ARTICLE VIII—HEARSAY

Sec. 8-1. Definitions

As used in this Article:

(1) "Statement" means (A) an oral or written assertion or (B) nonverbal conduct of a person, if it is intended by the person as an assertion.

(2) "Declarant" means a person who makes a statement.

(3) "Hearsay" means a statement, other than one made by the declarant while testifying at the proceeding, offered in evidence to establish the truth of the matter asserted.

COMMENTARY

(1) "Statement"

The definition of "statement" takes on significance when read in conjunction with the definition of "hearsay" in subdivision (3). The definition of "statement" includes both oral and written assertions; see *Rompe* v. *King*, 185 Conn. 426, 428, 441 A.2d 114 (1981); *Cherniske* v. *Jajer*, 171 Conn. 372, 376, 370 A.2d 981 (1976); and nonverbal conduct of a person intended as an assertion. *State* v. *King*, 249 Conn. 645, 670, 735 A.2d 267 (1999) (person nodding or shaking head in response to question is form of nonverbal conduct intended as assertion)*;State* v. *Blades*, 225 Conn. 609, 632, 626 A.2d 273 (1993); *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 702, 622 A.2d 578 (1993)**[***; see also C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.2, p. 319 (person nodding or shaking head in response to question is form of nonverbal conduct intended as assertion)***]**. The effect of this definition is to exclude from the hearsay rule's purview nonassertive verbalizations and nonassertive, nonverbal conduct. See *State* v. *Hull*, 210 Conn. 481, 498–99, 556 A.2d 154 (1989) (''[i]f the statement is not an assertion . . . it is not hearsay" [internal quotation marks omitted]); *State* v. *Thomas*, 205 Conn. 279, 285, 533 A.2d 553 (1987) (''[n]onassertive conduct such as running to hide, or shaking and trembling, is not hearsay").

The definition of "statement" in Section 8-1 is used solely in conjunction with the definition of hearsay and the operation of the hearsay rule and its exceptions. See generally Art. VIII of the Code. The definition does not apply in other contexts or affect

definitions of "statement" in other provisions of the General Statutes or Practice Book. See, e.g., General Statutes § 53-441 (a); Practice Book §§ 13-1 and 40-15.

(2) "Declarant"

The definition of "declarant" is consistent with the longstanding common-law recognition of that term. See, e.g., *State* v. *Jarzbek*, 204 Conn. 683, 696 n.7, 529 A.2d 1245 (1987), cert. denied, 484 U.S. 1061, 108 S. Ct. 1017, 98 L. Ed. 2d 982 (1988); *State* v. *Barlow*, 177 Conn. 391, 396, 418 A.2d 46 (1979). Numerous courts have held that data generated by a computer solely as a product of a computerized system or process are not made by a "declarant" and, therefore, not hearsay. See *State* v. *Buckland*, 313 Conn. 205, 216–221, 96 A.3d 1163 (2014) (agreeing with federal cases holding that "raw data" generated by breath test machine is not hearsay because machine is not declarant), cert. denied, ___ U.S. ___, 135 S. Ct. 992, 190 L. Ed. 2d 837 (2015); *State* v. *Gojcaj*, 151 Conn. App. 183, 195, 200–202, 92 A.3d 1056 **[**(2014)**]** (holding that there was no declarant making computer-generated log, which was created automatically to record date and time whenever any person entered passcode to activate or deactivate security system), cert. denied, 314 Conn. 924, 100 A.3d 854 (2014); see also *Lorraine v. Markel American Ins. Co.*, 241 F.R.D. 534, 564–65 (D. Md. 2007) (making same point, using fax "header" as example). In certain forms, this type of computer-generated information is known as "metadata." The term "metadata" has been defined as "data about data"; (internal quotation marks omitted) *Lorraine* v. *Markel American Ins. Co.,* supra, 547; and refers to computer-generated information describing the history, tracking or management of electronically stored information. See id. *Gojcaj* recognized that a party seeking to introduce computer-generated data and records, even if not hearsay, must establish that the computer system reliably and accurately produces records or data of the type that is being offered. *State* v. *Gojcaj*, supra, 202 n.12.

(3) "Hearsay"

Subdivision (3)'s definition of "hearsay" finds support in the cases. E.g., *State* v. *Crafts*, 226 Conn. 237, 253, 627 A.2d 877 (1993); *State* v. *Esposito*, 223 Conn. 299, 315, 613 A.2d 242 (1992); *Obermeier* v. *Nielsen*, 158 Conn. 8, 11, 255 A.2d 819 (1969). The purpose for which the statement is offered is crucial; if it is offered for a purpose

other than to establish the truth of the matter asserted, the statement is not hearsay. E.g., *State* v. *Esposito*, supra, 315; *State* v. *Hull*, supra, 210 Conn. 498–99; *State* v. *Ober*, 24 Conn. App. 347, 357, 588 A.2d 1080, cert. denied, 219 Conn. 909, 593 A.2d 134, cert. denied, 502 U.S. 915, 112 S. Ct. 319, 116 L. Ed. 2d 26 (1991).

Sec. 8-2. Hearsay Rule

(a) General Rule. Hearsay is inadmissible, except as provided in the Code, the General Statutes or **[**the**]** any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(b) Testimonial Statements and Constitutional Right of Confrontation. In criminal cases, hearsay statements which might otherwise be admissible under one of the exceptions in this Article may be inadmissible if the admission of such statements is in violation of the constitutional right of confrontation.

COMMENTARY

(a) General Rule.

Section 8-2 is consistent with common law. See *State* v. *Oquendo*, 223 Conn. 635, 664, 613 A.2d 1300 (1992); *State* v. *Acquin*, 187 Conn. 647, 680, 448 A.2d 163 (1982), cert. denied, 463 U.S. 1229, 103 S. Ct. 3570, 77 L. Ed. 2d 1411 (1983), overruled in part on other grounds by *Davis* v. *United States*, 512 U.S. 452, 114 S. Ct. 2350, 129 L. Ed. 2d 362 (1994); *General Motors Acceptance Corp.* v. *Capitol Garage Inc.*, 154 Conn. 593, 597, 227 A.2d 548 (1967).

In a few instances, the Practice Book contains rules of evidence that may ostensibly conflict with Code provisions. The Supreme Court has resolved any such conflicts either through decisional law or by formally adopting certain hearsay exceptions embodied in the rules of practice, adopted before June 18, 2014, the date on which the Court adopted the Code. See, e.g., Practice Book §§ 13-31 (a) (2) (depositions of certain health care providers admissible, availability immaterial); 13-31 (a) (3) (deposition of party or officer, director, managing agent or employee on behalf of corporation, partnership or government agency, admissible when used by adverse party for any purpose); 13-31 (a) (4) (deposition admissible, inter alia, if witness is thirty miles or more from place of trial); 25-60 (c) (reports of evaluation or study in family matters

prepared under Practice Book §§ 25-60A and 25-61, admissible if author subject to cross-examination); 35a-9 (reports in dispositional phase of child neglect proceedings admissible, if author subject to cross-examination); see also *Hibbard* v. *Hibbard*, 139 Conn. App. 10, 15, 55 A.3d 301 (2012) (report and hearsay statements contained therein admissible under Practice Book § 25-60).

(b) Testimonial Statements and Constitutional Right of Confrontation.

This subsection reflects the federal constitutional principle announced in *Crawford* v*. Washington*, 541 U.S. 36, 68–69, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), which holds that testimonial hearsay statements may be admitted as evidence against an accused at a criminal trial only when: (1) the declarant does not testify and (2) the defendant has had a prior opportunity to cross-examine the declarant. See U.S. Const., amend. VI; Conn. Const., art. I, § 8.

Sec. 8-3. Hearsay Exceptions: Availability of Declarant Immaterial

The following are not excluded by the hearsay rule, even though the declarant is available as a witness:

(1) Statement by a party opponent. A statement that is being offered against a party and is (A) the party's own statement, in either an individual or a representative capacity, (B) a statement that the party has adopted or approved, (C) a statement by a person authorized by the party to make a statement concerning the subject, (D) a statement by the party's agent, servant or employee, concerning a matter within the scope of the agency or employment, and made during the existence of the relationship; (E) a statement by a coconspirator of a party while the conspiracy is ongoing and in furtherance of the conspiracy, **[**(E)**]** (F) in an action for a debt for which the party was surety, a statement by the party's principal relating to the principal's obligations, or **[**(F)**]** (G) a statement made by a predecessor in title of the party, provided the declarant and the party are sufficiently in privity that the statement of the declarant would affect the party's interest in the property in question.

The hearsay statement itself may not be considered to establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

(2) Spontaneous utterance. A statement relating to a startling event or condition

made while the declarant was under the stress of excitement caused by the event or condition.

(3) Statement of then existing physical condition. A statement of the declarant's then-existing physical condition provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(4) Statement of then-existing mental or emotional condition. A statement of the declarant's then-existing mental or emotional condition, including a statement indicating a present intention to do a particular act in the immediate future, provided that the statement is a natural expression of the condition and is not a statement of memory or belief to prove the fact remembered or believed.

(5) Statement for purposes of obtaining medical diagnosis or treatment. A statement made for purposes of obtaining a medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof, insofar as reasonably pertinent to the medical diagnosis or treatment.

(6) Recorded recollection. A memorandum or record concerning an event about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness at or about the time of the event recorded and to reflect that knowledge correctly.

(7) Public records and reports. Records, reports, statements or data compilations, in any form, of public offices or agencies, provided (A) the record, report, statement or data compilation was made by a public official under a duty to make it, (B) the record, report, statement or data compilation was made in the course of his or her official duties, and (C) the official or someone with a duty to transmit information to the official had personal knowledge of the matters contained in the record, report, statement or data compilation.

(8) Statement in learned treatises. To the extent called to the attention of an expert witness on cross-examination or relied on by the expert witness in direct examination, a statement contained in a published treatise, periodical or pamphlet on a subject of history, medicine, or other science or art, recognized as a standard authority in

the field by the witness, other expert witness or judicial notice.

(9) Statement in ancient documents. A statement in a document in existence for more than thirty years if it is produced from proper custody and otherwise free from suspicion.

(10) Published compilations. Market quotations, tabulations, lists, directories or other published compilations, that are recognized authority on the subject, or are otherwise trustworthy.

(11) Statement in family bible. A statement of fact concerning personal or family history contained in a family bible.

(12) Personal identification. Testimony by a witness of his or her own name or age.

(Amended June 29, 2007, to take effect Jan. 1, 2008)

COMMENTARY

(1) Statement by party opponent.

Section 8-3 (1) sets forth six categories of party opponent admissions that were excepted from the hearsay rule at common law **[**:**]** and adds one more category which has been adopted in the Federal Rules of Evidence and a majority of other states.

(A) The first category excepts from the hearsay rule a party's own statement when offered against him or her. E.g., *In re Zoarski*, 227 Conn. 784, 796, 632 A.2d 1114 (1993); *State* v. *Woodson*, 227 Conn. 1, 15, 629 A.2d 386 (1993). Under Section 8-3 (1) (A), a statement is admissible against its maker, whether he or she was acting in an individual or representative capacity when the statement was made. **[**Although there apparently are no Connecticut cases that support extending the exception to statements made by and offered against those serving in a representative capacity, t**]**The rule is in accord with the modern trend. E.g., Fed. R. Evid. 801 (d) (2) (A). **[**Connecticut excepts party admissions from the usual requirement that**]** A party statement is admissible under Section 8-3 (1), regardless of whether the person making the statement **[**have**]** has personal knowledge of the facts stated therein. *Dreir* v. *Upjohn Co.*, 196 Conn. 242, 249, 492 A.2d 164 (1985). If the statement at issue was made by the party opponent in a deposition, the statement is admissible in accordance with Practice Book § 13-31 (a) (3). That provision permits an adverse party to use at trial, for

any purpose, the deposition of a party, or a person who at the time of the deposition was an officer, director, or managing agent of a party, or a person designated under Practice Book § 13-27 (h) to testify on behalf of a public or private corporation, partnership, association or government agency. This rule of practice was deemed "analogous" to Section 8-3 (1) in *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (construing Practice Book § 248 [1] [c], predecessor to Practice Book § 13-31 [a] [3]).

(B) The second category recognizes the common-law hearsay exception for "adoptive admissions." See, e.g., *State* v. *John*, 210 Conn. 652, 682–83, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); *Falker* v. *Samperi*, 190 Conn. 412, 426, 461 A.2d 681 (1983). Because adoption or approval may be implicit; see, e.g., *State* v. *Moye*, 199 Conn. 389, 393–94, 507 A.2d 1001 (1986); the common-law hearsay exception for tacit admissions, under which silence or a failure to respond to another person's statement may constitute an admission; e.g., *State* v. *Morrill*, 197 Conn. 507, 535, 498 A.2d 76 (1985); *Obermeier* v. *Nielsen*, 158 Conn. 8, 11–12, 255 A.2d 819 (1969); is carried forward in Section 8-3 (1) (B). The admissibility of tacit admissions in criminal cases is subject to the evidentiary limitations on the use of an accused's postarrest silence; see *State* v. *Ferrone*, 97 Conn. 258, 266, 116 A. 336 (1922); and the constitutional limitations on the use of the accused's post-*Miranda* warning silence. *Doyle* v. *Ohio*, 426 U.S. 610, 617–19, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976); see, e.g., *State* v. *Zeko*, 177 Conn. 545, 554, 418 A.2d 917 (1977).

(C) The third category restates the common-law hearsay exception for "authorized admissions." See, e.g., *Presta* v. *Monnier*, 145 Conn. 694, 699, 146 A.2d 404 (1958); *Collins* v. *Lewis*, 111 Conn. 299, 305–306, 149 A. 668 (1930). For this exception to apply, **[**T**]**the speaker must have **[**speaking**]** actual or apparent authority to speak concerning the subject upon which he or she speaks in the declaration at issue; a mere agency relationship (e.g., employer-employee), without more, is not enough to confer **[**speaking**]** such authority. E.g., *Liebman* v. *Society of Our Lady of Mount St. Carmel, Inc.*, 151 Conn. 582, 586, 200 A.2d 721 (1964); *Munson* v. *United Technologies Corp.*, 28 Conn. App. 184, 188, 609 A.2d 1066, cert. denied, 200 Conn. 805, 510 A.2d 192 (1992); cf. *Graham* v. *Wilkins*, 145 Conn. 34, 40–41, 138 A.2d 705 (1958);

Haywood v. *Hamm*, 77 Conn. 158, 159, 58 A. 695 (1904). The proponent need not, however, show that the speaker was authorized to make the particular statement sought to be introduced. The existence of **[**speaking**]** authority to speak for the principal is to be determined by reference to the substantive law of agency. See, e.g., *Ackerman* v. *Sobol Family Partnership, LLP*, 298 Conn. 495, 508–12, 4 A.3d 288 (2010) (applying principles of agency law to conclude that attorney had authority to bind client to settlement). Although not expressly mentioned in the exception, the Code in no way abrogates the common-law rule that speaking authority must be established without reference to the purported agent's out-of-court statements, save when those statements are independently admissible. See Section 1-1 (d) **[**(1)**]** (2). See generally *Robles* v. *Lavin*, 176 Conn. 281, 284, 407 A.2d 957 (1978). **[**Because partners are considered agents of the partnership for the purpose of its business; General Statutes § 34-322 (1); a partner's declarations in furtherance of partnership business ordinarily are admissible against the partnership under Section 8-3 (1) (C) principles. See 2 C. McCormick, Evidence (5th Ed. 1999) § 259, p. 156; cf. *Munson* v. *Wickwire*, 21 Conn. 513, 517 (1852).**]**

(D) The fourth category encompasses the exception set forth in Fed. R. Evid. 801 (d) (2) and adopted in a majority of state jurisdictions. The notes of the federal advisory committee on the 1972 proposed rules express "dissatisfaction" with the traditional rule requiring proof that the agent had actual authority to make the offered statement on behalf of the principal. The advisory committee notes cite to a "substantial trend [which] favors admitting statements relating to a matter within the scope of the agency or employment. *Grayson* v. *Williams*, 256 F.2d 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines* v. *Tuller*, 110 U.S. App. D.C. 282, 292 F.2d 775, 784 [(D.C. Cir.), cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed 2d 136] (1961); *Martin* v. *Savage Truck Lines, Inc*., 121 F. Supp. 417 (D.D.C. 1954), and numerous state court decisions collected in 4 Wigmore, 1964 Supp., 66–73 . . . ." Fed. R. Evid. 801 (d) (2) (D) advisory committee note. This trend has continued since then. See, e.g., *B & K Rentals & Sales Co.* v. *Universal Leaf Tobacco Co.*, 324 Md. 147, 158, 596 A.2d 640 (1991) (adopting federal approach and observing "[t]he authorities, both courts and commentators, have almost universally condemned the strict common law

rule in favor of the . . . rule set forth in [Fed. R. Evid. 801 (d) (2)]"). Id., 645. Connecticut now adopts the modern rule as well, and, in doing so, overrules the line of cases adhering to the common law by requiring proof that the declarant was authorized to speak on behalf of the employer or principal. See *Cascella* v. *Jay James Camera Shop, Inc.*, 147 Conn. 337, 341, 160 A.2d 899 (1960); *Wade* v. *Yale University*, 129 Conn. 615, 617, 30 A.2d 545 (1943).

[(D)**]** (E) The **[**fourth**]** fifth category encompasses the hearsay exception for statements of coconspirators. E.g., *State* v. *Peeler*, 267 Conn. 611, 628–34, 841 A.2d 181 (2004); *State* v. *Couture*, 218 Conn. 309, 322, 589 A.2d 343 (1991); *State* v. *Pelletier*, 209 Conn. 564, 577, 552 A.2d 805 (1989); see also *State* v. *Vessichio*, 197 Conn. 644, 654–55, 500 A.2d 1311 (1985) (additional foundational elements include existence of conspiracy and participation therein by both declarant and party against whom statement is offered), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986). The exception is applicable in civil and criminal cases alike. See *Cooke* v. *Weed*, 90 Conn. 544, 548, 97 A. 765 (1916). The proponent must prove the foundational elements by a preponderance of the evidence and independently of the hearsay statements sought to be introduced. *State* v. *Carpenter*, 275 Conn. 785, 838, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); *State* v. *Vessichio*, supra, 655; *State* v. *Haggood*, 36 Conn. App. 753, 767, 653 A.2d 216, cert. denied, 233 Conn. 904, 657 A.2d 644 (1995).

[(E)**]** (F) The **[**fifth**]** sixth category of party opponent admissions is derived from *Agricultural Ins. Co.* v. *Keeler*, 44 Conn. 161, 162–64 (1876). **[**See generally C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 11.5.6 (d), p. 347; 4 J. Wigmore, Evidence (4th Ed. 1972) § 1077.**]**

[(F)**]** (G) The final category incorporates the common-law hearsay exception applied in *Pierce* v. *Roberts*, 57 Conn. 31, 40–41, 17 A. 275 (1889), and *Ramsbottom* v. *Phelps*, 18 Conn. 278, 285 (1847).

(2) Spontaneous utterance.

The hearsay exception for spontaneous utterances is well established. See, e.g., *State* v. *Stange*, 212 Conn. 612, 616–17, 563 A.2d 681 (1989); *Cascella* v. *Jay James*

Camera Shop, Inc., 147 Conn. 337, 341–42, 160 A.2d 899 (1960); *Perry* v. *Haritos*, 100 Conn. 476, 483–84, 124 A. 44 (1924). Although the language of Section 8-3 (2) **[**states the exception in terms different from that of the case law on which the exception is based**]** is not identical to the language used in pre-Code cases to describe the exception; cf. *State* v. *Stange*, supra, 616–17; *Rockhill* v. *White Line Bus Co.*, 109 Conn. 706, 709, 145 A. 504 (1929); *Perry* v. *Haritos*, supra, 484; *State* v. *Guess*, 44 Conn. App. 790, 803, 692 A.2d 849 (1997), aff'd, 244 Conn. 761, 751 A.2d 643 (1998); the **[**rule**]** provision **[**assumes incorporation of**]** incorporates the **[**case law**]** same principles **[**underlying the exception**]**. See, e.g., *State* v. *Kirby*, 280 Conn. 361, 374–77, 908 A.2d 506 (2006).

The event or condition triggering the utterance must be sufficiently startling, so "as to produce nervous excitement in the declarant and render [the declarant's] utterances spontaneous and unreflective." *State* v. *Rinaldi*, 220 Conn. 345, 359, 599 A.2d 1 (1991) **[**, quoting C. Tait & J. LaPlante, § 11.11.2, pp. 373–74; accord 2 C. McCormick, supra, § 272, p. 204**]**.

(3) Statement of then-existing physical condition.

Section 8-3 (3) embraces the hearsay exception for statements of then-existing physical condition. *Martin* v. *Sherwood*, 74 Conn. 475, 481–82, 51 A. 526 (1902); *State* v. *Dart,* 29 Conn. 153, 155 (1860); see *McCarrick* v. *Kealy*, 70 Conn. 642, 645, 40 A. 603 (1898).

The exception is limited to statements of *then-existing* physical condition, whereby the declarant describes how the declarant feels **[**as**]** at the time the declarant **[**speaks**]** makes the hearsay statement. Statements concerning past physical condition; *Martin* v. *Sherwood*, supra, 74 Conn. 482; *State* v. *Dart*, supra, 29 Conn. 155; or the events leading up to or the cause of a present condition; *McCarrick* v. *Kealy*, supra, 70 Conn. 645; are not admissible under this exception. Cf. Section 8-3 (5) (exception for statements made to physician for purpose of obtaining medical treatment or advice and describing *past* or present bodily condition or cause thereof).

(4) Statement of then-existing mental or emotional condition.

Section 8-3 (4) embodies what is frequently referred to as the "state-of-mind" exception to the hearsay rule. See, e.g., *State* v. *Periere*, 186 Conn. 599, 605–606, 442

A.2d 1345 (1982).

The exception allows the admission of a declarant's statement describing his or her then-existing mental or emotional condition when the declarant's mental or emotional condition is a **[**factual**]** relevant issue in the case. E.g., *State* v. *Perkins*, 271 Conn. 218, 256–259, 856 A.2d 917 (2004) (defendant's state-of-mind at time of hearsay statement not relevant to any issue in case); *State* v. *Periere*, supra, 186 Conn. 606–607 (relevant to show declarant's fear)**[**; *Kearney* v. *Farrell*, 28 Conn. 317, 320–21 (1859) (to show declarant's "mental feeling")**]**. Only statements describing *then-existing* mental or emotional condition, i.e., that existing when the statement is made, are admissible.

The exception also covers a declarant's statement of present intention to perform a subsequent act as an inference that the subsequent act actually occurred. E.g., *State* v. *Rinaldi*, 220 Conn. 345, 358 n.7, 599 A.2d 1 (1991); *State* v. *Santangelo*, 205 Conn. 578, 592, 534 A.2d 1175 (1987); *State* v. *Journey*, 115 Conn. 344, 351, 161 A.2d 515 (1932). The inference drawn from the statement of present intention that the act actually occurred is a matter of relevancy rather than a hearsay concern.

When a statement describes the declarant's intention to do a future act in concert with another person, e.g., "I am going to meet Ralph at the store at ten," the case law does not prohibit admissibility. See *State* v. *Santangelo*, supra, 205 Conn. 592. But the declaration can be admitted only to prove the declarant's subsequent conduct, not to show what the other person ultimately did. *State* v. *Perelli*, 125 Conn. 321, 325, 5 A.2d 705 (1939). Thus, in the example above, the declarant's statement could be used to infer that the declarant actually did go to meet Ralph at the store at ten, but not to show that Ralph went to the store at ten to meet the declarant.

Placement of Section 8-3 (4) in the "availability of the declarant immaterial" category of hearsay exceptions confirms that the admissibility of statements of present intention to show future acts is not conditioned on any requirement that the declarant be unavailable. See *State* v. *Santangelo*, supra, 205 Conn. 592 (dictum suggesting that declarant's unavailability is precondition to admissibility).

While statements of present intention looking forward to the doing of some future act are admissible under the exception, backward-looking statements of memory or belief

offered to prove the act or event remembered or believed are inadmissible. See *Wade* v. *Yale University*, 129 Conn. 615, 618–19, 30 A.2d 545 (1943). But see *State* v. *Santangelo*, supra, 205 Conn. 592–93. As the advisory committee note to the corresponding federal rule suggests, "[t]he exclusion of `statements of memory or belief to prove the fact remembered or believed' is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind." Fed. R. Evid. 803 (3) advisory committee note, citing *Shepard* v. *United States*, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933). For cases dealing with the admissibility of statements of memory or belief in will cases, see *Spencer's Appeal*, 77 Conn. 638, 643, 60 A. 289 (1905); *Vivian Appeal*, 74 Conn. 257, 260–62, 50 A. 797 (1901); *Comstock* v. *Hadlyme Ecclesiastical Society*, 8 Conn. 254, 263–64 (1830). Cf. *Babcock* v. *Johnson*, 127 Conn. 643, 644, 19 A.2d 416 (1941) (statements admissible only as circumstantial evidence of state of mind and not for truth of matter asserted); *In re Johnson's Will*, 40 Conn. 587, 588 (1873) (same).

(5) Statement for purposes of obtaining medical diagnosis or treatment.

Statements made in furtherance of obtaining a medical diagnosis or treatment are excepted from the hearsay rule. E.g., *State* v. *DePastino*, 228 Conn. 552, 565, 638 A.2d 578 (1994). This is true even if diagnosis or treatment is not the primary purpose of the medical examination or the principal motivation for the statement; *State* v. *Griswold*, 160 Conn. App. 528, 553, 557, 127 A.3d 189 (statements made during forensic interview in child sexual abuse context), cert. denied, 320 Conn. 907, 128 A.3d 952 (2015); as long as the statement is "reasonably pertinent" to obtaining diagnosis or treatment. Id.

It is intended that the term "medical" be read broadly so that the exception would cover statements made for the purpose of obtaining diagnosis or treatment for both somatic and psychological maladies and conditions. See *State* v. *Wood*, 208 Conn. 125, 133–34, 545 A.2d 1026, cert. denied, 488 U.S. 895, 109 S. Ct. 235, 102 L. Ed. 2d 225 (1988).

Statements concerning the cause of an injury or condition traditionally were inadmissible under the exception. See *Smith* v. *Hausdorf*, 92 Conn. 579, 582, 103 A. 939 (1918). **[**Recent**]** Subsequent cases recognize that, in some instances, causation may be pertinent to medical diagnosis or treatment. See *State* v. *Daniels*, 13 Conn.

App. 133, 135, 534 A.2d 1253 (1987); cf. *State* v. *DePastino*, supra, 228 Conn. 565. Section 8-3 (5), thus, excepts from the hearsay rule statements describing "the inception or general character of the cause or external source" of an injury or condition when reasonably pertinent to medical diagnosis or treatment.

Statements as to causation that include the identity of the person responsible for the injury or condition ordinarily are neither relevant to nor in furtherance of the patient's medical treatment. *State* v. *DePastino*, supra, 228 Conn. 565; *State* v. *Dollinger*, 20 Conn. App. 530, 534, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990). Both the Supreme and Appellate Courts have recognized an exception to this principle in cases of domestic child abuse. *State* v. *DePastino*, supra, 565; *State* v. *Dollinger*, supra, 534–35; *State* v. *Maldonado*, 13 Conn. App. 368, 372–74, 536 A.2d 600, cert. denied, 207 Conn. 808, 541 A.2d 1239 (1988)**[***; see C. Tait & J. LaPlante, supra, (Sup. 1999) § 11.12.3, p. 233***]**. The courts reason that "[i]n cases of sexual abuse in the home, hearsay statements made in the course of medical treatment which reveal the identity of the abuser, are reasonably pertinent to treatment and are admissible. . . . If the sexual abuser is a member of the child victim's immediate household, it is reasonable for a physician to ascertain the identity of the abuser to prevent recurrences and to facilitate the treatment of psychological and physical injuries." (Citation omitted; internal quotation marks omitted.) *State* v. *Dollinger*, supra, 535, quoting *State* v. *Maldonado*, supra, 374; accord *State* v. *DePastino*, supra, 565. In 2001, this reasoning was extended to apply the exception to *adult* victims of sexual abuse as well. *State* v. *Kelly,* 256 Conn. 23, 45, 770 A.2d 908 (2001). "In *any* sexual assault, the identity of the perpetrator undoubtedly is relevant to the physician to facilitate the treatment of psychological and physical injuries." (Emphasis added; internal quotation marks omitted.) Id.

Traditionally, the exception seemingly required that the statement be made to a physician. See, e.g., *Wilson* v. *Granby*, 47 Conn. 59, 76 (1879). Statements qualifying under Section 8-3 (5), however, may be those made not only to a physician, but to other persons involved in the treatment of the patient, such as a nurse, a paramedic, an interpreter or even a family member. This approach is in accord with the modern trend. See *State* v. *Maldonado*, supra, 13 Conn. App. 369, 374 n.3 (statement by child abuse

victim who spoke only Spanish made to Spanish speaking hospital security guard enlisted by treating physician as translator).

Common-law cases address the admissibility of statements made only by the patient. E.g., *Gilmore* v. *American Tube & Stamping Co.*, 79 Conn. 498, 504, 66 A. 4 (1907). Section 8-3 (5) does not, by its terms, restrict statements admissible under the exception to those made by the patient. For example, if a parent were to bring his or her unconscious child into an emergency room, statements made by the parent to a health care provider for the purpose of obtaining treatment and pertinent to that treatment fall within the scope of the exception.

Early common law distinguished between statements made to physicians consulted for the purpose of treatment and statements made to physicians consulted solely for the purpose of **[**qualifying**]** testifying as an expert witness **[**to testify at trial**]**. Statements made to these so-called "nontreating" physicians were not accorded substantive effect. See, e.g., *Zawisza* v. *Quality Name Plate, Inc.*, 149 Conn. 115, 119, 176 A.2d 578 (1961); *Rowland* v. *Phila., Wilm. & Baltimore R. Co.*, 63 Conn. 415, 418–19, 28 A. 102 (1893). This distinction was [virtually] eliminated by the court in *George* v. *Ericson*, 250 Conn. 312, 324–25, 736 A.2d 889 (1999), which held that nontreating physician could rely on such statements The distinction between admission only as foundation for the expert's opinion and admission for all purposes was considered too inconsequential to maintain. Accordingly, the word "diagnosis" was added to, and the phrase "advice pertaining thereto" was deleted from, the phrase "medical treatment or advice pertaining thereto" in Section 8-3 (5) of the 2000 edition of the Code.

(6) Recorded recollection.

The hearsay exception for past recollection recorded requires four foundational requirements. First, the witness must have had personal knowledge of the event recorded in the memorandum or record. *Papas* v. *Aetna Ins. Co.*, 111 Conn. 415, 420, 150 A. 310 (1930); *Jackiewicz* v. *United Illuminating Co.*, 106 Conn. 302, 309, 138 A. 147 (1927); *Neff* v. *Neff*, 96 Conn. 273, 278, 114 A. 126 (1921).

Second, the witness' present recollection must be insufficient to enable the witness to testify fully and accurately about the event recorded. *State* v. *Boucino*, 199 Conn. 207, 230, 506 A.2d 125 (1986). The rule thus does not require the witness' memory

to be totally exhausted. See id. Earlier cases to the contrary, such as *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, 104 Conn. 54, 69, 132 A. 553 (1926), apparently have been rejected. See *State* v. *Boucino*, supra, 230. "Insufficient recollection" may be established by demonstrating that an attempt to refresh the witness' recollection pursuant to Section 6-9 (a) was unsuccessful. See *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, supra, 69.

Third, the memorandum or record must have been made or adopted by the witness "at or about the time" the event was recorded. *Gigliotti* v. *United Illuminating Co.*, 151 Conn. 114, 124, 193 A.2d 718 (1963); *Neff* v. *Neff*, supra, 96 Conn. 278; *State* v. *Day*, 12 Conn. App. 129, 134, 529 A.2d 1333 (1987).

Finally, the memorandum or record must accurately reflect **[**correctly**]** the witness' knowledge of the event as it existed at the time of the memorandum's or record's making or adoption. See *State* v. *Vennard*, 159 Conn. 385, 397, 270 A.2d 837 (1970), cert. denied, 400 U.S. 1011, 91 S. Ct. 576, 27 L. Ed. 2d 625 (1971), overruled on other grounds by *State* v. *Ferrell*, 191 Conn. 37, 43 n.6, 463 A.2d 573 (1983) ; *Capone* v. *Sloan*, 149 Conn. 538, 543, 182 A.2d 414 (1962); *Hawken* v. *Dailey*, 85 Conn. 16, 19, 81 A. 1053 (1911); *State* v. *Juan V.*, 109 Conn. App. 431, 441 n.9, 951 A.2d 651 ("[p]roving the record was accurate when made is an essential element of this exception"), cert. denied, 289 Conn. 931, 958 A.2d 161 (2008).

A memorandum or record admissible under the exception may be read into evidence and received as an exhibit. *Katsonas* v. *W.M. Sutherland Building & Contracting Co.*, supra, 104 Conn. 69; see *Neff* v. *Neff*, supra, 96 Conn. 278–79. Because a memorandum or record introduced under the exception is being offered to prove its contents, the original must be produced pursuant to Section 10-1, unless its production is excused. See Sections 10-3 through 10-6; cf. *Neff* v. *Neff*, supra, 278.

Multiple person involvement in recordation and observation of the event recorded is contemplated by the exception. For example, *A* reports to *B* an event *A* has just observed. *B* immediately writes down what *A* reported to him. *A* then examines the writing and adopts it as accurate close to the time of its making. *A* is now testifying and has forgotten the event. *A* may independently establish the foundational requirements for the admission of the writing under Section 8-3 (6). Cf. **[**C. Tait & J. LaPlante, supra,

§ 11.21, p. 408, citing**]** *Curtis* v. *Bradley*, 65 Conn. 99, 31 A. 591 (1894).

The past recollection recorded exception to the hearsay rule is to be distinguished from the procedure for refreshing recollection, which is covered in Section 6-9.

(7) Public records and reports.

Section 8-3 (7) sets forth a hearsay exception for certain public records and reports. The exception is derived primarily from common law although public records and reports remain the subject of numerous statutes. See, e.g., General Statutes §§ 12-39bb, 19a-412.

Although Connecticut has neither precisely nor consistently defined the elements comprising the common-law public records exception to the hearsay rule; cf. *Hing Wan Wong* v. *Liquor Control Commission*, 160 Conn. 1, 9, 273 A.2d 709 (1970), cert. denied, 401 U.S. 938, 91 S. Ct. 931, 28 L. Ed. 2d 218 (1971); Section 8-3 (7) gleans from case law three distinct requirements for substantive admissibility. Proviso (A) is found in cases such as *Hing Wan Wong* v. *Liquor Control Commission*, supra, 9, *Russo* v. *Metropolitan Life Ins. Co.*, 125 Conn. 132, 139, 3 A.2d 844 (1939), and *Ezzo* v. *Geremiah*, 107 Conn. 670, 679–80, 142 A. 461 (1928). Proviso (B) comes from cases such as *Gett* v. *Isaacson*, 98 Conn. 539, 543–44, 120 A. 156 (1923), and *Enfield* v. *Ellington*, 67 Conn. 459, 462, 34 A. 818 (1896). Proviso (C) is derived from *Heritage Village Master Assn., Inc.* v. *Heritage Village Water Co.*, 30 Conn. App. 693, 701, 622 A.2d 578 (1993), and from cases in which public records had been admitted under the business records exception. See, e.g., *State* v. *Palozie*, 165 Conn. 288, 294–95, 334 A.2d 458 (1973); *Mucci* v. *LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969).

The "duty" under which public officials act, as contemplated by proviso (A), often is one imposed by statute. See, e.g., *Lawrence* v. *Kozlowski*, 171 Conn. 705, 717–18, 372 A.2d 110 (1976), cert. denied, 431 U.S. 969, 97 S. Ct. 2930, 53 L. Ed. 2d 1066 (1977); *Hing Wan Wong* v. *Liquor Control Commission*, supra, 160 Conn. 8–10. Nevertheless, Section 8-3 (7) does not preclude the recognition of other sources of duties.

Proviso (C) anticipates the likelihood that more than one individual may be involved in the making of the public record. By analogy to the personal knowledge

requirement imposed in the business records context; e.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); proviso (C) demands that the public record be made upon the personal knowledge of either the public official who made the record or someone, such as a subordinate, whose duty it was to relay that information to the public official. See, e.g., *State* v. *Palozie*, supra, 165 Conn. 294–95 (public record introduced under business records exception).

(8) Statement in learned treatises.

Exception (8) explicitly permits the substantive use of statements contained in published treatises, periodicals or pamphlets on direct examination or cross-examination under the circumstances prescribed in the rule. In the case of a journal article, the requirement that the treatise is recognized as a "standard authority in the field"; (internal quotation marks omitted) *Filippelli* v. *Saint Mary's Hospital*, 319 Conn. 113, 136, 124 A.3d 501 (2015); generally requires proof that the specific article at issue is so recognized. See id., 137–38; *Musorofiti* v. *Vlcek*, 65 Conn. App. 365, 382–83, 783 A.2d 36, cert. denied, 258 Conn. 938, 786 A.2d 426 (2001). There may be situations, however, in which a journal is so highly regarded that a presumption of authoritativeness will arise with respect to an article selected for publication in that journal without any additional showing. See *Filippelli* v. *Saint Mary's Hospital*, supra, 138.

Although most of the earlier decisions concerned the use of medical treatises; e.g., *Cross* v. *Huttenlocher*, 185 Conn. 390, 395, 440 A.2d 952 (1981); *Perez* v. *Mount Sinai Hospital*, 7 Conn. App. 514, 520, 509 A.2d 552 (1986); Section 8-3 (8), by its terms, is not limited to that one subject matter or format. *Ames* v. *Sears, Roebuck & Co.*, 8 Conn. App. 642, 650–51, 514 A.2d 352 (1986) (published technical papers on design and operation of riding lawnmowers), cert. denied, 201 Conn. 809, 515 A.2d 378 (1986).

Connecticut allows the jury to receive the treatise, or portion thereof, as a full exhibit. *Cross* v. *Huttenlocher*, supra, 185 Conn. 395–96; see *State* v. *Gupta*, 297 Conn. 211, 239, 998 A.2d 1085 (2010). If admitted, the excerpts from the published work may be read into evidence or received as an exhibit, as the court permits. See **[**id.**]** *Cross* v. *Huttenlocher*, supra, 395–96; see also *Filippelli* v. *Saint Mary's Hospital*, supra, 319 Conn. 139–41 (trial court has discretion to require redaction so that only portion of

article admitted as full exhibit).

(9) Statement in ancient documents.

The hearsay exception for statements in ancient documents is well established. *Jarboe* v. *Home Bank & Trust Co.*, 91 Conn. 265, 270–71, 99 A. 563 (1917); *New York, N.H. & H. R. Co.* v. *Cella*, 88 Conn. 515, 520, 91 A. 972 (1914); see *Clark* v. *Drska*, 1 Conn. App. 481, 489, 473 A.2d 325 (1984).

The exception, by its terms, applies to all kinds of documents, including documents produced by electronic means, and electronically stored information, and is not limited to documents affecting an interest in property. See *Petroman* v. *Anderson*, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map introduced under exception)**[**; C. Tait & J. LaPlante, supra, § 11.18, p. 405**]**.

''[M]ore than thirty years" means any instant of time beyond the point in time at which the document has been in existence for thirty years.

(10) Published compilations.

Connecticut cases have recognized an exception to the hearsay rule—or at least have assumed an exception exists for these items. *Henry* v. *Kopf*, 104 Conn. 73, 80–81, 131 A. 412 (1925) (market reports); see *State* v. *Pambianchi*, 139 Conn. 543, 548, 95 A.2d 695 (1953) (compilation of used automobile prices); *Donoghue* v. *Smith*, 114 Conn. 64, 66, 157 A. 415 (1931) (mortality tables).

(11) Statement in family bible.

Connecticut has recognized, at least in dictum, an exception to the hearsay rule for factual statements concerning personal or family history contained in family bibles. See *Eva* v. *Gough*, 93 Conn. 38, 46, 104 A. 238 (1918).

(12) Personal identification.

A witness' in-court statement of his or her own name or age is admissible, even though knowledge of this information often is based on hearsay. *Blanchard* v. *Bridgeport*, 190 Conn. 798, 806, 463 A.2d 553 (1983) (name); *Toletti* v. *Bidizcki*, 118 Conn. 531, 534, 173 A. 223 (1934) (name), overruled on other grounds by *Petrillo* v. *Maiuri*, 138 Conn. 557, 563, 86 A.2d 869 (1952); *State* v. *Hyatt*, 9 Conn. App. 426, 429, 519 A.2d 612 (1987) (age); see *Creer* v. *Active Auto Exchange, Inc.*, 99 Conn. 266, 276, 121 A. 888 (1923) (age). **[**It is unclear whether case law supports the admissibility

of a declarant's out-of-court statement concerning his or her own name or age when offered independently of existing hearsay exceptions, such as the exception for statements made by a party opponent.**]**

Please Note: The bracketed titles of the subsections in this rule are part of the original text of the Code. For this particular rule, the brackets do not indicate an intention to delete material.

Sec. 8-4. Admissibility of Business Entries and Photographic Copies: Availability of Declarant Immaterial

"(a) [Business records admissible.] Any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence or event, shall be admissible as evidence of the act, transaction, occurrence or event, if the trial judge finds that it was made in the regular course of any business, and that it was the regular course of the business to make the writing or record at the time of the act, transaction, occurrence or event or within a reasonable time thereafter.

"(b) [Witness need not be available.] The writing or record shall not be rendered inadmissible by (1) a party's failure to produce as witnesses the person or persons who made the writing or record, or who have personal knowledge of the act, transaction, occurrence or event recorded or (2) the party's failure to show that such persons are unavailable as witnesses. Either of such facts and all other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect the weight of the evidence, but not to affect its admissibility.

"(c) [Reproductions admissible.] Except as provided in the Freedom of Information Act, as defined in [General Statutes §] 1-200, if any person in the regular course of business has kept or recorded any memorandum, writing, entry, print, representation or combination thereof, of any act, transaction, occurrence or event, and in the regular course of business has caused any or all of them to be recorded, copied or reproduced by any photographic, photostatic, microfilm, microcard, miniature photographic or other process which accurately reproduces or forms a durable medium

for so reproducing the original, the original may be destroyed in the regular course of business unless its preservation is otherwise required by statute. The reproduction, when satisfactorily identified, shall be as admissible in evidence as the original in any judicial or administrative proceeding, whether the original is in existence or not, and an enlargement or facsimile of the reproduction shall be likewise admissible in evidence if the original reproduction is in existence and available for inspection under direction of court. The introduction of a reproduced record, enlargement or facsimile shall not preclude admission of the original.

"(d) [Definition.] The term `business' shall include business, profession, occupation and calling of every kind." General Statutes § 52-180.

COMMENTARY

Section 8-4 sets forth what is commonly known as the business records or business entries exception to the hearsay rule. Section 8-4 quotes General Statutes § 52-180, which embraces modified versions of the 1927 Model Act for Proof of Business Transactions and the Photographic Copies of Business and Public Records as Evidence Act.

Subsection (a) describes the foundational elements a court must find for a business record to qualify under the exception. E.g., *River Dock & Pile, Inc.* v. *O & G Industries, Inc.*, 219 Conn. 787, 793–94, 595 A.2d 839 (1991); *Emhart Industries, Inc.* v. *Amalgamated Local Union 376, U.A.W.*, 190 Conn. 371, 383–84, 461 A.2d 442 (1983). The Supreme Court has interpreted § 52-180 to embrace an additional foundational requirement not found in the express terms of the exception: that the source of the information recorded be the entrant's own observations or the observations of an informant who had a business duty to furnish the information to the entrant. E.g., *In re Barbara J.*, 215 Conn. 31, 40, 574 A.2d 203 (1990); *State* v. *Milner*, 206 Conn. 512, 521, 539 A.2d 80 (1988); *Mucci* v. *LeMonte*, 157 Conn. 566, 569, 254 A.2d 879 (1969). If this requirement is not met, "it adds another level of hearsay [to the document] which necessitates a separate exception to the hearsay rule . . . ." (Internal quotation marks omitted.) *State* v. *George J.*, 280 Conn. 551, 593–94, 910 A.2d. 931 (2006), cert. denied, 549 U.S. 1326, 127 S. Ct. 1919, 167 L. Ed. 2d 573 (2007).

Business records increasingly are created, stored or produced by computer. Section 8-4 is applicable to electronically stored information, and, properly authenticated, such records are admissible if the elements of Section 8-4 (a) have been met. See *Federal Deposit Ins. Corp.* v. *Carabetta*, 55 Conn. App. 369, 376–77, 739 A.2d 301, cert. denied, 251 Conn. 927, 742 A.2d 362 (1999). In addition to satisfying the standard requirements of the business record exception to the hearsay rule, a proponent offering computerized business records will be required to establish that the computer system reliably and accurately produces records or data of the type that is being offered. See generally *Connecticut Light & Power Co.* v. *Gilmore*, 289 Conn. 88, 116–18, 956 A.2d 1145 (2008) (computer printout and letter containing results of electricity meter testing); *American Oil Co.* v. *Valenti*, 179 Conn. 349, 360–61, 426 A.2d 305 (1979) (computer records of loan account); *Silicon Valley Bank* v. *Miracle Faith World Outreach, Inc.*, 140 Conn. App. 827, 836–37, 60 A.3d 343 (computer screenshots of loan transaction history), cert. denied, 308 Conn. 930, 64 A.3d 119 (2013); see also *State* v. *Polanco*, 69 Conn. App. 169, 186, 797 A.2d 523 (2002) (proponent of computer generated business records required to establish the accuracy and reliability of computer system). **[**Depending on the circumstances, t**]**The court may also require evidence establishing that the **[**system adequately protects the integrity of the records**]** circumstances surrounding the creation and maintenance of the records adequately ensures their trustworthiness and reliability. See *Emigrant Mortgage Co.* v. *D'Agostino*, 94 Conn. App. 793, 809–812, 896 A.2d 814, cert. denied, 278 Conn. 919, 901 A.2d 43 (2006).

Computer printouts created in anticipation of litigation are admissible under the business records exception if the underlying computer-based data is produced in the regular course of business and satisfies the requirements of General Statutes § 52-180. See *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 10–12, 746 A.2d 826, cert. denied, 253 Conn. 918, 755 A.2d 215 (2000).

Sec. 8-5. Hearsay Exceptions: Declarant Must Be Available

The following are not excluded by the hearsay rule, provided the declarant is available for cross-examination at trial:

(1) Prior inconsistent statement. A prior inconsistent statement of a witness, provided (A) the statement is in writing or otherwise recorded by audiotape, videotape or some other equally reliable medium, (B) the writing or recording is duly authenticated as that of the witness, and (C) the witness has personal knowledge of the contents of the statement.

(2) Identification of a person. The identification of a person made by a declarant prior to trial where the identification is reliable.

(Amended June 29, 2007, to take effect Jan. 1, 2008)

COMMENTARY

(1) Prior inconsistent statement.

Section 8-5 (1) incorporates the rule of *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986), and later developments and clarifications. *State* v. *Simpson*, 286 Conn. 634, 641–42, 945 A.2d 449 (2008)[.]; [E.]e.g., *State* v. *Hopkins*, 222 Conn. 117, 126, 609 A.2d 236 (1992) (prior inconsistent statement must be made under circumstances assuring reliability, which is to be determined on case-by-case basis); *State* v. *Holloway*, 209 Conn. 636, 649, 553 A.2d 166 (tape-recorded statement admissible under *Whelan*), cert. denied, 490 U.S. 1071, 109 S. Ct. 2078, 104 L. Ed. 2d 643 (1989); *State* v. *Luis F.*, 85 Conn. App. 264, 271, 856 A.2d 522 (2004) (videotaped statement admissible); see also *State* v. *Woodson*, 227 Conn. 1, 21, 629 A.2d 386 (1993) (signature of witness unnecessary when tape-recorded statement offered under *Whelan*).

Use of the word “witness” in Section 8-5 (1) assumes that the declarant has testified at the proceeding in question, as required by the *Whelan* rule.

As to the requirements of authentication, see Section 9-1 of the Code.

(2) Identifications of a person.

Section 8-5 (2) incorporates the hearsay exception recognized in *State* v. *McClendon*, 199 Conn. 5, 11, 505 A.2d 685 (1986), and reaffirmed in subsequent cases. See *State* v. *Outlaw*, 216 Conn. 492, 497–98, 582 A.2d 751 (1990); *State* v. *Townsend*, 206 Conn. 621, 624, 539 A.2d 114 (1988); *State* v. *Weidenhof*, 205 Conn. 262, 274, 533 A.2d 545 (1987). Although this hearsay exception appears to have been the subject of criminal cases exclusively, Section 8-5 (2) is not so limited, and applies in

civil cases as well.

Either the declarant or another witness present when the declarant makes the identification, such as a police officer, can testify at trial as to the identification. Compare *State* v. *McClendon*, supra, 199 Conn. 8 (declarants testified at trial about their prior out-of-court identifications) with *State* v. *Weidenhof*, supra, 205 Conn. 274 (police officer who showed declarant photographic array was called as witness at trial to testify concerning declarant's prior out-of-court identification). Even when it is another witness who testifies as to the declarant's identification, the declarant must be available for cross-examination at trial for the identification to be admissible. But cf. *State* v. *Outlaw*, supra, 216 Conn. 498 (dictum suggesting that declarant must be available for cross-examination either at trial or at prior proceeding in which out-of-court identification is offered).

Constitutional infirmities in the admission of first-time identifications, whether pretrial or in-court, **[**identifications**]** are the subject of separate inquiries and constitute independent grounds for exclusion. See, e.g., *State* v. *Dickson*, 322 Conn. 410, 423–31, 141 A.3d 810 (2016); see also id., 445–47 (requiring state to seek permission from trial court prior to presenting first time in-court identification and establishing that trial court may grant permission only if no factual dispute as to identity of perpetrator or ability of eyewitness to identify defendant). **[***State* v. *White*, 229 Conn. 125, 161, 640 A.2d 572 (1994); *State* v. *Lee*, 177 Conn. 335, 339, 417 A.2d 354 (1979).**]**

General Statutes § 54-1p prescribes numerous rules regarding eyewitness identification procedures used by law enforcement. The statute is silent on the remedy for noncompliance. See *State* v. *Grant*, 154 Conn. App. 293, 312 n.10, 112 A.3d 175 (2014) (procedures in § 54-1p are "best practices" and "not constitutionally mandated"), cert. denied, 315 Conn. 928, 109 A.3d 923 (2015); see also *State* v. *Guilbert*, 306 Conn. 218, 49 A.3d 705 (2012); *State* v. *Ledbetter*, 275 Conn. 534, 881 A.2d 290 (2005), cert. denied, 547 U.S. 1082, 126 S. Ct. 1798, 164 L. Ed. 2d 537 (2006).

Sec. 8-6. Hearsay Exceptions: Declarant Must Be Unavailable

The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:

(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, provided (A) the issues in the former hearing are the same or substantially similar to those in the hearing in which the testimony is being offered, and (B) the party against whom the testimony is now offered had an opportunity to develop the testimony in the former hearing.

(2) Dying declaration. In a prosecution in which the death of the declarant is the subject of the charge, a statement made by the declarant, while the declarant was conscious of his or her impending death, concerning the cause of or the circumstances surrounding the death.

(3) Statement against civil interest. A trust-worthy statement that, at the time of its making, was against the declarant's pecuniary or proprietary interest, or that so far tended to subject the declarant to civil liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of such a statement the court shall consider whether safeguards reasonably equivalent to the oath taken by a witness and the test of cross-examination exist.

(4) Statement against penal interest. A trustworthy statement against penal interest that, at the time of its making, so far tended to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true. In determining the trustworthiness of a statement against penal interest, the court shall consider (A) the time the statement was made and the person to whom the statement was made, (B) the existence of corroborating evidence in the case, and (C) the extent to which the statement was against the declarant's penal interest.

(5) Statement concerning ancient private boundaries. A statement, made before the controversy arose, as to the location of ancient private boundaries if the declarant had peculiar means of knowing the boundary and had no interest to misrepresent the truth in making the statement.

(6) Reputation of a past generation. Reputation of a past generation concerning facts of public or general interest or affecting public or private rights as to ancient rights of which the declarant is presumed or shown to have had competent

knowledge and which matters are incapable of proof in the ordinary way by available witnesses.

(7) Statement of pedigree and family relationships. A statement concerning pedigree and family relationships, provided (A) the statement was made before the controversy arose, (B) the declarant had no interest to misrepresent in making the statement, and (C) the declarant, because of a close relationship with the family to which the statement relates, had special knowledge of the subject matter of the statement.

(8) Forfeiture by wrongdoing. A statement offered against a party who has engaged in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.

(Amended June 29, 2007, to take effect Jan. 1, 2008)

COMMENTARY

The **[**common thread running through**]** fundamental threshold requirement of all Section 8-6 hearsay exceptions is **[**the requirement**]** that the declarant be unavailable as a witness. At common law, the definition of unavailability has varied with the **[**individual**]** particular hearsay exception at issue. For example, the Supreme Court has recognized death as the only form of unavailability for the dying declaration and ancient private boundary hearsay exceptions. See, e.g., *Rompe* v. *King*, 185 Conn. 426, 429, 441 A.2d 114 (1981) (boundaries); *State* v. *Manganella*, 113 Conn. 209, 215–16, 155 A. 74 (1931) (dying declarations). **[**But i**]**In *State* v. *Frye*, 182 Conn. 476, 481–82, 438 A.2d 735 (1980), the court adopted the federal rule's uniform definition of unavailability set forth in Fed. R. Evid. 804 (a), though only for the limited purpose of determining unavailability for the statement against penal interest exception**[**; id., 481–82; thereby recognizing other forms of unavailability such as testimonial privilege and lack of memory. See Fed. R. Evid. 804 (a); s**]**.See also *State* v. *Schiappa*, 248 Conn. 132, 14**[**2**]**1–45, 728 A.2d 466 (1999). **[**The court has yet to determine whether the definition of unavailability recognized in *Frye* applies to other hearsay exceptions requiring the unavailability of the declarant.**]** The Rule 804 (a) definition has also been applied to determine unavailability for purposes of the former testimony exception covered by Section 8-6 (1). See *State* v. *Lapointe*, 237 Conn. 694, 736–38, 678 A.2d 942, cert.

denied, 519 U.S. 994, 117 S. Ct. 484, 136 L. Ed. 2d 378 (1996); *State* v. *Wright*, 107 Conn. App. 85, 89–90, 943 A.2d 1159, cert. denied, 287 Conn. 914, 950 A.2d 1291 (2008).

[In keeping with the common law,**]** At this point, however, Section 8-6 **[**eschews a**]** contains no uniform definition of unavailability. **[**Reference should be made to common-law cases addressing the particular hearsay exception.**]**

The proponent of evidence offered under Section 8-6 carries the burden of proving the declarant's unavailability. E.g., *State* v. *Aillon*, 202 Conn. 385, 390 (1987); *State* v. Rivera, 220 Conn. 408, 411, 599 A.2d 1060 (1991). To satisfy this burden, the proponent must show that a good faith, genuine effort was made to procure the declarant's attendance by process or other reasonable means. "[S]ubstantial diligence" is required; *State* v. *Lopez*, 239 Conn. 56, 75, 681 A.2d 950 (1996); but the proponent is not required to do "everything conceivable" to secure the witness' presence. (Internal quotation marks omitted.) *State* v. *Wright*, supra, 107 Conn. App. 89–90.

With respect to deposition testimony, Practice Book § 13-31 (a) (4) expands the scope of Section 8-6 by permitting the admissibility of depositions in certain circumstances where the deponent is deemed unavailable for purposes of that rule. Among other things, the rule covers situations where a deponent is dead, at a greater distance than thirty miles from the trial or hearing, out of state until the trial or hearing terminates, or unable to attend due to age, illness, infirmity, or imprisonment; where the party offering the deposition is unable to procure the attendance of the deponent by subpoena; or under exceptional circumstances in the interest of justice. See *Gateway Co.* v. *DiNoia*, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (observing that Practice Book § 248 [d], now § 13-31 [a], "broadens the rules of evidence by permitting otherwise inadmissible evidence to be admitted"). See Section 8-2 (a) and the commentary thereto regarding situations where the Code contains provisions that may have conflicted with the Practice Book.

Numerous statutes also provide for the admissibility of former deposition or trial testimony under specified circumstances. See General Statutes §§ 52-149a, 52-152 (a), 52-159, and 52-160.

(1) Former testimony.

Connecticut cases recognize the admissibility of a witness' former testimony as an exception to the hearsay rule when the witness subsequently becomes unavailable. E.g., *State* v. *Parker*, 161 Conn. 500, 504, 289 A.2d 894 (1971); *Atwood* v. *Atwood*, 86 Conn. 579, 584, 86 A. 29 (1913); *State* v. *Malone*, 40 Conn. App. 470, 475–78, 671 A.2d 1321, cert. denied, 237 Conn. 904, 674 A.2d 1332 (1996).

In addition to showing unavailability; e.g., *Crochiere* v. *Board of Education*, 227 Conn. 333, 356, 630 A.2d 1027 (1993); *State* v. *Aillon*, supra, 202 Conn. 391**[**, 521 A.2d 555 (1991)**]**; the proponent must establish two foundational elements. First, the proponent must show that the issues in the proceeding in which the witness testified and the proceeding in which the witness' former testimony is offered are the same or substantially similar. E.g., *State* v. *Parker*, supra, 161 Conn. 504; *In re Durant*, 80 Conn. 140, 152, 67 A. 497 (1907); *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 690, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). The similarity of issues is required primarily as a means of ensuring that the party against whom the former testimony is offered had a motive and interest to adequately examine the witness in the former proceeding. See *Atwood* v. *Atwood*, supra, 86 Conn. 584.

Second, the proponent must show that the party against whom the former testimony is offered had an opportunity to develop the testimony in the former proceeding. E.g., *State* v. *Parker*, supra, 161 Conn. 504; *Lane* v. *Brainerd*, 30 Conn. 565, 579 (1862). This second foundational requirement simply requires the opportunity to develop the witness' testimony; the use made of that opportunity is irrelevant to a determination of admissibility. See *State* v. *Parker*, supra, 504; *State* v. *Crump*, 43 Conn. App. 252, 264, 683 A.2d 402, cert. denied, 239 Conn. 941, 684 A.2d 712 (1996).

The common law generally stated this second foundational element in terms of an opportunity for cross-examination; e.g., *State* v. *Weinrib*, 140 Conn. 247, 252, 99 A.2d 145 (1953); probably because the cases involved the introduction of former testimony against the party against whom it previously was offered. Section 8-6 (1), however, supposes development of a witness' testimony through direct or redirect examination, in addition to cross-examination; cf. *Lane* v. *Brainerd*, supra, 30 Conn. 579; thus recognizing the possibility of former testimony being offered against its

original proponent. The rules allowing a party to impeach its own witness; Section 6-4; and authorizing leading questions during direct or redirect examination of hostile or forgetful witnesses, for example; Section 6-8 (b); provide added justification for this approach.

Section 8-6 (1), **[**in harmony**]** consistent with the modern trend, abandons the traditional requirement of mutuality, i.e., that the identity of the parties in the former and current proceedings be the same; see *Atwood* v. *Atwood*, supra, 86 Conn. 584; *Lane* v. *Brainerd*, supra, 30 Conn. 579; in favor of requiring merely that the party against whom the former testimony is offered have had an opportunity to develop the witness' testimony in the former proceeding. See **[**5 J. Wigmore, Evidence (4th Ed. 1974) § 1388, p. 111; cf.**]** *In re Durant*, supra, 80 Conn. 152.

(2) Dying declaration.

Section 8-6 (2) recognizes Connecticut's common-law dying declaration hearsay exception. E.g., *State* v. *Onofrio*, 179 Conn. 23, 43–44, 425 A.2d 560 (1979); *State* v. *Manganella*, 113 Conn. 209, 215–16, 155 A. 74 (1931); *State* v. *Smith*, 49 Conn. 376, 379 (1881). The exception is limited to criminal prosecutions for homicide. See, e.g., *State* v. *Yochelman*, 107 Conn. 148, 154–55, 139 A. 632 (1927); *Daily* v. *New York & New Haven R. Co.*, 32 Conn. 356, 358 (1865). Furthermore, by demanding that "the death of the declarant [be] the subject of the charge," Section 8-6 (2) retains the requirement that the declarant be the victim of the homicide that serves as the basis for the prosecution in which the statement is offered. See, e.g., *State* v. *Yochelman*, supra, 155; *Daily* v. *New York & New Haven R. Co.*, supra, 358**[**;see also C. Tait & J. LaPlante, supra, § 11.7.2, p. 353**]**.

Section 8-6 (2), in accordance with common law, limits the exception to statements concerning the cause of or circumstances surrounding what the declarant considered to be his or her impending death. *State* v. *Onofrio*, supra, 179 Conn. 43–44; see *State* v. *Smith*, supra, 49 Conn. 379. A declarant is "conscious of his or her impending death" within the meaning of the rule when the declarant believes that his or her death is imminent and abandons all hope of recovery. See *State* v. *Onofrio*, supra, 44; *State* v. *Cronin*, 64 Conn. 293, 304, 29 A. 536 (1894). This belief may be established by reference to the declarant's own statements or circumstantial evidence

such as the administration of last rites, a physician's prognosis made known to the declarant or the severity of the declarant's wounds. *State* v. *Onofrio*, supra, 44–45; *State* v. *Swift*, 57 Conn. 496, 505–506, 18 A. 664 (1888); *In re Jose M.*, 30 Conn. App. 381, 393, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993). Dying declarations in the form of an opinion are subject to the limitations on lay opinion testimony set forth in Section 7-1. See *State* v. *Manganella*, supra, 113 Conn. 216.

(3) Statement against civil interest.

Section 8-6 (3) restates the rule from *Ferguson* v. *Smazer*, 151 Conn. 226, 232–34, 196 A.2d 432 (1963).

(4) Statement against penal interest.

In *State* v. *DeFreitas*, 179 Conn. 431, 449–52, 426 A.2d 799 (1980), the Supreme Court recognized a hearsay exception for statements against penal interest, abandoning the traditional rule rendering such statements inadmissible. See, e.g., *State* v. *Stallings*, 154 Conn. 272, 287, 224 A.2d 718 (1966). Section 8-6 (4) embodies the hearsay exception recognized in *DeFreitas* and affirmed in its progeny. E.g., *State* v. *Lopez*, 239 Conn. 56, 70–71, 681 A.2d 950 (1996); *State* v. *Mayette*, 204 Conn. 571, 576–77, 529 A.2d 673 (1987). The exception applies in both criminal and civil cases. See *Reilly* v. *DiBianco*, 6 Conn. App. 556, 563–64, 507 A.2d 106, cert. denied, 200 Conn. 804, 510 A.2d 193 (1986).

Recognizing the possible unreliability of this type of evidence, admissibility is conditioned on the statement's trustworthiness. E.g., *State* v. *Hernandez*, 204 Conn. 377, 390, 528 A.2d 794 (1987). Section 8-6 (4) sets forth three factors a court shall consider in determining a statement's trustworthiness, factors well entrenched in the common-law analysis. E.g., *State* v. *Rivera*, 221 Conn. 58, 69, 602 A.2d 571 (1992). Although the cases often cite a fourth factor, namely, the availability of the declarant as a witness; e.g., *State* v. *Lopez*, supra, 239 Conn. 71; *State* v. *Rosado*, 218 Conn. 239, 244, 588 A.2d 1066 (1991); this factor has been eliminated because the unavailability of the declarant is always required, and, thus, the factor does nothing to change the equation from case to case. Cf. *State* v. *Gold*, 180 Conn. 619, 637, 431 A.2d 501 (''application of the fourth factor, availability of the declarant as a witness, does not bolster the reliability of the [statement] inasmuch as [the declarant] was unavailable at

the time of trial"), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980).

Section 8-6 (4) preserves the common-law definition of "against penal interest" in providing that the statement be one that "so far tend[s] to subject the declarant to criminal liability that a reasonable person in the declarant's position would not have made the statement unless the person believed it to be true." Thus, statements other than outright confessions of guilt may qualify under the exception as well. *State* v. *Bryant*, 202 Conn. 676, 695, 523 A.2d 451 (1987); *State* v. *Savage*, 34 Conn. App. 166, 172, 640 A.2d 637, cert. denied, 229 Conn. 922, 642 A.2d 1216 (1994). A statement is not made against the declarant's penal interest if made at a time when the declarant had already been convicted and sentenced for the conduct that is the subject of the statement. *State* v. *Collins*, 147 Conn. App. 584, 590–91, 82 A.3d 1208, cert. denied, 311 Conn. 929, 86 A.3d 1057 (2014).

The usual scenario involves the defendant's use of a statement that implicates the declarant**[,]** but exculpates the defendant. Connecticut case law, however, makes no distinction between statements that inculpate the declarant but exculpate the defendant, and statements that inculpate both the declarant and the defendant. Connecticut law supports the admissibility of this so-called "dual-inculpatory" statement, provided that corroborating circumstances clearly indicate its trustworthiness. *State* v. *Camacho*, 282 Conn. 328, 359–62, 924 A.2d 99 (2007); *State* v. *Schiappa*, supra, 248 Conn. 154–55.

When a narrative contains both disserving statements and collateral, self-serving or neutral statements, the Connecticut rule admits the entire narrative, letting the "trier of fact assess its evidentiary quality in the complete context." *State* v. *Bryant*, supra, 202 Conn. 697; accord *State* v. *Savage*, supra, 34 Conn. App. 173–74.

Connecticut has adopted the Federal Rule's definition of unavailability, as set forth in Fed. R. Evid. 804 (a), for determining a declarant's unavailability under this exception. *State* v. *Frye*, 182 Conn. 476, 481–82 & n.3, 438 A.2d 735 (1980); accord *State* v. *Schiappa*, supra, 248 Conn. 141–42.

(5) Statement concerning ancient private boundaries.

Section 8-6 (5) reflects the common law concerning private boundaries. See *Porter* v. *Warner*, 2 Root (Conn.) 22, 23 (1793). Section 8-6 (5) captures the exception

in its current form. *Wildwood Associates, Ltd.* v. *Esposito*, 211 Conn. 36, 44, 557 A.2d 1241 (1989); *DiMaggio* v. *Cannon*, 165 Conn. 19, 22–23, 327 A.2d 561 (1973); *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 13, 682 A.2d 1046 (1996).

"Unavailability,'' for purposes of this hearsay exception, is limited to the declarant's death. See *Wildwood Associates, Ltd.* v. *Esposito*, supra, 211 Conn. 44; *Rompe* v. *King*, 185 Conn. 426, 429, 441 A.2d 114 (1981)**[***;* C. Tait & J. LaPlante, supra, § 11.10.2, p. 371**]**.

The requirement that the declarant have "peculiar means of knowing the boundary'' is part of the broader common-law requirement that the declarant qualify as a witness as if he were testifying at trial. E.g., *Wildwood Associates, Ltd.* v. *Esposito*, supra, 211 Conn. 44; *Putnam, Coffin & Burr, Inc.* v. *Halpern*, 154 Conn. 507, 514, 227 A.2d 83 (1967). It is intended that this general requirement remain in effect, even though not expressed in the text of the exception. Thus, statements otherwise qualifying for admission under the text of Section 8-6 (5), nevertheless, may be excluded if the court finds that the declarant would not qualify as a witness had he testified in court.

Although the cases generally speak of "ancient'' private boundaries; e.g., *Wildwood Associates, Ltd.* v. *Esposito*, supra, 211 Conn. 44; *Putnam, Coffin & Burr, Inc.* v. *Halpern*, supra, 154 Conn. 514; but see, e.g., *DiMaggio* v. *Cannon*, supra, 165 Conn. 22–23; no case actually defines "ancient'' or decides what limitation that term places, if any, on the admission of evidence under this exception.

(6) Reputation of a past generation.

Section 8-6 (6) recognizes the common-law hearsay exception for reputation, or what commonly was referred to as "traditionary'' evidence, to prove public and private boundaries or facts of public or general interest. E.g., *Hartford* v. *Maslen*, 76 Conn. 599, 615, 57 A. 740 (1904); Wooster v. Butler, 13 Conn. 309, 316 (1839). **[**See generally C. Tait & J. LaPlante, supra, § 11.17.**]**

Section 8-6 (6) retains both the common-law requirement that the reputation be that of a past generation; *Kempf* v. *Wooster*, 99 Conn. 418, 422, 121 A. 881 (1923); *Dawson* v. *Orange*, 78 Conn. 96, 108, 61 A. 101 (1905); and the common-law requirement of antiquity. See *Hartford* v. *Maslen*, supra, 76 Conn. 616.

Because the hearsay exception for reputation or traditionary evidence was

disfavored at common law; id., 615; Section 8-6 (6) is not intended to expand the limited application of this common-law exception.

(7) Statement of pedigree and family relationships.

Out-of-court declarations describing pedigree and family relationships have long been excepted from the hearsay rule. *Ferguson* v. *Smazer*, 151 Conn. 226, 230–31, 196 A.2d 432 (1963); *Shea* v. *Hyde*, 107 Conn. 287, 289, 140 A. 486 (1928); *Chapman* v. *Chapman*, 2 Conn. 347, 349 (1817). Statements admissible under the exception include not only those concerning genealogy, but those revealing facts about birth, death, marriage and the like. See *Chapman* v. *Chapman*, supra, 349.

Dicta in cases suggest that forms of unavailability besides death may qualify a declarant's statement for admission under this exception. See *Carter* v. *Girasuolo*, 34 Conn. Supp. 507, 511, 373 A.2d 560 (1976); cf. *Ferguson* v. *Smazer*, supra, 151 Conn. 230 n.2.

The declarant's relationship to the family or person to whom the hearsay statement refers must be established independently of the statement. *Ferguson* v. *Smazer*, supra, 151 Conn. 231.

(8) Forfeiture by wrongdoing.

This provision has roots extending far back in English and American common law. See, e.g., *Lord Morley's Case*, 6 Howell State Trials 769, 770–71 (H.L. 1666); *Reynolds* v. *United States*, 98 U.S. 145, 158–59, 25 L. Ed. 244 (1878). "The rule has its foundation in the maxim that no one shall be permitted to take advantage of his own wrong . . . ." *Reynolds* v. *United States*, supra, 159; see also *State* v. *Henry*, 76 Conn. App. 515, 534–39, 820 A.2d 1076, cert. denied, 264 Conn. 908, 826 A.2d 178 (2003). Section 8-6 (8) represents a departure from Rule 804 (b) (6) of the Federal Rules of Evidence, which provides a hearsay exception for statements by unavailable witnesses where the party against whom the statement is offered "engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." Section 8-6 (8) requires more than mere acquiescence.

The preponderance of evidence standard should be employed in determining whether a defendant has procured the unavailability of a witness for purposes of this exception. See *State v. Thompson*, 305 Conn. 412, 425, 45 A.3d 605 (2012), cert.

denied, ___U.S.___, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013). A defendant who wrongfully procures the unavailability of a witness forfeits any confrontation clause claims with respect to statements made by that witness. See id., 422–23.

Sec. 8-7. Hearsay within Hearsay

Hearsay within hearsay is admissible only if each part of the combined statements is independently admissible under a hearsay exception.

COMMENTARY

Section 8-7 applies to situations in which a hearsay statement contains within it another level of hearsay, forming what is frequently referred to as "[h]earsay within hearsay . . . ." (Internal quotation marks omitted.) *Dinan* v. *Marchand*, 279 Conn. 558, 571, 903 A.2d 201 (2006). The rule finds support in the case law. See *State* v. *Williams*, 231 Conn. 235, 249, 645 A.2d 999 (1994); *State* v. *Buster*, 224 Conn. 546, 560 n.8, 620 A.2d 110 (1993).

Section 8-7 in no way abrogates the court's discretion to exclude hearsay within hearsay otherwise admissible when its probative value is outweighed by its prejudicial effect arising from the unreliability sometimes found in multiple levels of hearsay. See Section 4-3; cf. *State* v. *Green*, 16 Conn. App. 390, 399–400, 547 A.2d 916, cert. denied, 210 Conn. 802, 553 A.2d 616 (1988). As the levels of hearsay increase, so should the potential for exclusion under Section 4-3.

A familiar example of hearsay within hearsay is the writing, which qualifies under the business records exception; see Section 8-4; and which contains information derived from individuals under no business duty to provide information. See, e.g., *O'Shea* v. *Mignone*, 35 Conn. App. 828, 831–32, 647 A.2d 37 (1994) (police officer's report containing hearsay statement of bystander). The informant's statements independently must fall within another hearsay exception for the writing to be admissible. See *State* v. *Sharpe*, 195 Conn. 651, 663–64, 491 A.2d 345 (1985); *State* v. *Palozie*, 165 Conn. 288, 294–95, 334 A.2d 468 (1973); see also *State* v. *Torelli*, 103 Conn. App. 646, 659–62, 931 A.2d 337 (2007) (statement to 911 operator by motorist observing defendant admissible as spontaneous utterance contained in business record).

Sec. 8-8. Impeaching and Supporting Credibility of Declarant

When hearsay has been admitted in evidence, the credibility of the declarant may be impeached, and if impeached may be supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. Evidence of a statement of the declarant made at any time, inconsistent with the declarant's hearsay statement, need not be shown to or the contents of the statement disclosed to the declarant.

COMMENTARY

Note: The Commentary to Sec. 8-8 has been omitted from this Appendix because further revisions will be presented to the Committee at the meeting of April 26, 2017.

Sec. 8-9. Residual Exception

A statement that is not admissible under any of the foregoing exceptions is admissible if the court determines that (1) there is a reasonable necessity for the admission of the statement, and (2) the statement is supported by equivalent guarantees of trustworthiness and reliability that are essential to other evidence admitted under traditional exceptions to the hearsay rule.

COMMENTARY

Section 8-9 recognizes that the Code's enumerated hearsay exceptions will not cover every situation in which an extrajudicial statement may be deemed reliable and essential enough to justify its admission. In the spirit of the Code's purpose, as stated in Section 1-2 (a), of promoting "the growth and development of the law of evidence," Section 8-9 provides the court with discretion to admit, under limited circumstances; see *State* v. *Dollinger*, 20 Conn. App. 530, 540, 568 A.2d 1058, cert. denied, 215 Conn. 805, 574 A.2d 220 (1990); a hearsay statement not admissible under other exceptions enumerated in the Code. Section 8-9 sets forth what is commonly known as the residual or catch-all exception to the hearsay rule. E.g., *Doe* v. *Hartford Roman Catholic Diocesan Corp.*, 317 Conn. 357, 390–95, 119 A.3d 462 (2015). The exception traces its roots to cases such as *State* v. *Sharpe*, 195 Conn. 651, 664, 491 A.2d 345 (1985), and of more recent vintage, *State* v. *Oquendo*, 223 Conn. 635, 664, 613 A.2d 1300 (1992).

See also *Goodno* v. *Hotchkiss*, 88 Conn. 655, 669, 92 A. 419 (1914) (necessity and trustworthiness are hallmarks underlying exceptions to hearsay rule).

"Reasonable necessity" is established by showing that "unless the hearsay statement is admitted, the facts it contains may be lost, either because the declarant is dead or otherwise unavailable, or because the assertion is of such a nature that evidence of the same value cannot be obtained from the same or other sources." *State* v. *Sharpe*, supra, 195 Conn. 665; accord *State* v. *Alvarez*, 216 Conn. 301, 307 n.3, 579 A.2d 515 (1990); *In re Jason S.*, 9 Conn. App. 98, 106, 516 A.2d 1352 (1986). A minor child may be deemed unavailable under this exception upon competent proof that the child will suffer psychological harm from testifying. See *In re Tayler F.*, 296 Conn. 524, 544, 995 A.2d 611 (2010).

In determining whether the statement is supported by guarantees of trustworthiness and reliability, Connecticut courts have considered factors such as the length of time between the event to which the statement relates and the making of the statement; e.g., *State* v. *Outlaw*, 216 Conn. 492, 499, 582 A.2d 751 (1990); the declarant's motive to tell the truth or falsify; e.g., *State* v. *Oquendo*, supra, 223 Conn. 667; and the declarant's availability for cross-examination at trial. E.g., id., 668; *O'Shea* v. *Mignone*, 35 Conn. App. 828, 838, 647 A.2d 37, cert. denied, 231 Conn. 938, 651 A.2d 263 (1994).

Section 8-9 takes no position on whether a statement that comes close but fails to satisfy a hearsay exception enumerated in the Code nevertheless can be admitted under the residual exception. Connecticut courts so far have **[**not addressed definitively**]** not taken a uniform approach to the "near miss" problem**[**, although some cases would seem to sanction the practice of applying the residual exception to near misses**]**. **[**See**]** Compare *State* v. *Dollinger*, supra, 20 Conn. App. 537–42 (admissibility of statement rejected under spontaneous utterance exception; see Section 8-3 [2]; but upheld under residual exception) with *Eubanks* v. *Commissioner of Correction*, 166 Conn. App. 1, 15 and 15 n.12, 140 A.3d 402 (2016) (suggesting that residual exception would be unavailable to hearsay statement deemed inadmissible under *Whelan* exception; see Section 8-5 [1]); cf., e.g., *State* v. *Outlaw*, supra, 216 Conn. 497–500 (admissibility of statement rejected under hearsay exception for extrajudicial identifications; see Section

8-5 [2]; then analyzed and rejected under residual exception).

Sec. 8-10. Hearsay Exception: Tender Years

"**[**Admissibility in criminal and juvenile proceedings of statement by child under thirteen relating to sexual offense or offense involving physical abuse against child.**]** (a) Notwithstanding any other rule of evidence or provision of law, a statement by a child under thirteen years of age relating to a sexual offense committed against that child**,** or an offense involving physical abuse committed against that child by a person or persons who had authority or apparent authority over the child, shall be admissible in a criminal or juvenile proceeding if: (1) The court finds, in a hearing conducted outside the presence of the jury, if any, that the circumstances of the statement, including its timing and content, provide particularized guarantees of its trustworthiness, (2) the statement was not made in preparation for a legal proceeding, (3) the proponent of the statement makes known to the adverse party an intention to offer the statement and the particulars of the statement including the content of the statement, the approximate time, date and location of the statement, the person to whom the statement was made and the circumstances surrounding the statement that indicate its trustworthiness, at such time as to provide the adverse party with a fair opportunity to prepare to meet it, and (4) either (A) the child testifies and is subject to cross-examination at the proceeding, or (B) the child is unavailable as a witness and (i) there is independent nontestimonial corroborative evidence of the alleged act, and (ii) the statement was made prior to the defendant's arrest or institution of juvenile proceedings in connection with the act described in the statement.

"(b) Nothing in this section shall be construed to (1) prevent the admission of any statement under another hearsay exception, (2) allow broader definitions in other hearsay exceptions for statements made by children under thirteen years of age at the time of the statement concerning any alleged act described in subsection (a) of this section than is done for other declarants, or (3) allow the admission pursuant to the residual hearsay exception of a statement described in subsection (a) of this section." General Statutes § 54-86*l*.

COMMENTARY:

This section, which parallels General Statutes § 54-86*l*, addresses the unique and limited area of statements made by children concerning alleged acts of sexual assault or other sexual misconduct against the child, or other alleged acts of physical abuse against the child by a parent, guardian or other person with like authority over the child at the time of the alleged act. Subsection (a) **[**provides guidance on the test for particularized guarantees of trustworthiness that must be applied to the proffered statement under *Crawford* v. *Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 77 (2004)**]** sets forth the factors that must be applied in considering the admissibility of such a statement. See *State* v. *Maguire*, 310 Conn. 535, 565, 78 A.3d 828 (2013) **[**(standard of admissibility under *Crawford* and tender years exception are same)**]**; *State* v. *Griswold*, 160 Conn. App. 528, 537–50, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).

[The section was amended to harmonize it with the general statutes. As amended, and to be consistent with the 2009 amendment to General Statutes § 54-86*l*, it no longer explicitly provides that the cross-examination of the child may be by video telecommunication or by submitting to a recorded video deposition for that purpose; it does not require the proponent to provide the adverse party a copy of the statement in writing or in whatever other medium the original statement is in and is intended to be proffered in; and, it does not provide a good cause exception to the obligation to provide the adverse party with advance notice sufficient to permit the adverse party to prepare to meet the statement. These changes do not limit the discretion of the court to impose such requirements.**]**