ARTICLE VI—WITNESSES

Sec. 6-1. General Rule of Competency

Except as otherwise provided by the Code, every person is presumed competent to be a witness.

COMMENTARY

Section 6-1 establishes a general presumption of competency subject to exceptions. Cf. *State* v. *Weinberg*, 215 Conn. 231, 243–44, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). Consequently, a status or attribute of a person that early common law recognized as a per se ground for disqualification; e.g., *Lucas* v. *State*, 23 Conn. 18, 19–20 (1854) (wife of accused incompetent to testify in criminal proceeding); *State* v. *Gardner*, 1 Root (Conn.) 485, 485 (1793) (person convicted of theft incompetent to testify); is now merely a factor bearing on that person's credibility as a witness. **[**C. Tait & J. LaPlante, Connecticut Evidence (Sup. 1999) § 7.1, p. 83.**]**

Section 6-1 is consistent with the development of state statutory law, which has eliminated several automatic grounds for witness incompetency. E.g., General Statutes § 52-145 (no person is disqualified as witness because of his or her interest in outcome of litigation, disbelief in existence of supreme being or prior criminal conviction); General Statutes § 54-84a (one spouse is competent to testify for or against other spouse in criminal proceeding); General Statutes § 54-86h (no child is automatically incompetent to testify because of age).

The determination of a witness' competency is a preliminary question for the court. E.g., *Manning* v. *Michael*, 188 Conn. 607, 610, 452 A.2d 1157 (1982); *State* v. *Brigandi*, 186 Conn. 521, 534, 442 A.2d 927 (1982); see Section 1-3 (a).

Sec. 6-2. Oath or Affirmation

Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.

COMMENTARY

The rule that every witness must declare that he or she will testify truthfully by oath or affirmation before testifying is well established. *State* v. *Dudicoff*, 109 Conn. 711, 721, 145 A. 655 (1929); **[***Cologne* v. *Westfarms Associates*, 197 Conn. 141, 152–53, 496 A.2d 476 (1985);**]** *Curtiss* v. *Strong*, 4 Day (Conn.) 51, 55, 56 (1809); see Practice Book § 5-3. Section 6-2 recognizes, in accordance with Connecticut law, that a witness may declare that he or she will testify truthfully by either swearing an oath or affirming that he or she will testify truthfully. General Statutes § 1-23**[**; see also *State* v. *Dudicoff*, 109 Conn. 711, 721, 145 A. 655 (1929)**]**.

The standard forms of oaths and affirmations for witnesses are set forth in General Statutes § 1-25. Section 6-2 recognizes that there will be exceptional circumstances in which the court may need to deviate from the standard forms set forth in § 1- 25. See General Statutes § 1-22. In such circumstances, the oath or affirmation shall conform to the general standards set forth in Section 6-2.

Sec. 6-3. Incompetencies

(a) Incapable of understanding the duty to tell the truth. A person may not testify if the court finds the person incapable of understanding the duty to tell the truth, or if the person refuses to testify truthfully.

(b) Incapable of sensing, remembering or expressing oneself. A person may not testify if the court finds the person incapable of receiving correct sensory impressions, or of remembering such impressions, or of expressing himself or herself concerning the matter so as to be understood by the trier of fact either directly or through interpretation by one who can understand the person.

COMMENTARY

Subsections (a) and (b) collectively state the general grounds for witness incompetency recognized at common law. See, e.g., *State* v. *Paolella*, 211 Conn. 672, 689, 561 A.2d 111 (1989); *State* v. *Boulay*, 189 Conn. 106, 108–109, 454 A.2d 724 (1983); *State* v. *Siberon*, 166 Conn. 455, 457–58, 352 A.2d 285 (1974). Although the cases do not expressly mention subsection (a)'s alternative ground for incompetency, namely, "if the person refuses to testify truthfully," it flows from the requirement found in

Section 6-2 that a witness declare by oath or affirmation that he or she will testify truthfully.

The Supreme Court has **[**recently**]** outlined the procedure courts shall follow in determining a witness' competency when one of the Section 6-3 grounds of incompetency is raised. See generally *State* v. *Weinberg*, 215 Conn. 231, 242–44, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 430, 112 L. Ed. 2d 413 (1990). When a party raises an objection with respect to the competency of a witness, the court, as a threshold matter, shall determine whether the witness is "minimally credible": whether the witness is minimally capable of understanding the duty to tell the truth and sensing, remembering and communicating the events to which the witness will testify. See id., 243. If the court determines the witness "passes the test of minimum credibility . . . the [witness'] testimony is admissible and the weight to be accorded it, in light of the witness' incapacity, is a question for the trier of fact." Id., 243–44. Thus, a witness' credibility may still be subject to impeachment on those grounds enumerated in Section 6-3 notwithstanding the court's finding that the witness is competent to testify.

Sec. 6-4. Who May Impeach

The credibility of a witness may be impeached by any party, including the party calling the witness, unless the court determines that a party's impeachment of its own witness is primarily for the purpose of introducing otherwise inadmissible evidence.

COMMENTARY

Section 6-4 reflects the rule announced in *State* v. *Graham*, 200 Conn. 9, 17–18, 509 A.2d 493 (1986). In *Graham*, the Supreme Court abandoned the common-law "voucher" rule; id., 17; which provided that a party could not impeach its own witness except upon a showing of surprise, hostility or adversity, or when the court permitted impeachment in situations in which a witness' in-court testimony was inconsistent with his or her prior out-of-court statements. See, e.g., *State* v. *McCarthy*, 197 Conn. 166, 177, 496 A.2d 190 (1985); *Schmeltz* v. *Tracy*, 119 Conn. 492, 498, 177 A. 520 (1935).

In *Graham* and subsequent decisions; e.g., *State* v. *Williams*, 204 Conn. 523, 531, 529 A.2d 653 (1987); *State* v. *Jasper*, 200 Conn. 30, 34, 508 A.2d 1387 (1986); the court has supplied a two-pronged test for determining whether impeachment serves as

a mere subterfuge for introducing substantively inadmissible evidence. A party's impeachment of a witness it calls by using the witness' prior inconsistent statements is improper when: (1) the primary purpose of calling the witness is to impeach the witness; and (2) the party introduces the statement in hope that the jury will use it substantively. E.g., *State* v. *Graham*, supra, 200 Conn. 18. The court in *Graham* instructed trial courts to prohibit impeachment when both prongs are met. Id. Note, however, that if the prior inconsistent statement is substantively admissible under *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); see Section 8-5 (1); or under any other exceptions to the hearsay rule, the limitation on impeachment will not apply because impeachment with the prior inconsistent statement cannot result in introducing otherwise inadmissible evidence. Cf. *State* v. *Whelan*, supra, 753 n.8.

Section 6-4 applies to all parties in both criminal and civil cases and applies to all methods of impeachment authorized by the Code.

Sec. 6-5. Evidence of Bias, Prejudice or Interest

The credibility of a witness may be impeached by evidence showing bias for, prejudice against, or interest in any person or matter that might cause the witness to testify falsely.

COMMENTARY

Section 6-5 **[**embodies**]** reflects **[**well**]** established law. E.g., *State* v. *Alvarez*, 216 Conn. 301, 318–19, 579 A.2d 515 (1990); Fordiani's Petition for Naturalization, 99 Conn. 551, 560–62, 121 A. 796 (1923); see General Statutes § 52-145 (b) (''[a] person's interest in the outcome of [an] action . . . may be shown for the purpose of affecting his [or her] credibility"); see also *State* v. *Bova*, 240 Conn. 210, 224–26, 690 A.2d 1370 (1997); *State* v. *Barnes*, 232 Conn. 740, 745–47, 657 A.2d 611 (1995).

While a party's inquiry into facts tending to establish a witness' bias, prejudice or interest is generally a matter of right, the scope of examination and extent of proof on these matters are subject to judicial discretion. E.g., *State* v. *Mahmood*, 158 Conn. 536, 540, 265 A.2d 83 (1969); see also Section 4-3.

The range of matters potentially giving rise to bias, prejudice or interest is virtually endless. See *State* v. *Cruz*, 212 Conn. 351, 360, 562 A.2d 1071 (1989). A witness may be biased by having a friendly feeling toward a person or by favoring a certain position based upon a familial or employment relationship. E.g., *State* v. *Santiago*, 224 Conn. 325, 332, 618 A.2d 32 (1992); *State* v. *Asherman*, 193 Conn. 695, 719–20, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). A witness may be prejudiced against a person or position based upon a prior quarrel with the person against whom the witness testifies; see *Beardsley* v. *Wildman*, 41 Conn. 515, 517 (1874); or by virtue of the witness' animus toward a class of persons. *Jacek* v. *Bacote*, 135 Conn. 702, 706, 68 A.2d 144 (1949). A witness may have an interest in the outcome of the case independent of any bias or prejudice when, for example, he or she has a financial stake in its outcome; see *State* v. *Colton*, 227 Conn. 231, 250–51, 630 A.2d 577 (1993); or when the witness has filed a civil suit arising out of the same events giving rise to the criminal trial at which the witness testifies against the defendant. *State* v. *Arline*, 223 Conn. 52, 61, 612 A.2d 755 (1992).

Because evidence tending to show a witness' bias, prejudice or interest is never collateral; e.g., *State* v. *Chance*, 236 Conn. 31, 58, 671 A.2d 323 (1996); impeachment of a witness on these matters may be accomplished through the introduction of extrinsic evidence, in addition to examining the witness directly. See, e.g., *State* v. *Bova*, supra, 240 Conn. 219; *Fairbanks* v. *State*, 143 Conn. 653, 657, 124 A.2d 893 (1956). The scope and extent of proof through the use of extrinsic evidence is subject to the court's discretion, however; *State* v. *Colton*, supra, 227 Conn. 249; *State* v. *Shipman*, 195 Conn. 160, 163, 486 A.2d 1130 (1985); and whether extrinsic evidence may be admitted to show bias, prejudice or interest without a foundation is also within the court's discretion. E.g., *State* v. *Townsend*, 167 Conn. 539, 560, 356 A.2d 125, cert. denied, 423 U.S. 846, 96 S. Ct. 84, 46 L. Ed. 2d 67 (1975); *State* v. *Crowley*, 22 Conn. App. 557, 559, 578 A.2d 157, cert. denied, 216 Conn. 816, 580 A.2d 62 (1990).

The offering party must establish the relevancy of impeachment evidence by laying a proper foundation; *State* v. *Barnes*, supra, 232 Conn. 747; which may be established in one of three ways: (1) by making an offer of proof; (2) the record

independently may establish the relevance of the proffered evidence; or (3) "stating a 'good faith belief' that there is an adequate factual basis for [the] inquiry." Id.

Sec. 6-6. Evidence of Character and Conduct of Witness

(a) Opinion and reputation evidence of character. The credibility of a witness may be impeached or supported by evidence of character for truthfulness or untruthfulness in the form of opinion or reputation. Evidence of truthful character is admissible only after the character of the witness for truthfulness has been impeached.

(b) Specific instances of conduct.

(1) General rule. A witness may be asked, in good faith, about specific instances of conduct of the witness, if probative of the witness' character for untruthfulness.

(2) Extrinsic evidence. Specific instances of the conduct of a witness, for the purpose of impeaching the witness' credibility under subdivision (1), may not be proved by extrinsic evidence.

(c) Inquiry of character witness. A witness who has testified about the character of another witness for truthfulness or untruthfulness may be asked on cross-examination, in good faith, about specific instances of conduct of the other witness if probative of the other witness' character for truthfulness or untruthfulness.

COMMENTARY

Section 4-4 (a) (3) **[**bars the admission of character evidence when offered to prove that a person acted in conformity therewith, but is subject to exceptions. One exception is evidence bearing on a witness' character for truthfulness or untruthfulness when offered on the issue of credibility. See Section 4-4 (a) (3)**]** provides for the admission of evidence addressing the character of a witness for truthfulness or untruthfulness to support or impeach the credibility of such witness. Section 6-6 **[**regulates the admissibility of such evidence and the means by which such evidence, if admissible, may be introduced**]** addresses when such evidence is admissible and the appropriate methods of proof.

(a) Opinion and reputation evidence of character.

The first sentence of subsection (a) reflects common law. See, e.g., *State* v. *Gould*, 241 Conn. 1, 19, 695 A.2d 1022 (1997); *State* v. *Gelinas*, 160 Conn. 366, 367–

68, 279 A.2d 552 (1971); *State* v. *Pettersen*, 17 Conn. App. 174, 181, 551 A.2d 763 (1988). Evidence admitted under subsection (a) must relate to the witness' character for truthfulness and thus general character evidence is inadmissible. **[**C. Tait & J. LaPlante**,** Connecticut Evidence (2d Ed. 1988) § 7.23.1, p. 205;**].** **[**s**]**See, e.g., *Dore* v. *Babcock*, 74 Conn. 425, 429–30, 50 A. 1016 (1902).

The second sentence of subsection (a) also adopts common law. See *State* v. *Ward*, 49 Conn. 429, 442 (1881); *Rogers* v. *Moore*, 10 Conn. 13, 16–17 (1833); see also *State* v. *Suckley*, 26 Conn. App. 65, 72, 597 A.2d 1285 (1991).

A foundation establishing personal contacts with the witness or knowledge of the witness' reputation in the community is a prerequisite to the introduction of opinion or reputation testimony bearing on a witness' character for truthfulness. See, e.g., *State* v. *Gould*, supra, 241 Conn. 19–20; *State* v. *George*, 194 Conn. 361, 368–69, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985). Whether an adequate foundation has been laid is a matter within the discretion of the court. E.g., *State* v. *Gould*, supra, 19; *State* v. *George*, supra, 368; see Section 1-3 (a).

(b) Specific instances of conduct.

Under subdivision (1), a witness may be asked about his or her specific instances of conduct that, while not resulting in criminal conviction, are probative of the witness' character for untruthfulness. See, e.g., *State* v. *Chance*, 236 Conn. 31, 60, 671 A.2d 323 (1996); *State* v. *Roma*, 199 Conn. 110, 116–17, 513 A.2d 116 (1986); *Martyn* v. *Donlin*, 151 Conn. 402, 408, 198 A.2d 700 (1964). Such inquiries must be made in good faith. See *State* v. *Chance*, supra, 60; *Marsh* v. *Washburn*, 11 Conn. App. 447, 452–53, 528 A.2d 382 (1987). The misconduct evidence sought to be admitted must be probative of the witness' character for untruthfulness, not merely general bad character. E.g., *Demers* v. *State*, 209 Conn. 143, 156, 547 A.2d 28 (1988); *Vogel* v. *Sylvester*, 148 Conn. 666, 675, 174 A.2d 122 (1961).

Impeachment through the use of specific instance evidence under subdivision (1) is committed to the trial court's discretionary authority. *State* v. *Vitale*, 197 Conn. 396, 401, 497 A.2d 956 (1985). The trial court must, however, exercise its discretionary authority by determining whether the specific instance evidence is probative of the witness' character for untruthfulness, and whether its probative value is outweighed by

any of the Section 4-3 balancing factors. *State* v. *Martin*, 201 Conn. 74, 88–89, 513 A.2d 116 (1986); see Section 4-3.

Inquiry into specific instances of conduct bearing on the witness' character for untruthfulness is not limited to cross-examination; such inquiry may be initiated on direct examination, redirect or recross. See *Vogel* v. *Sylvester*, supra, 148 Conn. 675 (direct examination). Although inquiry often will occur during cross-examination, subsection (b) contemplates inquiry on direct or redirect examination when, for example, a calling party impeaches its own witness pursuant to Section 6-4, or anticipates impeachment by explaining the witness' untruthful conduct or portraying it in a favorable light.

Subdivision (1) only covers inquiries into specific instances of conduct bearing on a witness' character for untruthfulness. It does not cover inquiries into conduct relating to a witness' character for truthfulness, inasmuch as prior cases addressing the issue have been limited to the former situation. See, e.g., *State* v. *Dolphin*, 195 Conn. 444, 459, 488 A.2d 812 (1985). Nothing in subsection (b) precludes a court, in its discretion, from allowing inquiries into specific instances of conduct reflecting a witness' character for truthfulness when the admissibility of such evidence is not precluded under this or other provisions of the Code.

Subdivision (2) recognizes well settled law. E.g., *State* v. *Chance*, supra, 236 Conn. 60; *State* v. *Martin*, supra, 201 Conn. 86; *Shailer* v. *Bullock*, 78 Conn. 65, 69, 70, 61 A. 65 (1905). The effect of subdivision (2) is that the examiner must introduce the witness' untruthful conduct solely through examination of the witness himself or herself. *State* v. *Chance*, supra, 61; *State* v. *Horton*, 8 Conn. App. 376, 380, 513 A.2d 168, cert. denied, 201 Conn. 813, 517 A.2d 631 (1986).

(c) Inquiry of character witness.

Subsection (c) provides a means by which the basis of a character witness' testimony may be explored and is consistent with common law. *State* v. *McGraw*, 204 Conn. 441, 446–47, 528 A.2d 821 (1987); see *State* v. *DeAngelis*, 200 Conn. 224, 236–37, 511 A.2d 310 (1986); *State* v. *Martin*, 170 Conn. 161, 165, 365 A.2d 104 (1976). Subsection (c) is a particularized application of Section 4-4 (c), which authorizes a cross-examiner to ask a character witness about specific instances of conduct that relate to a particular character trait of the person about which the witness previously

testified. As with subsection (b), subsection (c) requires that inquiries be made in good faith.

The cross-examiner's function in asking the character witness about the principal witness' truthful or untruthful conduct is not to prove that the conduct did in fact occur; *State* v. *Turcio*, 178 Conn. 116, 126, 422 A.2d 749 (1979), cert. denied, 444 U.S. 1013, 100 S. Ct. 661, 62 L. Ed. 2d 642 (1980); or to support or attack the principal witness' character for truthfulness; *State* v. *McGraw*, supra, 204 Conn. 447; but to test the soundness of the character witness' testimony "by ascertaining [the character witness'] good faith, his [or her] source and amount of information and his [or her] accuracy." *State* v. *Martin*, supra, 170 Conn. 165.

Because extrinsic evidence of untruthful or truthful conduct is inadmissible to support or attack a witness' character for truthfulness; e.g., *State* v. *McGraw*, supra, 204 Conn. 446; questions directed to the character witness on cross-examination concerning the principal witness' conduct should not embrace any details surrounding the conduct. *State* v. *Martin*, supra, 170 Conn. 165; accord *State* v. *Turcio*, supra, 178 Conn. 126. The accepted practice is to ask the character witness whether he or she knows or has heard of the principal witness' truthful or untruthful conduct. See *State* v. *McGraw*, supra, 447. **[**; C. Tait & J. LaPlante, supra, § 8.3.6, pp. 240–41.**]**

Sec. 6-7. Evidence of Conviction of Crime

(a) General rule. For the purpose of impeaching the credibility of a witness, evidence that a witness has been convicted of a crime is admissible if the crime was punishable by imprisonment for more than one year. In determining whether to admit evidence of a conviction, the court shall consider:

(1) the extent of the prejudice likely to arise**[**,**]**;

(2) the significance of the particular crime in indicating untruthfulness**[**,**]**; and

(3) the remoteness in time of the conviction.

(b) Methods of proof. Evidence that a witness has been convicted of a crime may be introduced by the following methods:

(1) examination of the witness as to the conviction**[**,**]**; or

(2) introduction of a certified copy of the record of conviction into evidence, after the witness has been identified as the person named in the record.

(c) Matters subject to proof. If, for purposes of impeaching the credibility of a witness, evidence is introduced that the witness has been convicted of a crime, the court shall limit the evidence to the name of the crime and when and where the conviction was rendered, except that (1) the court may exclude evidence of the name of the crime and (2) if the witness denies the conviction, the court may permit evidence of the punishment imposed.

(d) Pendency of appeal. The pendency of an appeal from a conviction does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible.

COMMENTARY

(a) General rule.

Subsection (a) recognizes the trial court's discretionary authority to admit prior crimes evidence; e.g., **[***State v. Sauris*, 227 Conn. 389, 409, 631 A.2d 238 (1993)**]** *State v. Skakel*, 276 Conn. 633, 738, 888 A.2d 985 (2006); Heating Acceptance Corp. v. Patterson, 152 Conn. 467, 472, 208 A.2d 341 (1965); see General Statutes § 52-145 (b); subject to consideration of the three factors set forth in the rule. *State* v. *Nardini*, 187 Conn. 513, 522, 447 A.2d 396 (1982); accord **[***State* v. *Carter*, 228 Conn. 412, 430, 636 A.2d 821 (1994)**]** *State v. Skakel*, supra, 738; *State* v. *Cooper*, 227 Conn. 417, 434–35, 630 A.2d 1043 (1993).

A determination of youthful offender status pursuant to chapter 960a of the General Statutes does not constitute a conviction for purposes of subsection (a). *State* v. *Keiser*, 196 Conn. 122, 127–28, 491 A.2d 382 (1985); see General Statutes § 54-76k.

The trial court must balance the probative value of the conviction evidence against its prejudicial impact. *State* v. *Harrell*, 199 Conn. 255, 262, 506 A.2d 1041 (1986); see Section 4-3; see also *Label Systems, Inc.* v. *Aghamohammadi*, 270 Conn. 291, 313, 852 A.2d 703 (2004) (trial court must weigh "[1] the potential for the evidence to cause prejudice, [2] its significance to indicate untruthfulness, and [3] its remoteness in time"). The balancing test applies whether the witness against whom the conviction evidence is being offered is the accused or someone other than the accused. See *State*

v. *Cooper*, supra, 227 Conn. 435; *State* v. *Pinnock*, 220 Conn. 765, 780–81, 601 A.2d 521 (1992). The party objecting to the admission of conviction evidence bears the burden of showing the prejudice likely to arise from its admission. E.g., *State* v. *Harrell*, supra, 262; *State* v. *Binet*, 192 Conn. 618, 624, 473 A.2d 1200 (1984).

The Supreme Court has established no absolute time limit that would bar the admissibility of certain convictions, although it has suggested a ten year limit on admissibility measured from the later of the date of conviction or the date of the witness' release from the confinement imposed for the conviction. **[***State* v. *Carter*, supra, 228 Conn. 431; *State* v. *Sauris*, supra, 227 Conn. 409–10**]** *Label Systems, Inc.* v. *Aghamohammadi*, supra, 270 Conn. 309; *State* v. *Nardini*, supra, 187 Conn. 526. The court has noted, however, that those "convictions having . . . special significance upon the issue of veracity [may] surmount the standard bar of ten years . . . ." *State* v. *Nardini*, supra, 526; accord **[***State v. Carter*, supra, 431**]** *Label Systems, Inc.* v. *Aghamohammadi*, supra, 309 ("unless a conviction had some special significance to untruthfulness, the fact that it was more than ten years old would most likely preclude its admission under *our balancing test*" [emphasis in original]). Ultimately, the trial court retains discretion to determine whether the remoteness of a particular conviction will call for its exclusion. See **[***State v. Sauris*, supra, 409**]** *Label Systems, Inc.* v. *Aghamohammadi*, supra, 313; *State* v. *Nardini*, supra, 526.

A conviction that qualifies under the rule may be admitted to attack credibility, whether the conviction was rendered in this state or another jurisdiction. *State* v. *Perelli*, 128 Conn. 172, 180, 21 A.2d 389 (1941); see *State* v. *Grady*, 153 Conn. 26, 30, 211 A.2d 674 (1965). When a conviction from a jurisdiction other than Connecticut is used, choice of law principles govern whether, for purposes of the "more than one year" requirement, the source of the time limitation derives from the law of the jurisdiction under which the witness was convicted or from an analogous provision in the General Statutes. See *State* v. *Perelli*, supra, 180. **[**Thus, the Code takes no position on this issue.**]**

(b) Methods of proof.

Subsection (b) restates the two common-law methods of proving a witness' criminal conviction. E.g., **[***State* v. *Sauris*, supra, 227 Conn. 411;**]** *State* v. *Denby*, 198

Conn. 23, 29–30, 501 A.2d 1206 (1985), cert. denied, 475 U.S. 1097, 106 S. Ct. 1497, 89 L. Ed. 2d 898 (1986); *State* v. *English*, 132 Conn. 573, 581–82, 46 A.2d 121 (1946). Although these are the traditional methods of proving a witness' criminal conviction, nothing in subsection (b) precludes other methods of proof when resort to the traditional methods prove to be unavailing.

Use of the disjunctive "or'' is not intended to preclude resort to one method of proof merely because the other method of proof already has been attempted.

(c) Matters subject to proof.

Subsection (c) is consistent with common law. *State* v. *Robinson*, 227 Conn. 711, 736, 631 A.2d 288 (1993) (name of crime and date and place of conviction); *State* v. *Dobson*, 221 Conn. 128, 138, 602 A.2d 977 (1992) (date and place of conviction); *State* v. *Pinnock*, supra, 220 Conn. 780 (name of crime and date of conviction). Inquiry into other details and circumstances surrounding the crime for which the witness was convicted is impermissible. See *State* v. *Denby*, supra, 198 Conn. 30; *State* v. *Marino*, 23 Conn. App. 392, 403, 580 A.2d 990, cert. denied, 216 Conn. 818, 580 A.2d 63 (1990).

The rule preserves the court's common-law discretion to limit the matters subject to proof. See, e.g., *State* v. *Dobson*, supra, 221 Conn. 138; *State* v. *Pinnock*, supra, 220 Conn. 780. The court's discretion to exclude the name of the crime generally has been limited to those situations in which the prior conviction does not reflect directly on veracity. See, e.g., *State* v. *Pinnock*, supra, 780, 782. When the court orders the name of the crime excluded, the examiner may refer to the fact that the witness was convicted for the commission of an unspecified crime that was punishable by imprisonment for more than one year. See *State* v. *Dobson*, supra, 138; *State* v. *Geyer*, supra, 194 Conn. 16.

The rule also reflects the holding in *State* v. *Robinson*, supra, 227 Conn. 736. If the witness admits the fact of conviction, the punishment or sentence imposed for that conviction is inadmissible. *State* v. *McClain*, 23 Conn. App. 83, 87–88, 579 A.2d 564 (1990).

(d) Pendency of appeal.

Subsection (d) restates the rule from cases such as *State* v. *Varszegi*, 36 Conn. App. 680, 685–86, 653 A.2d 201 (1995), aff'd on other grounds, 236 Conn. 266, 673 A.2d 90 (1996), and *State* v. *Schroff*, 3 Conn. App. 684, 689, 492 A.2d 190 (1985).

Sec. 6-8. Scope of Cross-Examination and Subsequent Examinations; Leading Questions

(a) Scope of cross-examination and subsequent examinations. Cross-examination and subsequent examinations shall be limited to the subject matter of the preceding examination and matters affecting the credibility of the witness, except in the discretion of the court.

(b) Leading questions. Leading questions shall not be used on the direct or redirect examination of a witness, except that the court may permit leading questions, in its discretion, in circumstances such as, but not limited to, the following:

(1) when a party calls a hostile witness or a witness identified with an adverse party,

(2) when a witness testifies so as to work a surprise or deceit on the examiner,

(3) when necessary to develop a witness' testimony, or

(4) when necessary to establish preliminary matters.

COMMENTARY

(a) Scope of cross-examination and subsequent examinations.

Subsection (a) is in accord with common law. E.g., *State* v. *Ireland*, 218 Conn. 447, 452, 590 A.2d 106 (1991) (scope of cross-examination); *Mendez* v. *Dorman*, 151 Conn. 193, 198, 195 A.2d 561 (1963) (same); see *State* v. *Jones*, 205 Conn. 638, 666, 534 A.2d 1199 (1987) (scope of redirect examination); *Grievance Committee* v. *Dacey*, 154 Conn. 129, 151–52, 222 A.2d 220 (1966), appeal dismissed, 386 U.S. 683, 87 S. Ct. 1325, 18 L. Ed. 2d 404 (1967) (same). The trial court is vested with discretion in determining whether evidence offered on cross-examination or during a subsequent examination relates to subject matter brought out during the preceding examination. See *Canton Motorcar Works, Inc.* v. *DiMartino*, 6 Conn. App. 447, 458, 505 A.2d 1255 (1986); *Larensen* v. *Karp*, 1 Conn. App. 228, 230, 470 A.2d 715 (1984).

Subsection (a) recognizes the discretion afforded the trial judge in determining the scope of cross-examination and subsequent examinations. E.g., *State* v. *Prioleau*, 235 Conn. 274, 302, 664 A.2d 793 (1995) (cross-examination); see *State* v. *Conrod*, 198 Conn. 592, 596, 504 A.2d 494 (1986) (redirect examination). Thus, subsection (a) does not preclude a trial judge from permitting a broader scope of inquiry in certain circumstances, such as when a witness could be substantially inconvenienced by having to testify on two different occasions.

(b) Leading questions.

Subsection (b) addresses the use of leading questions on direct or redirect examination. A leading question is a question that suggests the answer desired by the examiner in accord with the examiner's view of the facts. E.g., *Hulk* v. *Aishberg*, 126 Conn. 360, 363, 11 A.2d 380 (1940); *State* v. *McNally*, 39 Conn. App. 419, 423, 665 A.2d 137 (1995)**.** **[**; C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 7.12.1, p. 159.**]**

Subsection (b) restates the common-law rule. See *Mendez* v. *Dorman*, supra, 151 Conn. 198; *Bradbury* v. *South Norwalk*, 80 Conn. 298, 302–303, 68 A. 321 (1907). The court is vested with discretion in determining whether leading questions should be permitted on direct or redirect examination. E.g., *Hulk* v. *Aishberg*, supra, 126 Conn. 363; *State* v. *Russell*, 29 Conn. App. 59, 67, 612 A.2d 471, cert. denied, 224 Conn. 908, 615 A.2d 1049 (1992).

Subsection (b) sets forth illustrative exceptions to the general rule that are discretionary with the court. Exceptions (1) and (2) are well established. *Mendez* v. *Dorman*, supra, 151 Conn. 197–98; *State* v. *Stevens*, 65 Conn. 93, 98–99, 31 A. 496 (1894); *Stratford* v. *Sanford*, 9 Conn. 275, 284 (1832). For purposes of exception (1), "a witness identified with an adverse party" also includes the adverse party.

Under exception (3), the court may allow the calling party to put leading questions to a young witness who is apprehensive or reticent; e.g., *State* v. *Salamon*, 287 Conn. 509, 559–60, 949 A.2d 1092 (2008) (excessively nervous minor victim of assault); *State* v. *Hydock*, 51 Conn. App. 753, 765, 725 A.2d 379 (minor victim who "evinced fear and hesitancy to testify"), cert. denied, 248 Conn. 929, 733 A.2d 845 (1999); *State* v. *Parsons*, 28 Conn. App. 91, 104, 612 A.2d 73, cert. denied, 223 Conn.

920, 614 A.2d 829 (1992); or to a witness who has trouble communicating. [, by virtue of either a disability or language deficiency; C. Tait & J. LaPlante, supra, § 7.12.2, p. 161; or] See *State* v. *Salamon*, supra, 560 (native French speaker with substantial difficulty testifying in English). The court may also allow the calling party to put leading questions to a witness whose recollection is exhausted. See *State* v. *Palm*, 123 Conn. 666, 675– 76, 197 A.2d 168 (1938).

Under exception (4), the court has discretion to allow a calling party to use leading questions to develop preliminary matters in order to expedite the trial. *State* v. *Russell*, supra, 29 Conn. App. 68; see *State* v. *Castelli*, 92 Conn. 58, 65–66, 101 A.2d 476 (1917).

It is intended that subsection (b) will coexist with General Statutes § 52-178. That statute allows any party in a civil action to call an adverse party, or certain persons identified with an adverse party, to testify as a witness, and to examine that person "to the same extent as an adverse witness." The statute has been interpreted to allow the calling party to elicit testimony from the witness using leading questions. See *Fasanelli* v. *Terzo*, 150 Conn. 349, 359, 189 A.2d 500 (1963)[.]; see also *Mendez* v. *Dorman*, supra, 151 Conn. 196–98. [To the extent that the facts in a particular case place the examination of a witness within the ambit of § 52-178, the use of leading questions is not discretionary with the court, notwithstanding the provisions of subsection (b).]

Sec. 6-9. Object or Writing Used To Refresh Memory

(a) While testifying. Any object or writing may be used by a witness to refresh the witness' memory while testifying. If, while a witness is testifying, an object or writing is used by the witness to refresh the witness' memory, any party may inspect the object or writing and cross-examine the witness on it. Any party may introduce the object or writing in evidence if it is otherwise admissible under the Code.

(b) Before testifying. If a witness, before testifying, uses an object or writing to refresh the witness' memory for the purpose of testifying, the object or writing need not be produced for inspection unless the court, in its discretion, so orders. Any party may introduce the object or writing in evidence if it is otherwise admissible under the Code.

COMMENTARY

(a) While testifying.

Subsection (a) recognizes the practice of refreshing a witness' recollection while testifying. If, while testifying, a witness has difficulty recalling a fact or event the witness once perceived, the witness may be shown any object or writing, regardless of authorship, time of making or originality, to refresh the witness' memory. See, e.g., *State* v. *Rado*, 172 Conn. 74, 79, 372 A.2d 159 (1976), cert. denied, 430 U.S. 918, 97 S. Ct. 1335, 51 L. Ed. 2d 598 (1977); *Henowitz* v. *Rockville Savings Bank*, 118 Conn. 527, 529–30, 173 A. 221 (1934); *Neff* v. *Neff*, 96 Conn. 273, 278, 114 A. 126 (1921). The object or writing need not be admissible because the witness will testify from his or her refreshed recollection, not from the object or writing that was used to refresh his or her recollection. See *Krupp* v. *Sataline*, 151 Conn. 707, 708, 200 A.2d 475 (1964); *Neff* v. *Neff*, supra, 279**[.]**; see also *Doyle v. Kamm*, 133 Conn. App. 25, 40, 35 A.3d 308 (2012) (item used to refresh witness' recollection need not be admissible).

The trial court is afforded discretion in controlling the admissibility of refreshed testimony. Specifically, the court is vested with the authority to determine whether the witness' recollection needs to be refreshed, whether the object or writing will refresh the witness' recollection and whether the witness' recollection has been refreshed. See, e.g., *State* v. *Grimes*, 154 Conn. 314, 322, 228 A.2d 141 (1966); see also Section 1-3 (a).

Subsection (a) confers on any party the right to inspect the object or writing used to refresh the witness' recollection while testifying and to cross-examine the witness thereon. E.g., *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Cole*, 189 Conn. 518, 526, 457 A.2d 656 (1983); *State* v. *Grimes*, supra, 154 Conn. 323; *Neff* v. *Neff*, supra, 96 Conn. 280–81. This protection affords the party the opportunity to verify whether the witness' recollection genuinely has been refreshed and, if applicable, to shed light upon any inconsistencies between the writing and the refreshed testimony. See *State* v. *Masse*, 24 Conn. Sup. 45, 56, 186 A.2d 553 (1962); 1 C. McCormick, Evidence **[**(5th Ed. 1999) § 9, p. 36**]** (7th Ed. 2013) § 9, pp. 54–56.

Any party may introduce into evidence the object or writing used to stimulate the witness' recollection if the object or writing is otherwise admissible under other provisions of the Code. **[**See C. Tait & J. LaPlante, Connecticut Evidence (2d Ed. 1988) § 7.14.1 (b), p. 166; cf. *Erie Preserving Co.* v. *Miller*, 52 Conn. 444, 446 (1885)**]** Cf.

Palmer v. *Hartford Dredging Co.*, 73 Conn. 182, 187–88, 47 A. 125 (1900). Section 6-9 does not, however, create an independent exception to the hearsay rule or other exclusionary provisions in the Code. Cf. id. Contrast this rule with Section 8-3 (6), which recognizes a past recollection recorded exception to the hearsay rule.

(b) Before testifying.

Unlike the situation contemplated in subsection (a), in which the witness uses an object or writing to refresh recollection while testifying, subsection (b) covers the situation in which the witness has used an object or writing before taking the stand to refresh his or her memory for the purpose of testifying at trial. In accordance with common law, subsection (b) establishes a presumption against production of the object or writing for inspection in this situation, but vests the court with discretion to order production. *State* v. *Cosgrove*, 181 Conn. 562, 588–89, 436 A.2d 33 (1980); *State* v. *Watson*, 165 Conn. 577, 593, 345 A.2d 532 (1973), cert. denied, 416 U.S. 960, 94 S. Ct. 1977, 40 L. Ed. 2d 311 (1974).

Assuming the court exercises its discretion in favor of production, subsection (b) does not contemplate production of all objects or writings used by a witness prior to testifying at trial. Rather, it contemplates production of only those objects or writings a witness uses before testifying to refresh the witness' memory of facts or events the witness previously perceived.

As with subsection (a), subsection (b) authorizes any party to introduce the object or writing in evidence if it is independently admissible under other provisions of the Code.

For purposes of Section 6-9, a writing may include, but is not limited to, communications recorded in any tangible form.

Sec. 6-10. Prior Inconsistent Statements of Witnesses

(a) Prior inconsistent statements generally. The credibility of a witness may be impeached by evidence of a prior inconsistent statement made by the witness.

(b) Examining witness concerning prior inconsistent statement. In examining a witness concerning a prior inconsistent statement, whether written or not, made by the witness, the statement should be shown to or the contents of the statement disclosed to the witness at that time.

(c) Extrinsic evidence of prior inconsistent statement of witness. If a prior inconsistent statement made by a witness is shown to or if the contents of the statement are disclosed to the witness at the time the witness testifies, and if the witness admits to making the statement, extrinsic evidence of the statement is inadmissible, except in the discretion of the court. If a prior inconsistent statement made by a witness is not shown to or if the contents of the statement are not disclosed to the witness at the time the witness testifies, extrinsic evidence of the statement is inadmissible, except in the discretion of the court.

COMMENTARY

(a) Prior inconsistent statements generally.

Subsection (a) embraces a familiar common-law principle. *State* v. *Avis*, 209 Conn. 290, 302, 551 A.2d 26, cert. denied, 489 U.S. 1097, 109 S. Ct. 1570, 103 L. Ed. 2d 937 (1989); *G & R Tire Distributors, Inc.* v. *Allstate Ins. Co.*, 177 Conn. 58, 60–61, 411 A.2d 31 (1979); *Beardsley* v. *Wildman*, 41 Conn. 515, 516 (1874).

Impeachment of a witness' in-court testimony with the witness' prior inconsistent statements is proper only if the prior statements are in fact "inconsistent" with the witness' testimony. E.g., *State* v. *Richardson*, 214 Conn. 752, 763, 574 A.2d 182 (1990); *State* v. *Reed*, 174 Conn. 287, 302–303, 386 A.2d 243 (1978). A finding of a statement's inconsistency "is not limited to cases in which diametrically opposed assertions have been made." *State* v. *Whelan*, 200 Conn. 743, 749 n.4, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986). Inconsistencies can be found in omissions, changes of position, denials of recollection or evasive answers. Id., 748–49 n.4. The determination whether an "inconsistency" exists lies within the discretion of the court. *State* v. *Avis*, supra, 209 Conn. 302.

The substantive admissibility of prior inconsistent statements is treated elsewhere in the Code. See Section 8-5 (1).

(b) Examining witness concerning prior inconsistent statement.

Subsection (b) addresses the necessity of laying a foundation as a precondition to examining the witness about his or her prior inconsistent statement. It adopts the rule of *State* v. *Saia*, 172 Conn. 37, 46, 372 A.2d 144 (1976). Accord *State* v. *Butler*, 207

Conn. 619, 626, 543 A.2d 270 (1988); *State* v. *Williams*, 204 Conn. 523, 534, 529 A.2d 653 (1987).

Although Connecticut favors the laying of a foundation; see *State* v. *Saia*, supra, 172 Conn. 46; it consistently has maintained that there is "no inflexible rule regarding the necessity of calling the attention of a witness on cross-examination to [the] alleged prior inconsistent statement before . . . questioning him [or her] on the subject . . . ." Id.; see *Adams* v. *Herald Publishing Co*., 82 Conn. 448, 452–53, 74 A. 755 (1909).

(c) Extrinsic evidence of prior inconsistent statement of witness.

The first sentence is consistent with common law. See *G & R Tire Distributors, Inc.* v. *Allstate Ins. Co.*, supra, 177 Conn. 61; see also *Barlow Bros. Co.* v. *Parsons*, 73 Conn. 696, 702–703, 49 A. 205 (1901) (finding extrinsic proof of prior inconsistent statement unnecessary when witness admits to making statement); *State* v. *Graham*, 21 Conn. App. 688, 704, 575 A.2d 1057 (same), cert. denied, 216 Conn. 805, 577 A.2d 1063 (1990); cf. *State* v. *Butler*, supra, 207 Conn. 626 (where witness denies or states that he or she does not recall having made prior statement, extrinsic evidence establishing making of that statement may be admitted). Notwithstanding the general rule, subsection (c) recognizes the court's discretion to admit extrinsic evidence of a witness' prior inconsistent statement even when the examiner lays a foundation and the witness admits making the statement. See *G & R Tire Distributors, Inc.* v. *Allstate Ins. Co.*, supra, 61.

The second sentence reconciles two interrelated principles: the preference for laying a foundation when examining a witness concerning prior inconsistent statements; see subsection (b); and the discretion afforded the trial court in determining the admissibility of extrinsic evidence of a witness' prior inconsistent statements where no foundation has been laid. *State* v. *Saia*, supra, 172 Conn. 46.

Case law forbids the introduction of extrinsic evidence of a witness' prior inconsistent statement when the witness' statement involves a collateral matter, i.e., a matter not directly relevant and material to the merits of the case. E.g., *State* v. *Diaz*, 237 Conn. 518, 548, 679 A.2d 902 (1996); *Johnson* v. *Palomba Co.*, 114 Conn. 108, 115–16, 157 A. 902 (1932).

Sec. 6-11. Prior Consistent Statements of Witnesses; Constancy of Accusation by a Sexual Assault Victim

(a) General rule. Except as provided in this section, the credibility of a witness may not be supported by evidence of a prior consistent statement made by the witness.

(b) Prior consistent statement of a witness. If the credibility of a witness is impeached by (1) a prior inconsistent statement of the witness, (2) a suggestion of bias, interest or improper motive that was not present at the time the witness made the prior consistent statement, or (3) a suggestion of recent contrivance, evidence of a prior consistent statement made by the witness is admissible, in the discretion of the court, to rebut the impeachment.

(c) Constancy of accusation by a sexual assault victim. A person to whom a sexual assault victim has reported the alleged assault may testify that the allegation was made and when it was made, provided the victim has testified to the facts of the alleged assault and to the identity of the person or persons to whom the assault was reported. Any testimony by the witness about details of the assault shall be limited to those details necessary to associate the victim's allegations with the pending charge. The testimony of the witness is admissible only to corroborate the victim's testimony and not for substantive purposes.

COMMENTARY

(a) General rule.

Connecticut's rule on the admissibility of prior consistent statements is phrased in terms of a general prohibition subject to exceptions. E.g., *State* v. *Valentine*, 240 Conn. 395, 412–13, 692 A.2d 727 (1997); *State* v. *Dolphin*, 178 Conn. 564, 568–69, 424 A.2d 266 (1979). Exceptions to the general prohibition are set forth in subsections (b) and (c).

(b) Prior consistent statement of a witness.

Common law permits the use of a witness' prior statement consistent with the witness' in-court testimony to rehabilitate the witness' credibility after it has been impeached via one of the three forms of impeachment listed in the rule. E.g., *State* v. *Valentine*, supra, 240 Conn. 413; *State* v. *Brown*, 187 Conn. 602, 607–608, 447 A.2d 734 (1982). The cases sometimes list a fourth form of impeachment—a claim of inaccurate memory—under which prior consistent statements could be admitted to

repair credibility. E.g., *State* v. *Valentine*, supra, 413; *State* v. *Anonymous* (83-FG), 190 Conn. 715, 729, 463 A.2d 533 (1983). This form of impeachment is not included because it is subsumed under the "impeachment by prior inconsistent statements'' category. The only conceivable situation in which a prior consistent statement could be admitted to counter a claim of inaccurate memory involves: (1) impeachment by a prior inconsistent statement made some time after the event when the witness' memory had faded; and (2) support of the witness' in-court testimony by showing a prior consistent statement made shortly after the event when the witness' memory was fresh. Cf., e.g., *Brown* v. *Rahr*, 149 Conn. 743, 743–44, 182 A.2d 629 (1962); *Thomas* v. *Ganezer*, 137 Conn. 415, 418–21, 78 A.2d 539 (1951).

Although Connecticut has no per se requirement that the prior consistent statement precede the prior inconsistent statement used to attack the witness' credibility; see *State* v. *McCarthy*, 179 Conn. 1, 18, 425 A.2d 924 (1979); the trial court may consider the timing of the prior consistent statement as a factor in assessing its probative value.

Prior consistent statements introduced under subsection (b) are admissible for the limited purpose of repairing credibility and are not substantive evidence. E.g., *State* v. *Brown*, supra, 187 Conn. 607; *Thomas* v. *Ganezer*, supra, 137 Conn. 421.

In stating that evidence of a witness' prior consistent statement is admissible "in the discretion of the court,'' Section 6-11 stresses the broad discretion afforded the trial judge in admitting this type of evidence. See *Thomas* v. *Ganezer*, supra, 137 Conn. 420; cf. *State* v. *Mitchell*, 169 Conn. 161, 168, 362 A.2d 808 (1975), overruled in part on other grounds by *State* v. *Higgins*, 201 Conn. 462, 472, 518 A.2d 631 (1986).

(c) Constancy of accusation by a sexual assault victim.

Subsection (c) reflects the supreme court's **[**recent**]** modification of the constancy of accusation rule in *State* v. *Troupe*, 237 Conn. 284, 304, 677 A.2d 917 (1996). See *State* v. *Samuels*, 273 Conn. 541, 547–49, 871 A.2d 1005 (2005).

Evidence introduced under subsection (c) is admissible for corroborative purposes only. Evidence may be introduced substantively only where permitted elsewhere in the Code. E.g., Section 8-3 (2) (spontaneous utterance hearsay exception); see *State* v. *Troupe*, supra, 237 Conn. 304 n.19. Upon request, the court

shall give a limiting instruction regarding the admission of constancy of accusation testimony. See Conn. Code. Evid. § 1-4; *State v. Salazar*, 151 Conn. App. 463, 475-76, 93 A.3d 1192 (2014).

Admissibility is contingent on satisfying the relevancy and balancing standards found in Sections 4-1 and 4-3, respectively. See **[**id.**]** *State* v. *Troupe*, supra, 305 & n.20.