be misled into giving too much weight to the hearsay evidence and, on the other hand, that the party against whom the hearsay evidence is offered may unfairly benefit from the party's own wrongful conduct because the opposing party will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered as impeaching evidence.

Note

Subdivision (1), first sentence, is derived from Court of Appeals case law, which uniformly recognizes the rule stated therein. (*See People v Fratello*, 92 NY2d 565, 572 [1998], *cert den* 526 US 1068 [1999]; *Matter of Hesdra,* 119 NY 615 [1890].) The second sentence restates recent authority addressing this point. (*See Lawton v Palmer,* 126 AD3d 945 (2d Dept [2015]; *People v Conde,* 16 AD2d 327, 331-332 [3d Dept 1962]*, affd* 13 NY2d 939 [1963].)

Subdivision (2) applies when the hearsay statements are admitted because of the defendant's forfeiture of the right to exclude them (*see* Guide to NY Evid rule 8.19) and is derived from *People v Bosier* (6 NY3d 523, 528 [2006] ["(W)e do not hold that such a defendant (who tampered with a witness) should never be able to introduce the unavailable witness's out-of-court statements for impeachment purposes. The trial judge has discretion to permit such impeachment where there is a possibility that, if it is not allowed, the jury will be misled into giving too much weight to the statement offered by the prosecution. But such impeachment need not always be allowed. Where impeachment is permitted, the defendant, in direct

contravention of the most basic legal principles and the policy objectives of *Geraci* (85 NY2d 359 [1995]), may benefit from his or her own wrongful conduct because the prosecution will have no opportunity to rehabilitate the witness by clarifying any unclear or inconsistent testimony proffered (as impeaching evidence). Here, where the inconsistency defendant relied on did not go to the heart of the prosecution's case and might well have been credibly explained if the witness had been present, it was not an abuse of discretion to exclude the impeaching evidence"]).

6.29. Impeachment of a Law Enforcement Officer

(1) A law enforcement witness is subject to the same rules governing the impeachment of any witness, as set forth in Guide to New York Evidence rule 6.11. The credibility of a law enforcement witness therefore may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) The foundational requirements include:

(a) the showing of a good faith basis for the impeachment inquiry. A good faith basis for an impeachment inquiry requires that the inquiring party have a reasonable basis for believing the truth of things about which counsel seeks to ask.

(b) identification of specific allegations, credibility determinations, or acts of misconduct that are relevant to the credibility of the witness in the current proceeding.

(c) the trial court's assessment as to whether the proffered impeachment inquiry would confuse or mislead the jury or create a substantial risk of undue prejudice to the parties. Upon a finding that it would, the court may in the exercise of its discretion preclude or limit the scope of the inquiry.

(3) Sources of a good faith basis for impeachment of a law enforcement officer include:

(a) Civil lawsuit.

(i) Specific acts of misconduct lodged in a lawsuit against a testifying member of law enforcement constitutes a good faith basis for an impeachment inquiry of the

allegations asserted in that lawsuit that are relevant to the witness's credibility in the action in which the witness is testifying.

(ii) If the lawsuit did not result in an adverse finding against a witness, on cross-examination, it is not permitted to ask the witness if he or she has been sued, or if the case was settled (unless there was an admission of wrongdoing), or if the criminal charges related to the plaintiffs in those actions were dismissed. However, pursuant to paragraph (a) of this subdivision, questions based on the specific allegations of the lawsuit may be asked.

(b) A judicial determination that a law enforcement witness testified falsely in a proceeding, while not binding on the question of the witness's credibility in the proceeding in which the witness is testifying, constitutes a good faith basis for an impeachment inquiry of that witness with respect to that determination.

(c) Other misconduct of the witness, whether proved in a court proceeding or not, including, for example, acts of dishonesty and misstatements about an event or the officer's conduct made to a prosecutor, constitutes a good faith basis for an impeachment inquiry of the witness.

(4) Evidence that charges on trial had already been determined adversely to the defendant by another tribunal is inadmissible for impeachment of the defendant or otherwise.

Note

This rule is derived from the holdings of *People v Smith* (27 NY3d 652 [2016]) and *People v Rouse* (34 NY3d 269 [2019]).

Subdivision (1) is derived from *Smith*, which held that "law enforcement witnesses should be treated in the same manner as any other witness for purposes of cross-examination. The same standard for good faith basis and specific allegations relevant to credibility applies—as does the same broad latitude to preclude or limit cross-examination" (*Smith* at 661-662; *Rouse* at 273).

Subdivision (2) is drawn from the "logical framework" *Smith* set forth for deciding whether *to permit* the impeachment inquiry:

> "First, counsel must present a good faith basis for inquiring, namely, the lawsuit relied upon; second, specific allegations that are relevant to the credibility of the law enforcement witness must be identified; and third, the trial judge exercises discretion in assessing whether inquiry into such allegations would confuse or mislead the jury, or create a substantial risk of undue prejudice to the parties" (*Smith* at 662).

Rouse declared that a good faith basis "requires only that counsel have some reasonable basis for believing the truth of things about which counsel seeks to ask" (*Rouse* at 277 [internal quotation marks and citation omitted]).

Subdivision (3) (a) (i) is derived from the facts of the three cases decided in the *Smith* opinion (*Smith*; *Ingram*; *McGhee*). In all three cases, the Court held that a lawsuit alleging misconduct by the testifying officers constituted a good faith basis for the inquiry and that specific allegations in those lawsuits about which the defense sought to question the officers were relevant to the case on trial and the credibility of the witness.

In *Ingram*, for example, the defense was that the officers had "fabricated evidence and concocted a false story" of the events (27 NY3d at 666). The officers were subject to a pending civil suit that alleged some of the same conduct; that civil suit provided the good faith basis for the inquiry and for the inquiry of "specific allegations" that were relevant to the officers' credibility (*id.* at 667). The trial court had denied the application to cross-examine the officers because the civil action was pending. That, the Court of Appeals held, was an abuse of discretion.

It was not relevant that the action was pending or that the lawsuits had not been resolved, given the long-standing rule of impeachment that a good faith basis for inquiry about bad acts is permitted irrespective of whether the prior bad act has been proved in a court proceeding (*Smith* at 661; *Rouse* at 273).

Subdivision (3) (a) (ii) sets forth the limitation on cross-examination that *Smith* pronounced:

> "Where a lawsuit has not resulted in an adverse finding against a police officer, as is the case with these three appeals, defendants should not be permitted to ask a witness if he or she has been sued, if the case was settled (unless there was an admission of wrongdoing) or if the criminal charges related to the plaintiffs in those actions were dismissed. However, subject to the trial court's discretion, defendants should be permitted to ask questions based on the specific allegations of the lawsuit if the allegations are relevant to the credibility of the witness" (*Smith* at 662).

Subdivision (3) (b) and (c) are principally derived from *Rouse. Rouse* confirmed the holding and scope of *Smith* by recognizing that, subject to the analytical framework set forth in *Smith*, misstatements of a testifying officer made to a federal prosecutor in a different matter and a prior judicial determination in which a testifying officer was found to have given unreliable testimony constituted a good faith basis for inquiry (*Rouse*, 34 NY3d at 276-278).

The officer in *Rouse* had "misled" a federal prosecution with respect to his involvement in a ticket-fixing scheme about which the defense should have been permitted to cross-examine him, given that dishonesty is conduct bearing on a person's truthfulness. (*Id.* at 276 ["even where a prior bad act by a law enforcement officer is not criminal, it may be a proper subject for impeachment questioning where it demonstrates an untruthful bent or significantly reveals a willingness . . . to place the advancement of his individual self-interest ahead of principle or of the interests of society" (internal quotation marks and citation omitted)].)

Also, in *Rouse*, there were federal court rulings that the police officers testifying in the state court proceeding had given testimony "incredible in a manner which suggested that the officers may have falsely testified in order to obtain a desired result" (*id.* at 280). Those determinations, held *Rouse*,

> "were probative of the officers' credibility in the current prosecution, where defendant's entire defense was aimed at convincing the jury that the officers were incorrectly identifying him as the shooter in order to avoid backlash for allegedly assaulting defendant upon arrest or for capturing an innocent bystander. The only countervailing prejudice articulated by the court in precluding defense counsel from this line of inquiry was concern that the jury *may* view the prior judicial determinations of credibility as binding. Such concern, however, could be mitigated by providing the jury with clarifying or limiting instructions, and that prejudice does not outweigh the probative and impeaching value of the inquiry." (*Id.* at 280-281.)

Other examples where the trial court properly allowed or should have allowed cross-examination include: *People v Enoe* (144 AD3d 1052, 1054 [2d Dept 2016] [An officer who testified about having witnessed the defendant possessing a gun in the back seat of a livery cab was properly subject to cross-examination about specific allegations in a federal lawsuit that the officer had falsely arrested an individual "on a weapon possession charge" in order to gain overtime compensation and " 'credit' for a gun-related arrest"]) and *People v Conner* (184 AD3d 431, 431 [1st Dept 2020] [defendant should have been permitted to cross-examine an officer about allegations in a civil lawsuit that charged him with the lodging of false charges, given that the complaint contained "allegations of falsification specific to this officer (and another officer), which bore on his credibility at the trial"]).

By comparison, examples where the trial court properly denied the impeachment inquiry include: *People v Watson* (163 AD3d 855, 860-861 [2d Dept 2018] [the trial court properly exercised its discretion in precluding defense counsel from inquiring into the underlying facts of two federal lawsuits because the "complaints in those actions only contained broad conclusory allegations of unlawful police action by large groups of officers, and did not set forth specific acts of misconduct against [the testifying officer] individually"]); *People v Williams* (184 AD3d 442, 442 [1st Dept 2020] ["The court providently exercised its discretion in precluding defendant from cross-examining a Department of Correction captain about a pending disciplinary investigation. The allegations underlying the pending investigation involved a violation of Department policy that had no bearing on the officer's credibility, whether in general or in this case"]) and *People v Barnes* (173 AD3d 565, 566 [1st Dept 2019] [The court properly denied defense counsel's motion to cross-examine a police witness based on a federal action against him "and other officers" that had been settled without any admission of wrongdoing, where the federal " 'complaint did not allege, or even support an inference, that (the witness) personally engaged in any specific misconduct or acted with knowledge of the misconduct of other officers' " (quoting *Smith* at 663)]).

In light of the repeal of Civil Rights Law § 50-a (L 2020, ch 96 [eff June 12, 2020]), issues have arisen regarding the scope of required disclosure of police internal affairs bureau (IAB) files and the corresponding availability of those records for impeachment. One court has directed the disclosure of "substantiated" and "unsubstantiated" IAB files of police officers involved in a case with the further holding that "exonerated" or "unfounded" files need not be produced on the theory that as a threshold matter there in an insufficient good faith basis for cross-examination by defense counsel of the latter files. The ultimate issue regarding the scope of permissible cross-examination of such witnesses, however, remains unsettled and will probably be resolved by in limine motions directed to the trial judge's discretion. (*See People v Randolph*, 69 Misc 3d 770 [Sup Ct, Suffolk County 2020].)

Subdivision (4) is derived from *People v Rosenfeld* (11 NY2d 290, 297-

298 [1962]) where the Court explained that it had "held it to be serious error to bring to the jury's attention in a criminal case the fact that the charges on trial had already been determined adversely to the defendant by another tribunal." Thus, *Rosenfeld* held it was error for the prosecutor in cross-examining defendants who were police officers to elicit that they had been suspended from police duty for the conduct for which they were on trial. (*Id.* at 297-299.)