Foreword

The Connecticut Code of Evidence was adopted by the judges of the Superior Court on June 28, 1999, to be effective January 1, 2000. The adoption of the Code signified the culmination of work that had been in progress since 1993 when Supreme Court Justice David M. Borden was asked to chair a committee of the Connecticut Law Revision Commission charged with drafting a proposed code of evidence for Connecticut. The members of this drafting committee included: Professor Colin C. Tait of the University of Connecticut School of Law; Supreme Court Justice Joette Katz; Appellate Court Judge Paul M. Foti; Superior Court Judges Julia L. Aurigemma, Samuel Freed and Joseph Q. Koletsky; Attorneys Robert B. Adelman, Jeffrey Apuzzo, Joseph G. Bruckmann, William Dow III, David Elliot, Susann E. Gill, Donald R. Holtman, Houston Putnam Lowry, Jane S. Scholl, and Eric W. Wiechmann; Law Revision Commission members Jon P. FitzGerald, Representative Arthur J. O'Neill, Superior Court Judge Elliot N. Solomon, and Senator Thomas F. Upson; and Law Revision Commission Senior Attorney Jo A. Roberts and Staff Attorney Eric M. Levine.

The drafting committee completed its work in September, 1997. After receiving public comment, the drafting committee submitted its work product to the full Law Revision Commission, which voted to adopt the proposed code and commentary in December, 1997. Thereafter, the proposed code and commentary were submitted to the Judiciary Committee of the General Assembly for consideration during the 1998 legislative session. Before commencement of the session, however, certain members of the General Assembly had suggested that, for various reasons, a code of evidence should be adopted, if at all, by the judges of the Superior Court pursuant to their rule-making authority rather than by legislation. Thus, the Judiciary Committee urged then Supreme Court Chief Justice Robert J. Callahan to have the judges of the Superior Court consider adopting the proposed code as rules of court.

In response, Chief Justice Callahan appointed a committee to consider and review the proposed code and its commentary for adoption by the judges of the Superior Court. This committee was chaired by Justice Katz and included Appellate Court Judge Barry R. Schaller, Superior Court Judges Aurigemma, Thomas A. Bishop, Thomas J. Corradino, Freed, John F. Kavanewsky, Jr., Koletsky, and William B. Rush, Professor Tait, and Attorneys Roberts and Levine. This committee reviewed the proposed code and commentary from June, 1998, until September, 1998, made changes to various parts thereof and then submitted its final work product to the Rules Committee for approval. The Rules Committee unanimously approved the proposed code and commentary. Thereafter, the proposed code and commentary were subject to a public hearing in June, 1999, and finally were adopted by the judges on June 28, 1999.

An oversight committee was created by the judges of the Superior Court when they adopted the Code, for the purpose of monitoring the development of the Code and making recommendations for future revision and clarification. The membership of the committee included: Justice Katz (chair), Superior Court Judges Bishop, Corradino, Beverly J. Hodgson, Kavanewsky, Koletsky, and Michael R. Sheldon, Attorneys Adelman, Bruckmann, Gill, Jack G. Steigelfest, Wiechmann, and Levine (liaison, Office of the Reporter of Judicial Decisions), and Professor Tait. The oversight committee convened in October, 1999, and recommended minor changes to the Code and commentary based primarily on recent developments in the law. Those recommended changes were approved by the Rules Committee, then by the judges of the Superior Court, and were reflected in periodic amendments to the Code and commentary.
In 2008, the Connecticut Supreme Court issued its decision in *State v. DeJesus*, 288 Conn. 418, 953 A.2d 45 (2008), in which the court asserted its common-law supervisory authority to fashion a rule of evidence contrary to an applicable provision of the Code. In *DeJesus*, the court also clarified that the judges of the Superior Court, in their rule-making authority over the Code, do not have the ability to enact rules contrary to Supreme Court precedent. Following *DeJesus*, and Justice Katz’ resignation from the oversight committee, Judge Bishop, then of the Appellate Court, was appointed to chair the committee. Pursuant to the holding of *DeJesus*, the committee recommended changes to Section 4-5, regarding the admission of evidence of other crimes, wrongs or acts. The committee also recommended an addition to Section 8-10, regarding hearsay, to harmonize the Code with legislation enacted by the General Assembly, permitting certain evidence from an alleged victim, twelve years or younger, of sexual assault or other sexual misconduct. Both of these recommendations were approved by the Rules Committee and the judges of the Superior Court and became part of the Code.

In 2014, pursuant to a proposal from the Judicial Branch, the General Assembly enacted No. 14-120 of the 2014 Public Acts (P.A. 14-120), which authorized the Supreme Court to adopt the Code. This legislation, codified at General Statutes § 51-14a, also provides that, if the Supreme Court does, in fact, adopt the Code, the Chief Justice shall appoint a standing advisory committee of judges and lawyers to study the field of evidence law and periodically make recommendations to the Supreme Court regarding any proposed amendments. Additionally, the legislation includes a provision requiring the advisory committee to make periodic reports on its activities to the Judiciary Committee. Finally, the legislation contains a provision making it clear that, notwithstanding this evidence rule-making authority, the Supreme Court retains its common-law authority over the law of evidence, and the General Assembly retains its legislative authority, as well.

Following the passage of P.A. 14-120, the Supreme Court adopted the Code on June 18, 2014, and, shortly thereafter, the following judges and lawyers were appointed to its Code of Evidence Oversight Committee: Judge Bishop, Chair; Appellate Court Judges Eliot D. Prescott and Sheldon; Superior Court Judges Thomas D. Colin, Steven D. Ecker, Barbara B. Jongbloed, and Angela C. Robinson; and Attorneys Adelman, Leonard C. Boyle, Brian S. Carlow, John R. Gulash, Kimberly P. Massicotte, Steigelfest, Lawrence J. Tytla, and Wiechmann. Additionally, Professor Julia Simon-Kerr agreed to serve as academic advisor to the committee in place of Professor Tait, who had retired, Attorney Levine served as liaison to the Office of the Reporter of Judicial Decisions, and Attorney Lori Petruzzelli of the Legal Services Division of the Judicial Branch was appointed to serve as counsel to the committee.

During the fall and winter of 2014–2015, the committee studied whether to recommend amendments to the Code and its commentary regarding computer related evidence. Following the committee’s recommendations to the Supreme Court and a period for public comment, the Supreme Court adopted the committee’s recommendations on May 20, 2015. As an ongoing function, the committee continues to study the Code and the field of evidence to determine whether to make recommendations to the Supreme Court for any changes or additions to the Code.

Hon. Chase T. Rogers  
Chief Justice, Supreme Court  
December 14, 2017
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CONNECTICUT CODE OF EVIDENCE
ARTICLE I—GENERAL PROVISIONS

Sec. 1-1. Short Title; Application

(a) Short title. These rules shall be known and may be cited as the Code of Evidence. The Code of Evidence is hereinafter referred to as the “Code.”

(b) Application of the Code. The Code and the commentary apply to all proceedings in the Superior Court in which facts in dispute are found, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(c) Rules of privilege. Privileges shall apply at all stages of all proceedings in the court.

(d) The Code inapplicable. The Code, other than with respect to privileges, does not apply in proceedings such as, but not limited to, the following:

1. Proceedings before investigatory grand juries, as provided for in General Statutes §§ 54-47b through 54-47f.

2. Proceedings involving questions of fact preliminary to admissibility of evidence pursuant to Section 1-3 of the Code.

3. Proceedings involving sentencing.

4. Proceedings involving probation.

5. Proceedings involving small claims matters.


7. Certain pretrial criminal proceedings in which it has been determined as a matter of statute or decisional law that the rules of evidence do not apply.

(Commentary: Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

(b) Application of the Code.

When the Code was initially adopted by the judges of the Superior Court in 1999 and then readopted by the Supreme Court in 2014, the adoption included both the rules and the commentary, thereby making both equally applicable. See State v. Pierre, 277 Conn. 42, 60, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

The Code is broadly applicable. The Code applies to all civil and criminal bench or jury trials in the Superior Court. The Probate Assembly adopted Probate Rule 82.1, effective July 1, 2013, making the Code applicable to all issues in which facts are in dispute. The Code applies, for example, to the following proceedings:

1. Proceedings before investigatory grand juries; e.g., State v. Avcollie, 188 Conn. 626, 630–31, 453 A.2d 418 (1982),

2. Probable cause hearings conducted pursuant to General Statutes § 54-46a excepting certain matters exempted under General Statutes § 54-46a (b); see State v. Conn, 234 Conn. 97, 110, 662 A.2d 68 (1995); In re Ralph M., 211 Conn. 289, 305–306, 559 A.2d 179 (1989);

3. Juvenile transfer hearings conducted pursuant to General Statutes § 46b-127 as provided in subsection (b) of that provision; In re Michael B., 36 Conn. App. 364, 381, 650 A.2d 1251 (1990); In re Jose M., 36 Conn. App. 381, 384–85, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993);

4. Juvenile proceedings; however, adoption of subsection (b) is not intended to abrogate the well established rule that the court may relax its strict application of the formal rules of evidence to reflect the informal nature of juvenile proceedings provided the fundamental rights of the parties are preserved; In re Juvenile Appeal (85-2), 3 Conn. App. 384, 390, 485 A.2d 1362 (1986); see Anonymous v. Norton, 168 Conn. 421, 425, 362 A.2d 532, cert. denied, 423 U.S. 925, 96 S. Ct. 294, 46 L. Ed. 2d 268 (1975); Practice Book § 32a-2 (a); and

5. Proceedings involving family relations matters enumerated under General Statutes § 46b-1.

The Code is not intended to apply to matters to which the technical rules of evidence traditionally have not applied. Thus, for example, the Code would be inapplicable to hearings on the issuance of bench warrants of arrest or search warrants conducted pursuant to General Statutes §§ 54-2a and 54-33a, respectively; see State v. Delnegris, 153 Conn. 5, 9, 212 A.2d 894 (1965); State v. Caponigro, 4 Conn. Cir. Ct. 603, 609, 238 A.2d 434 (1967).

Matters to which the Code specifically is inapplicable are set forth in subsection (d).

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(2) preliminary determinations of questions of fact by the court made pursuant to Section 1-3 (a); although there is no Connecticut authority specifically stating this inapplicability, it is generally the prevailing view. E.g., Fed. R. Evid. 104 (a); Unif. R. Evid. 104 (a), 13A U.L.A. 16–17 (1999);

(3) sentencing proceedings following trial; e.g., State v. Huey, 199 Conn. 121, 126, 505 A.2d 1242 (1986); see also State v. Pena, 301 Conn. 669, 680–83, 22 A.3d 611 (2011) (in sentencing, trial court may rely on evidence bearing on crimes of which defendant was acquitted). The Code, however, does apply to sentencing proceedings that constitutionally require that a certain fact be found by the trier of fact beyond a reasonable doubt before the defendant is deemed eligible for a particular sentence. See, e.g., Apprendi v. New Jersey, 530 U.S. 466, 490, 121 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) (“other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt”); Bullington v. Missouri, 451 U.S. 430, 446, 101 S. Ct. 1852, 68 L. Ed. 2d 270 (1981) (“many of the protections available to a defendant at a criminal trial also are available at a sentencing hearing . . . in a capital case”);

(4) hearings involving the violation of probation conducted pursuant to General Statutes § 53a-32 (a); State v. White, 169 Conn. 223, 239–40, 363 A.2d 143, cert. denied, 423 U.S. 1025, 96 S. Ct. 469, 46 L. Ed. 2d 398 (1976); In re Marius M., 34 Conn. App. 535, 536, 642 A.2d 733 (1994);

(5) proceedings involving small claims matters; General Statutes § 52-549c (a); see Practice Book § 24-23;

(6) summary contempt proceedings; see generally Practice Book § 1-16; and

(7) certain criminal pretrial proceedings; see, e.g., State v. Fernando A., 294 Conn. 1, 26–30, 981 A.2d 427 (2009); see also General Statutes § 54-644 (b) (hearing on revocation of release).

Nothing in subsection (d) (2) abrogates the common-law rule that in determining preliminary questions of fact upon which the application of certain exceptions to the hearsay rule depends, the court may not consider the declarant’s out-of-court statements themselves in determining those preliminary questions. E.g., State v. Vessichio, 197 Conn. 644, 655, 500 A.2d 1311 (1985) (court may not consider cocounselor statement in determining preliminary questions of fact relating to admissibility of those statements under cocompensator state- ment exception to hearsay rule; see Section 8-3 (1) [E]); cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986); Robles v. Lavin, 176 Conn. 281, 284, 407 A.2d 958 (1978) (determining whether authorized admissions against party opponent exception to hearsay rule applies, authority to speak must be established before alleged agent’s declarations can be introduced; see Section 8-3 (1) [C]); Ferguson v. Smazer, 151 Conn. 226, 231, 196 A.2d 432 (1963) (in determining whether hearsay exception for statements of pedigree and family relationships applies, declarant’s relationship to person to whom statement relates must be established without reference to declarant’s statements; see Section 8-6 [7]).

Sec. 1-2. Purposes and Construction

(a) Purposes of the Code. The purposes of the Code are to adopt Connecticut case law regarding rules of evidence as rules of court and to promote the growth and development of the law of evidence through interpretation of the Code and through judicial rule making to the end that the truth may be ascertained and proceedings justly determined.

(b) Saving clause. Where the Code does not prescribe a rule governing the admissibility of evidence, the court shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience, except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or the Practice Book. The provisions of the Code shall not be construed as precluding any court from recognizing other evidentiary rules not inconsistent with such provisions.

(c) Writing. Any reference in the Code to a writing or any other medium of evidence includes electronically stored information.

(Amended May 20, 2015, to take effect Aug. 1, 2015.)

COMMENTARY

(a) Purposes of the Code.

Subsection (a) provides a general statement of the purposes of the Code. Case-by-case adjudication is integral to the growth and development of evidentiary law and, thus, future definition of the Code will be effected primarily through inter- pretation of the Code and through judicial rule making.

One of the goals of drafting the Code was to place common-law rules of evidence and certain identified statutory rules of evidence into a readily accessible body of rules to which the legal profession conveniently may refer. The Code sometimes states common-law evidentiary principles in language different from that of the cases from which these principles were derived. Because the Code was intended to maintain the status quo, i.e., preserve the common-law rules of evidence as they existed prior to adoption of the Code, its adoption is not intended to modify any prior common-law interpretation of those rules. Nor is the Code intended to change the common-law interpretation of certain incorporated statutory rules of evidence as it existed prior to the Code’s adoption.

In some instances, the Code embraces rules or principles for which no Connecticut case law presently exists, or for which the case law is indeterminate. In such instances, these rules or principles were formulated with due consideration of the recognized practice in Connecticut courts and the policies underlying existing common law, statutes and the Practice Book.


Unlike the Federal Rules of Evidence, which govern both the admissibility of evidence at trial and issues concerning the court’s role in administering and controlling the trial process, the Code was developed with the intention that it would address issues concerning the admissibility of evidence and competency of witnesses, leaving trial management issues to common law, the Practice Book and the discretion of the court.

(b) Saving clause.

Subsection (b) addresses the situation in which courts are faced with evidentiary issues not expressly covered by the
Code. Although the Code will address most evidentiary matters, it cannot possibly address every evidentiary issue that might arise during trial. Subsection (b) sets forth the standard by which courts are to be guided in such instances. Precisely because it cannot address every evidentiary issue, the Code is not intended to be the exclusive set of rules governing the admissibility of evidence. Thus, subsection (b) makes clear that a court is not precluded from recognizing other evidentiary rules not inconsistent with the Code’s provisions.

(c) Writing.

The rules and principles in the Code are intended to govern evidence in any form or medium, including, without limitation, written and printed material, photographs, video and sound recordings, and electronically stored information. As a result of advances in technology, the widespread availability and use of electronic devices for storage and communication, and the proliferation of social media, courts are frequently called upon to rule on the admissibility of electronically stored information. That term, as used in the Code, refers to information that is stored in an electronic medium and is retrievable in perceivable form. See Practice Book § 13-1 (a) (5).

Sec. 1-3. Preliminary Questions

(a) Questions of admissibility generally. Preliminary questions concerning the qualification and competence of a person to be a witness, the existence of a privilege or the admissibility of evidence shall be determined by the court.

(b) Admissibility conditioned on fact. When the admissibility of evidence depends upon connecting facts, the court may admit the evidence upon proof of the connecting facts or subject to later proof of the connecting facts.

COMMENTARY

(a) Questions of admissibility generally.

The admissibility of evidence, qualification of a witness, authentication of evidence or assertion of a privilege often is conditioned on a disputed fact. Was the declarant’s statement made under the stress of excitement? Is the alleged expert a qualified social worker? Was a third party present during a conversation between husband and wife? In each of these examples, the admissibility of evidence, qualification of the witness or assertion of a privilege will turn upon the answer to these questions of fact. Subsection (a) makes it the responsibility of the court to determine these types of preliminary questions of fact. E.g., State v. Stange, 212 Conn. 612, 617, 563 A.2d 681 (1989); Manning v. Michael, 188 Conn. 607, 610, 453 A.2d 1157 (1982); D’Amato v. Johnston, 140 Conn. 54, 61–62, 97 A.2d 893 (1953).

As it relates to authentication, this Section operates in conjunction with Section 1-1 (d) (2) and Article IX of the Code. The preliminary issue, decided by the court, is whether the proponent has offered a satisfactory foundation from which the finder of fact could reasonably determine that the evidence is what it purports to be. The court makes this preliminary determination in light of the authentication requirements of Article IX. Once a prima facie showing of authenticity has been made to the court, the evidence, if otherwise admissible, goes to the fact finder, and it is for the fact finder ultimately to resolve whether evidence submitted for its consideration is what the proponent claims it to be. State v. Carpenter, 275 Conn. 785, 856–57, 882 A.2d 604 (2005), cert. denied, 547 U.S. 1025, 126 S. Ct. 1578, 164 L. Ed. 2d 309 (2006); State v. Colon, 272 Conn. 106, 188–89, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005); State v. Shah, 134 Conn. App. 581, 593, 39 A.3d 1165 (2012).

Pursuant to Section 1-1 (d) (2), courts are not bound by the Code in determining preliminary questions of fact under subsection (a), except with respect to evidentiary privileges.

(b) Admissibility conditioned on fact.

Frequently, the admissibility of a particular fact or item of evidence depends upon proof of another fact or other facts, i.e., connecting facts. For example, the relevancy of a witness’s testimony that the witness observed a truck swerving in and out of the designated lane at a given point depends upon other testimony identifying the truck the witness observed as the defendant’s. Similarly, the probative value of evidence that A warned B that the machine B was using had a tendency to vibrate depends upon other evidence establishing that B actually heard the warning. When the admissibility of evidence depends upon proof of connecting facts, subsection (b) authorizes the court to admit the evidence upon proof of the connecting facts or admit the evidence subject to later proof of the connecting facts. See, e.g., State v. Anonymous (83-FG), 190 Conn. 715, 724–25, 463 A.2d 533 (1983); Steiber v. Bridgeport, 145 Conn. 363, 366–67, 143 A.2d 434 (1958); see also Finch v. Weiner, 109 Conn. 616, 618, 145 A. 31 (1929) (when admissibility of evidence depends upon connecting facts, order of proof is subject to discretion of court).

If the proponent fails to introduce evidence sufficient to prove the connecting facts, the court may instruct the jury to disregard the evidence or order the earlier testimony stricken. State v. Ferraro, 160 Conn. 42, 45, 273 A.2d 694 (1970); State v. Johnson, 160 Conn. 28, 32–33, 273 A.2d 702 (1970).

Sec. 1-4. Limited Admissibility

Evidence that is admissible as to one party but not as to another, or for one purpose but not for another, is admissible as to that party or for that purpose. The court may, and upon request shall, restrict the evidence to its proper scope.

COMMENTARY

Section 1-4 is consistent with Connecticut law. See Blanchard v. Bridgeport, 190 Conn. 798, 805, 463 A.2d 553 (1983); State v. Tryon, 145 Conn. 304, 309, 142 A.2d 54 (1958).

Absent a party’s request for a limiting instruction, upon the admission of evidence, the court is encouraged to instruct the jury on the proper scope of the evidence or inquire whether counsel desires a limiting instruction to be given. See Rokus v. Bridgeport, 191 Conn. 62, 67, 463 A.2d 252 (1983); cf. State v. Cox, 7 Conn. App. 377, 389, 509 A.2d 36 (1986). Nothing precludes a court from excluding evidence offered for a limited purpose or taking other action it deems appropriate when a limiting instruction will not adequately protect the rights of the parties. See Blanchard v. Bridgeport, supra, 190 Conn. 805.

Sec. 1-5. Remainder of Statements

(a) Contemporaneous introduction by proponent. When a statement is introduced by a party, the court may, and upon request shall, require the proponent at that time to introduce any other part of the statement, whether or not otherwise admissible, that the court determines,
considering the context of the first part of the statement, ought in fairness to be considered contemporaneously with it.

(b) Introduction by another party. When a statement is introduced by a party, another party may introduce any other part of the statement, whether or not otherwise admissible, that the court determines, considering the context of the first part of the statement, ought in fairness to be considered with it.

COMMENTARY

(a) Contemporaneous introduction by proponent.

Subsection (a) recognizes the principle of completeness. Sometimes, one part of a statement may be so related to another that, in fairness, both should be considered contemporaneously. Subsection (a) details the circumstances under which a court may or shall require a proponent of one part of a statement to contemporaneously introduce the other part. See Clark v. Smith, 10 Conn. 1, 5 (1833); Ives v. Bartholomew, 9 Conn. 309, 312-13 (1832); see also Practice Book § 13-31 (a) (5) (depositions); cf. Walter v. Sperry, 86 Conn. 474, 480, 85 A. 739 (1912).

The basis for the rule is that matters taken out of context can create misleading impressions or inaccuracies and that waiting until later in the trial to clear them up can be ineffectual. See, e.g., State v. Arthur S., 109 Conn. App. 135, 140-41, 950 A.2d 615, cert. denied, 289 Conn. 925, 958 A.2d 153 (2008).

“Statement,” as used in this subsection, includes written, recorded and oral statements. Because the other part of the statement is introduced for the purpose of placing the first part into context, the other part need not be independently admissible. See State v. Tropiano, 158 Conn. 412, 420, 262 A.2d 147 (1969), cert. denied, 398 U.S. 949, 90 S. Ct. 1866, 26 L. Ed. 2d 288 (1970).

(b) Introduction by another party.

Subsection (b) does not involve the contemporaneous introduction of evidence. Rather, it recognizes the right of a party to subsequently introduce another part or the remainder of a statement previously introduced in part by the opposing party under the conditions prescribed in the rule. See State v. Paulino, 223 Conn. 461, 468-69, 613 A.2d 720 (1992); State v. Castonguay, 218 Conn. 486, 496-97, 590 A.2d 901 (1991); Rokus v. Bridgeport, 191 Conn. 62, 69, 463 A.2d 252 (1983); see also Practice Book § 13-31 (a) (5) (depositions).

Although the cases upon which subsection (b) is based deal only with the admissibility of oral conversations or statements, the rule logically extends to written and recorded statements. Thus, like subsection (a), subsection (b)’s use of the word “statement” includes oral, written and recorded statements. In addition, because the other part of the statement is introduced under subsection (b) for the purpose of putting the first part into context, the other part need not be independently admissible. See State v. Paulino, supra, 223 Conn. 468-69; State v. Castonguay, supra, 218 Conn. 496; cf. Starzec v. Kida, 183 Conn. 41, 47 n.6, 438 A.2d 1157 (1981).
ARTICLE II—JUDICIAL NOTICE

Sec. 2-1. Judicial Notice of Adjudicative Facts

(a) Scope of section. This section governs only judicial notice of adjudicative facts.

(b) Taking of judicial notice. A court may, but is not required to, take notice of matters of fact, in accordance with subsection (c).

(c) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) within the knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration.

(d) Time of taking judicial notice. Judicial notice may be taken at any stage of the proceeding.

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

Sec. 2-2. Notice and Opportunity To Be Heard

(a) Request of party. A party requesting the court to take judicial notice of a fact shall give timely notice of the request to all other parties. Before the court determines whether to take the requested judicial notice, any party shall have an opportunity to be heard.

(b) Court’s initiative. The court may take judicial notice without a request of a party to do so.

(Commentary: (a) Request of party. Subsection (a) states what appeared to be the preferred practice at common law. Drabik v. East Lyme, 234 Conn. 390, 538 Conn. 2d 118 (1985); State v. Allen, 205 Conn. 370, 382, 523 A.2d 559 (1987). The Code does not govern the taking of judicial notice on appeal.)
Sec. 2-2

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(b) Court’s initiative.

The first sentence is consistent with existing Connecticut law. E.g., Connecticut Bank & Trust Co. v. Rivkin, 150 Conn. 618, 622, 192 A.2d 539 (1963). The dichotomous rule in the second sentence represents the common-law view as expressed in Moore v. Moore, 173 Conn. 120, 121–22, 376 A.2d 1085 (1977). Although the court in Moore suggested that “it may be the better practice to give parties an opportunity to be heard” on the propriety of taking judicial notice of accurate and established facts; id., 122; it did not so require. Accord Guerriero v. Galasso, 144 Conn. 600, 605, 136 A.2d 497 (1957).
Sec. 3-1. General Rule

Except as otherwise required by the constitution of the United States, the constitution of this state, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code, presumptions shall be governed by the principles of the common law as they may be interpreted in the light of reason and experience.

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

See Section 1-2 (b) and the commentary thereto.
ARTICLE IV—RELEVANCY

Sec.

4-1. Definition of Relevant Evidence

4-2. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

4-3. Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time

4-4. Character Evidence Not Admissible To Prove Conduct; Exceptions; Methods of Proof; Cross-Examination of a Character Witness

4-5. Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible

4-6. Habit; Routine Practice

4-7. Subsequent Remedial Measures

4-8. Offers To Compromise

4-8A. Pleas, Plea Discussions and Related Statements

4-9. Payment of Medical and Similar Expenses

4-10. Liability Insurance

4-11. Admissibility of Evidence of Sexual Conduct

Sec. 4-1. Definition of Relevant Evidence

“ Relevant evidence” means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence.

COMMENTARY

Section 4-1 embodies the two separate components of relevant evidence recognized at common law: (1) probative value; and (2) materiality. See State v. Jeffrey, 220 Conn. 698, 709, 601 A.2d 993 (1991); State v. Dabkowski, 199 Conn. 193, 206, 506 A.2d 118 (1986).

Section 4-1 incorporates the requirement of probative value by providing that the proffered evidence must tend “to make the existence of any fact . . . more probable or less probable than it would be without the evidence.” See, e.g., State v. Prioletou, 235 Conn. 274, 305, 664 A.2d 793 (1995); State v. Briggs, 179 Conn. 328, 332, 426 A.2d 298 (1979), cert. denied, 447 U.S. 912, 100 S. Ct. 3000, 64 L. Ed. 2d 862 (1980).

Section 4-1’s “more probable or less probable than it would be without the evidence” standard of probative worth is consistent with Connecticut law. See, e.g., State v. Rinaldi, 220 Conn. 345, 353, 599 A.2d 1 (1991) (“[t]o be relevant, the evidence need not exclude all other possibilities; it is sufficient if it tends to support the conclusion, even to a slight degree” [emphasis added]); State v. Miller, 202 Conn. 463, 482, 522 A.2d 249 (1987) (“evidence is not inadmissible because it is not conclusive; it is admissible if it has a tendency to support a fact relevant to the issues if only in a slight degree” [emphasis added]). Thus, it is not necessary that the evidence, by itself, conclusively establish the fact for which it is offered or render the fact more probable than not.

Section 4-1 expressly requires materiality as a condition to relevancy in providing that the factual proposition for which the evidence is offered must be “material to the determination of the proceeding . . . .” See State v. Marra, 222 Conn. 506, 521, 610 A.2d 1113 (1992); State v. Corchado, 188 Conn. 653, 668, 453 A.2d 427 (1982). The materiality of evidence turns upon what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law. See Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 570, 657 A.2d 212 (1995).

Sec. 4-2. Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible

All relevant evidence is admissible, except as otherwise provided by the constitution of the United States, the constitution of the state of Connecticut, the Code, the General Statutes or the common law. Evidence that is not relevant is inadmissible.

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

Section 4-2 recognizes two fundamental common-law principles: (1) all relevant evidence is admissible unless otherwise excluded; e.g., Delmore v. Polinsky, 132 Conn. 28, 31, 42 A.2d 349 (1945); see Federated Dept. Stores, Inc. v. Board of Tax Review, 162 Conn. 77, 82–83, 291 A.2d 715 (1971); and (2) irrelevant evidence is inadmissible. Williams Ford, Inc. v. Hartford Courant Co., 232 Conn. 559, 569, 657 A.2d 212 (1995); see State v. Mastropetre, 175 Conn. 512, 521, 400 A.2d 276 (1978).

Reference in Section 4-2 to the federal and state constitutions includes judicially created remedies designed to preserve constitutional rights, such as the exclusionary rule. See State v. Marsala, 216 Conn. 150, 161, 579 A.2d 58 (1990) (construing exclusionary rule under Connecticut constitution).

Sec. 4-3. Exclusion of Evidence on Grounds of Prejudice, Confusion or Waste of Time

Relevant evidence may be excluded if its probative value is outweighed by the danger of unfair prejudice or surprise, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time or needless presentation of cumulative evidence.

COMMENTARY


The discretion of a trial court to exclude relevant evidence on the basis of unfair prejudice is well established. E.g., State v. Higgins, 201 Conn. 462, 469, 518 A.2d 631 (1986). All evidence adverse to an opposing party is inherently prejudicial because it is damaging to that party’s case. Berry v. Loiseau, 223 Conn. 786, 806, 614 A.2d 414 (1992); Chouinard v. Mariani, 21 Conn. App. 572, 576, 575 A.2d 238 (1990). For exclusion, however, the prejudice must be “unfair” in the sense that it “unduly arouse[s] the jury’s emotions of prejudice, hostility...
or sympathy”; State v. Wilson, 180 Conn. 481, 490, 429 A.2d 931 (1980); or “tends to have some adverse effect upon [the party against whom the evidence is offered] beyond tending to prove the fact or issue that justified its admission into evidence.” State v. Graham, 200 Conn. 9, 12, 509 A.2d 493 (1986), quoting United States v. Figueroa, 618 F.2d 934, 943 (2d Cir. 1980).

Common law recognized unfair surprise as a factor to be weighed against the probative value of the evidence. See, e.g., State v. Higgins, supra, 201 Conn. 469; State v. DeMatteo, supra, 186 Conn. 703. When dangers of unfair surprise are claimed to outweigh probative value, nothing precludes the court from fashioning a remedy other than exclusion, e.g., continuance, when that remedy will adequately cure the harm suffered by the opposing party.

Section 4-3 also recognizes the court’s authority to exclude relevant evidence when its probative value is outweighed by factors such as confusion of the issues or misleading the jury; Farrell v. St. Vincent’s Hospital, supra, 203 Conn. 563; see State v. Gaynor, 182 Conn. 501, 511, 438 A.2d 749 (1980); State v. Sebastian, 81 Conn. 1, 4, 69 A. 1054 (1908); or by considerations of undue delay, waste of time or needless presentation of cumulative evidence. See, e.g., State v. Parris, 219 Conn. 283, 293, 592 A.2d 943 (1991); State v. DeMatteo, supra, 186 Conn. 702–703; Hydro-Centrifugals, Inc. v. Crawford Laundry Co., 110 Conn. 49, 54–55, 147 A. 31 (1929).

Sec. 4-4. Character Evidence Not Admissible To Prove Conduct; Exceptions; Methods of Proof; Cross-Examination of a Character Witness

(a) Character evidence generally. Evidence of a trait of character of a person is inadmissible for the purpose of proving that the person acted in conformity with the character trait on a particular occasion, except that the following is admissible:

(1) Character of the accused. Evidence of a specific trait of character of the accused relevant to an element of the crime charged offered by an accused, or by the prosecution to rebut such evidence introduced by the accused.

(2) Character of the victim in a homicide or criminal assault case. Evidence offered by an accused in a homicide or criminal assault case, after laying a foundation that the accused acted in self-defense, of the violent character of the victim to prove that the victim was the aggressor, or by the prosecution to rebut such evidence introduced by the accused.

(3) Character of a witness for truthfulness or untruthfulness. Evidence of the character of a witness for truthfulness or untruthfulness to impeach or support the credibility of the witness.

(4) Character of a person to support a third-party culpability defense.

(b) Methods of proof. In all cases in which evidence of a trait of character of a person is admissible to prove that the person acted in conformity with the character trait, proof may be made by testimony as to reputation or in the form of an opinion. In cases in which the accused in a homicide or criminal assault case may introduce evidence of the violent character of the victim, the victim’s character may also be proved by evidence of the victim’s conviction of a crime of violence.

(c) Specific instances of conduct on cross-examination of a character witness. A character witness may be asked, in good faith, on cross-examination about specific instances of conduct relevant to the trait of character to which the witness testified to test the basis of the witness’ opinion.

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

(a) Character evidence generally.

Subsection (a) adopts the well established principle that evidence of a trait of character generally is inadmissible to show conforming conduct. See, e.g., Berry v. Loiseau, 223 Conn. 786, 805, 614 A.2d 414 (1993) (criminal cases); State v. Moye, 177 Conn. 487, 500, 418 A.2d 870 (criminal cases, character traits of defendant), vacated on other grounds, 444 U.S. 893, 100 S. Ct. 199, 62 L. Ed. 2d 129 (1979); State v. Miranda, 176 Conn. 107, 109, 405 A.2d 622 (1978) (criminal cases, character traits of victim).

Subsection (a) enumerates four exceptions to the general rule. Subdivision (1) restates the rule from cases such as State v. Martin, 170 Conn. 161, 163, 365 A.2d 104 (1976). The language in subdivision (1), “relevant to an element of the crime charged,” reflects a prerequisite to the introduction of character traits evidence recognized at common law. E.g., State v. Blake, 157 Conn. 99, 103–104, 249 A.2d 232 (1968); State v. Campbell, 93 Conn. 3, 10, 104 A. 653 (1918).


Subdivision (2) does not address the admissibility of evidence of the victim’s violent character offered to prove the accused’s state of mind, where the accused’s knowledge of the victim’s violent character would be necessary. See State v. Smith, supra, 222 Conn. 17; State v. Padula, 106 Conn. 454, 456–57, 138 A. 456 (1927). The admissibility of such evidence is left to common-law development.

Subdivision (3) authorizes the court to admit evidence of a witness’ character for untruthfulness or truthfulness to attack or support that witness’ credibility. See, e.g., State v. George, 194 Conn. 361, 368, 481 A.2d 1068 (1984), cert. denied, 469 U.S. 1191, 105 S. Ct. 963, 83 L. Ed. 2d 968 (1985). Section 6-6 addresses the admissibility of such evidence and the appropriate methods of proof.

Subdivision (4) concerns proof of third-party culpability. See State v. Hedge, 297 Conn. 621, 648, 1 A.3d 1051 (2010) (once third-party evidence is allowed, evidence introduced by
Sec. 4-4. Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible

(a) General rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove the bad character, propensity, or criminal tendencies of that person except as provided in subsection (b).

(b) When evidence of other sexual misconduct is admissible to prove propensity. Evidence of other sexual misconduct is admissible in a criminal case to establish that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual misconduct if: (1) the case involves aberrant and compulsive sexual misconduct; (2) the trial court finds that the evidence is relevant to a charged offense in that the other sexual misconduct is not too remote in time, was allegedly committed upon a person similar to the alleged victim, and was otherwise similar in nature and circumstances to the aberrant and compulsive sexual misconduct at issue in the case; and (3) the trial court finds that the probative value of the evidence outweighs its prejudicial effect.

(c) When evidence of other crimes, wrongs or acts is admissible. Evidence of other crimes, wrongs or acts of a person is admissible for purposes other than those specified in subsection (a), such as to prove intent, identity, motive, motive, common plan or scheme, absence of mistake or accident, knowledge, a system of criminal activity, or an element of the crime, or to corroborate crucial prosecution testimony.

(d) Specific instances of conduct when character in issue. In cases in which character or a trait of character in relation to a charge, claim or defense is in issue, proof shall be made by evidence of specific instances of the person’s conduct.

Sec. 4-5. Evidence of Other Crimes, Wrongs or Acts Generally Inadmissible

(a) General rule. Evidence of other crimes, wrongs or acts of a person is inadmissible to prove
compulsive sexual behavior. *State v. Snelgrove*, 288 Conn. 742, 759–61, 954 A.2d 165 (2008); *State v. DeJesus*, 288 Conn. 418, 426–38, 953 A.2d 45 (2009); see *State v. Johnson*, 289 Conn. 437, 452–55, 958 A.2d 713 (2008), overruled in part on other grounds by *State v. Payne*, 303 Conn. 538, 34 A.3d 370 (2012); see also *State v. Smith*, 313 Conn. 325, 337–38, 96 A.3d 1238 (2014) (evidence of uncharged sexual misconduct that involved choking victim while she resisted sexual attack held sufficiently similar to be admissible); *State v. George A.*, 308 Conn. 274, 298–300, 63 A.3d 918 (2013) (evidence of uncharged sexual misconduct committed by defendant against minor victim’s mother held admissible); but see *State v. Gupta*, 297 Conn. 221, 224–34, 998 A.2d 1085 (2010) (evidence that defendant physician had fondled other patients too dissimilar to be admissible). Although *DeJesus* involved a sexual assault charge, later, the Supreme Court, in *Snelgrove*, made it clear that the *DeJesus* propensity rule is not limited to cases in which the defendant is charged with a sex offense. In *Snelgrove*, the court stated: “We conclude that this rationale for the exception to the rule barring propensity evidence applies whenever the evidence establishes that both the prior misconduct and the offense with which the defendant is charged were driven by an aberrant sexual compulsion, regardless of whether the prior misconduct or the conduct at issue resulted in sexual offense charges.” *State v. Snelgrove*, supra, 760. The admission of the evidence of a defendant’s uncharged sexual misconduct to prove that the defendant had a tendency or a propensity to engage in aberrant and compulsive sexual behavior should be accompanied by an appropriate cautionary instruction limiting the purpose for which it may properly be used. *State v. George A.*, supra, 294–95; *State v. DeJesus*, supra, 474.

(c) When evidence of other crimes, wrongs or acts is admissible.

Subsection (a) specifically prohibits the use of other crimes, wrongs or acts evidence to prove a person’s bad character or criminal tendencies. Subsection (c) however, authorizes the court, in its discretion, to admit other crimes, wrongs or acts evidence for other purposes, such as to prove:

1. intent; e.g., *State v. Lizi*, 199 Conn. 462, 468–69, 508 A.2d 16 (1986);

2. identity; e.g., *State v. Pollitt*, 205 Conn. 61, 69, 530 A.2d 155 (1987);

3. malice; e.g., *State v. Barlow*, 177 Conn. 391, 393, 418 A.2d 46 (1979);

4. motive; e.g., *State v. James*, 211 Conn. 555, 578, 560 A.2d 426 (1989);

5. a common plan or scheme; e.g., *State v. Randolph*, 284 Conn. 328, 356, 933 A.2d 1158 (2007); *State v. Morowitz*, 200 Conn. 440, 442–44, 512 A.2d 175 (1986);

6. absence of mistake or accident; e.g., *State v. Tucker*, 181 Conn. 406, 415–16, 435 A.2d 896 (1980);

7. knowledge; e.g., *State v. Fredericks*, 149 Conn. 121, 124, 176 A.2d 581 (1961);

8. a system of criminal activity; e.g., *State v. Vessichio*, 197 Conn. 644, 646–55, 500 A.2d 1311 (1985), cert. denied, 475 U.S. 1122, 106 S. Ct. 1642, 90 L. Ed. 2d 187 (1986);


10. third-party culpability by defendant’s proffer of third party’s other crimes, wrongs or acts; *State v. Hedge*, supra, 297 Conn. 650–52.

Admissibility of other crimes, wrongs or acts evidence is contingent on satisfying the relevancy standards and balancing test set forth in Sections 4-1 and 4-3, respectively. For other crimes, wrongs or acts evidence to be admissible, the court must determine that the evidence is probative of one or more of the enumerated purposes for which it is offered and that its probative value outweighs its prejudicial effect. E.g., *State v. Figueroa*, 235 Conn. 145, 162, 665 A.2d 63 (1995); *State v. Cooper*, 227 Conn. 417, 425–28, 630 A.2d 1043 (1993). Although the Supreme Court has established no absolute time limit that would bar admissibility of uncharged misconduct, it has suggested that remote prior misconduct must bear a substantial similarity to conduct at issue and be of an aberrant or compulsive nature to be admissible. See *State v. Chyung*, supra, 325 Conn. 264, 266 n.27 (fourteen year gap between incidents of misconduct did not render prior misconduct irrelevant “given the strong similarities between the two incidents and the strongly aberrational nature of the defendant’s conduct”); cf. *State v. Snelgrove*, supra, 760. The purposes enumerated in subsection (c) for which other crimes, wrongs or acts evidence may be admitted are intended to be illustrative rather than exhaustive. Neither subsection (a) nor subsection (c) precludes a court from recognizing other appropriate purposes for which other crimes, wrongs or acts evidence may be admitted, provided the evidence is not introduced to prove a person’s bad character or criminal tendencies, and the probative value of its admission is not outweighed by any of the Section 4-3 balancing factors.

(d) Specific instances of conduct when character in issue.


Sec. 4-6. Habit; Routine Practice

Evidence of the habit of a person or the routine practice of an organization is admissible to prove that the conduct of the person or the organization on a particular occasion was in conformity with the habit or routine practice.

COMMENTARY

While Section 4-4 generally precludes the use of evidence of a trait of character to prove conforming behavior, Section 4-6 admits evidence of a person’s habit or an organization’s routine practice to prove conformity therewith on a particular occasion. See, e.g., *Caslowitz v. Roosevelt Mills, Inc.*, 138 Conn. 125, 125–26, 82 A.2d 808 (1951); *State v. Williams*, 90 Conn. 126, 130, 96 A. 372 (1906); *Barlow v. Connecticut Co.*, 86 Conn. 527, 530–31, 86 A. 16 (1913); *Birkhamshaw v. Socha*, 156 Conn. App. 453, 471, 115 A.3d 1, cert. denied, 317 Conn. 913, 116 A.3d 812 (2015); *State v. Hubbard*, 32 Conn. App. 178, 185, 628 A.2d 626, cert. denied, 228 Conn. 902, 634 A.2d 296 (1993). The distinction between habit or routine practice and trait of character is, therefore, dispensible. See *State v. Whitford*, 260 Conn. 610, 641–43, 799 A.2d 1034 (2002) (victim’s violent acts inadmissible as habit evidence to

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establish defendant’s claim of self-defense in criminal assault case. “Our case law concerning this type of evidence, although sparse, suggests that habit is not relevant to prove willful or deliberate acts.” Id., 642.

“Whereas a trait of character entails a generalized description of one’s disposition as to a particular trait, such as honesty, peacefulness or carelessness, habit is a person’s regular practice of responding to a particular kind of situation with a specific type of conduct.” (Internal quotation marks omitted.) Birkhamshaw v. Socha, supra, 156 Conn. App. 471; see State v. Whitford, supra, 260 Conn. 641. “Habit and custom refer to a course of conduct that is fixed, invariable, and unthinking, and generally pertain to a very specific set of repetitive circumstances.” (Internal quotation marks omitted.) Birkhamshaw v. Socha, supra, 472. “Testimony as to the habit or practice of doing a certain thing in a certain way is evidence of what actually occurred under similar circumstances or conditions . . . . Evidence of a regular practice permits an inference that the practice was followed on a given occasion.” (Emphasis in original; internal quotation marks omitted.) Id. Routine practice of an organization, sometimes referred to as a business custom or customary practice, is equivalent to a habit of an individual for purposes of the foregoing standards. Cf. Maynard v. Sena, 158 Conn. App. 509, 518, 125 A.3d 541, cert. denied, 319 Conn. 910, 123 A.3d 436 (2015).

Sec. 4-7. Subsequent Remedial Measures

(a) General rule. Except as provided in subsection (b), evidence of measures taken after an event, which if taken before the event would have made injury or damage less likely to result, is inadmissible to prove negligence or culpable conduct in connection with the event. Evidence of those measures is admissible when offered to prove controverted issues such as ownership, control or feasibility of precautionary measures.

(b) Strict product liability of goods. Where a theory of liability relied on by a party is strict product liability, evidence of such measures taken after an event is admissible.

COMMENTARY

(a) General rule.


The rationale behind this exclusionary rule is twofold. First, evidence of subsequent remedial measures is of relatively slight probative value on the issue of negligence or culpable conduct at the time of the event. E.g., Hall v. Burns, supra, 213 Conn. 457–59 and n.3; Waterbury v. Waterbury Traction Co., 74 Conn. 152, 169, 50 A 3 (1901). Second, the rule reflects a social policy of encouraging potential defendants to take corrective measures without fear of having their corrective measures used as evidence against them. Hall v. Burns, supra, 457; see Waterbury v. Waterbury Traction Co., supra, 169.

Evidence of subsequent remedial measures may be admissible for purposes other than proving negligence or culpable conduct. Such evidence is admissible as proof on issues such as ownership, control or feasibility of precautionary measures. See, e.g., Williams v. Milner Hotels Co., 130 Conn. 507, 509–10, 36 A.2d 20 (1944) (control); Quinn v. New York, New Haven & Hartford Railroad Co., 56 Conn. 44, 53–54, 12 A. 97 (1887) (feasibility). These issues must be “controverted,” however, before evidence of subsequent remedial measures is admissible. See Wright v. Coe & Anderson, Inc., 156 Conn. 145, 155, 239 A.2d 493 (1968); Haffey v. Lemieux, 154 Conn. 185, 193, 222 A.2d 551 (1966).

The list in subsection (a) of other purposes for which evidence of subsequent remedial measures may be offered is meant to be illustrative rather than exhaustive. See Rokus v. Bridgeport, supra, 191 Conn. 66. So long as the evidence is not offered to prove negligence or culpable conduct, it may be admitted subject to the court’s discretion. See id., 66–67 (postaccident photograph of accident scene at which subsequent remedial measures had been implemented admissible when photograph was offered solely to show configuration and layout of streets and sidewalks to acquaint jury with accident scene); see also Baldwin v. Norwalk, 96 Conn. 1, 8, 112 A. 660 (1921) (subsequent remedial measures evidence also evidence also may be offered for impeachment purposes); cf. Duncan v. Mill Management Co. of Greenwich, Inc., 308 Conn. 1, 17–18, 60 A.3d 222 (2013) (postaccident photograph of subsequent remedial measure improperly admitted for impeachment purposes in absence of balancing probative value of evidence against its prejudicial effect).

(b) Strict product liability of goods.

Subsection (b) adopts the rule announced in Sanderson v. Steve Snyder Enterprises, Inc., 196 Conn. 134, 146–48, 491 A.2d 389 (1985). In Sanderson, the court stated two reasons for rendering the general exclusionary rule inapplicable in strict product liability cases. First, the court reasoned that the danger of discouraging subsequent corrective measures is not a chief concern in strict product liability cases: “The contemporary corporate mass producer of goods, the normal products liability defendant, manufactures tens of thousands of units of goods; it is manifestly unrealistic to suggest that such a producer will [forgo] making improvements in its product, and risk innumerable additional lawsuits and the attendant adverse effect upon its public image, simply because evidence of adoption of such improvement may be admitted in an action founded on strict liability . . . .” Id., 146.

Second, it reasoned that, because the defectiveness of mass produced goods is at issue in a strict product liability case, rather than the producer/defendant’s negligence or culpable conduct, the probative value of the evidence is high. Id., 147.

Permitting evidence of subsequent remedial measures also conforms to the designation of the risk-utility test as the primary basis for proving strict product liability for design defects, under which the availability of a reasonable, alternative design generally is an essential element of proof. See Bitlock v. Philip Morris, Inc., 324 Conn. 402, 434–35, 152 A.3d 1183 (2016); see also Izzarelli v. R.J. Reynolds Tobacco Co., 321 Conn. 172, 202, 136 A.3d 1232 (2016).

Sec. 4-8. Offers To Compromise

(a) General rule. Evidence of an offer to compromise or settle a disputed claim is inadmissible on the issues of liability and the amount of the claim.

(b) Exceptions. This rule does not require the exclusion of:

(1) Evidence that is offered for another purpose, such as proving bias or prejudice of a witness, refuting a contention of undue delay or proving
an effort to obstruct a criminal investigation or prosecution, or
(2) statements of fact or admissions of liability made by a party.

COMMENTARY

(a) General rule.
It is well established that evidence of an offer to compromise or settle a disputed claim is inadmissible to prove the validity or invalidity of the claim or its amount. See, e.g., Jutkowitz v. Dept. of Health Services, 220 Conn. 86, 97, 596 A.2d 374 (1991); Simone Corp. v. Connecticut Light & Power Co., 187 Conn. 487, 490, 446 A.2d 1071 (1982); Evans Products Co. v. Clinton Building Supply, Inc., 174 Conn. 512, 517, 391 A.2d 157 (1978); Fowles v. Allen, 64 Conn. 350, 351–52, 30 A. 144 (1894); Stranahan v. East Haddam, 11 Conn. 507, 514 (1836); cf. PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 332–33, 838 A.2d 135 (2004) (e-mail containing settlement discussion between defendant and third party admissible because Section 4-8 precludes only admission of evidence of settlement between parties to litigation, not third parties).

The purpose of the rule is twofold. First, an offer to compromise or settle is of slight probative value on the issues of liability or the amount of the claim since a party, by attempting to settle, merely may be buying peace instead of conceding the merits of the disputed claim. Stranahan v. East Haddam, supra, 11 Conn. 514.

Second, the rule supports the policy of encouraging parties to pursue settlement negotiations by assuring parties that evidence of settlement offers will not be introduced into evidence to prove liability or a lack thereof if a trial ultimately ensues. See Tomasso Bros., Inc. v. October Twenty-Four, Inc., 221 Conn. 194, 198, 602 A.2d 1011 (1991); Miko v. Commission on Human Rights & Opportunities, 220 Conn. 209, 596 A.2d 396 (1991).

(b) Exceptions.
Subdivision (2) recognizes the admissibility of evidence of settlement offers when introduced for some purpose other than to prove or disprove liability or damages. See State v. Milum, 197 Conn. 602, 613, 500 A.2d 555 (1986) (to show bias and effort to obstruct criminal prosecution). Section 4-8’s list of purposes for which such evidence may be introduced is intended to be illustrative rather than exhaustive. See Lynch v. Granby Holdings, Inc., 32 Conn. App. 574, 583–84, 630 A.2d 609 (1993) (evidence of offer to compromise admissible to show that parties attempted to resolve problem concerning placement of sign when trial court instructed jury that evidence did not indicate assumption of liability), rev’d on other grounds, 230 Conn. 95, 644 A.2d 325 (1994).

Subdivision (2) preserves the common-law rule permitting admissibility of statements made by a party in the course of settlement negotiations that constitute statements of fact or admissions of liability. See, e.g., Tomasso Bros., Inc. v. October Twenty-Four, Inc., supra, 221 Conn. 198; Hall v. Sera, 112 Conn. 291, 298, 152 A. 148 (1930); Hartford Bridge Co. v. Granger, 4 Conn. 142, 148 (1822). A statement made in the course of settlement negotiations that contains an admission of fact is admissible “where the statement was intended to state a fact.” (Internal quotation marks omitted.) Tomasso Bros., Inc. v. October Twenty-Four, Inc., supra, 198, quoting Simone Corp. v. Connecticut Light & Power Co., supra, 187 Conn. 490. However, if the party making the statement merely “intended to concede a fact hypothetically for the purpose of effecting a compromise”; Tomasso Bros., Inc. v. October Twenty-Four, Inc., supra, 198, quoting Evans Products Co. v. Clinton Building Supply, Inc., supra, 174 Conn. 517; the factual admission is inadmissible as an offer to compromise. See Tomasso Bros., Inc. v. October Twenty-Four, Inc., supra, 198. If, considering the statement and surrounding circumstances, it is unclear whether the statement was intended to further a compromise or as a factual admission, the statement must be excluded. E.g., id., 199; Simone Corp. v. Connecticut Light & Power Co., supra, 490.

Sec. 4-8A. Pleas, Plea Discussions and Related Statements

(a) Prohibited uses. Evidence of the following shall not be admissible in a civil or criminal case against a person who has entered a plea of guilty or nolo contendere in a criminal case or participated in plea negotiations in such case, whether or not a plea has been entered:
(1) a guilty plea that was later withdrawn or rejected or any statement made in conjunction with such a plea;
(2) a plea of nolo contendere or a guilty plea entered under the Alford doctrine or any statement made in conjunction with such a plea;
(3) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in subsection (a):
(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record and with counsel present.

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY


Further, the rule is consistent with rule 410 of the Federal Rules of Evidence. See United States v. Roberts, 660 F.3d 149, 157 (2d Cir. 2011) (discussion of rule 410 of Federal Rules of Evidence and waiver of such rights), cert. denied, 565 U.S. 1238, 132 S. Ct. 1640, 182 L. Ed. 2d 239 (2012). Excluding offers to plead guilty or nolo contendere promotes the disposition of criminal cases by compromise. “Effective criminal law administration . . . would hardly be possible if a large proportion of the charges were not disposed of by
such compromises." (Internal quotation marks omitted.) Fed. R. Evid. 410, advisory committee notes.

In Kercheval v. United States, 274 U.S. 220, 47 S. Ct. 582, 71 L. Ed. 1009 (1927), withdrawn pleas of guilty were held inadmissible in federal prosecutions. The court stated that "[w]hen the plea was annulled it ceased to be evidence . . . . As a practical matter, [the withdrawn plea] could not be received as evidence without putting the petitioner in a dilemma utterly inconsistent with the determination of the court awarding him a trial." (Citation omitted.) Id., 224.

As the advisory committee notes indicate, rule 410 of the Federal Rules of Evidence "gives effect to the principal traditional characteristic of the nolo plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position . . . recognizes the inconclusive and compromise nature of judgments based on nolo pleas." Fed. R. Evid. 410, advisory committee notes. Similarly, a plea under North Carolina v. Allford, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970), is viewed as the functional equivalent of a plea of nolo contendere. See State v. Palmer, 196 Conn. 157, 169 n.3, 491 A.2d 1075 (1985).

A statement made during an Allford plea is not necessarily inadmissible in every situation. See, e.g., State v. Simms, 211 Conn. 1, 6–7, 557 A.2d 914 (admissibility of Allford plea canvass upheld under unique circumstances when witness used Allford plea to strike bargain for himself and later changed position to benefit defendant), cert. denied, 493 U.S. 843, 110 S. Ct. 135, 107 L. Ed. 2d 93 (1989).

(b) Exceptions.

Sec. 4-9. Payment of Medical and Similar Expenses
Evidence of furnishing or offering or promising to pay medical, hospital, or similar expenses occasioned by an injury is inadmissible to prove liability for the injury.

COMMENTARY

The two considerations upon which Section 4-9 is premised are similar to those underlying Sections 4-7 and 4-8. First, such evidence is of questionable relevancy on the issue of liability because an offer to pay or actual payment of medical or similar expenses may be intended as an "act of mere belligerence" rather than an admission of liability. Danahy v. Cuneo, supra, 130 Conn. 216; accord Murphy v. Ossola, 124 Conn. 366, 377, 199 A. 648 (1938). Second, the rule fosters the public policy of encouraging assistance to an injured party by eliminating the possibility that evidence of such assistance could be offered as an admission of liability at trial. See Danahy v. Cuneo, supra, 217.

Section 4-9 covers the situation addressed by General Statutes § 52-184b (c), which provides that evidence of any advance payment for medical bills made by a health-care provider or by the insurer of such provider is inadmissible on the issue of liability in any action brought against the health-care provider for malpractice in connection with the provision of health care or professional services. Section 4-9’s exclusion goes further by excluding offers or promises to pay in addition to actual payments.

Section 4-9, by its terms, excludes evidence of a promise or offer to pay or a furnishing of medical, hospital or similar expenses, but not admissions of fact accompanying the promise, offer or payment. Furthermore, nothing in Section 4-9 precludes admissibility when such evidence is offered to prove something other than liability for the injury.

Unlike Section 4-8, Section 4-9 does not expressly require the existence of a disputed claim as to liability or damages when the offer or promise to pay, or actual payment, is made, for the exclusion to apply.

Sec. 4-10. Liability Insurance

(a) General rule. Evidence that a person was or was not insured against liability is inadmissible upon the issue of whether the person acted negligently or otherwise wrongfully.

(b) Exception. This section does not require the exclusion of evidence of insurance against liability when offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.

COMMENTARY

The exclusion of such evidence is premised on two grounds. First, the evidence is of slight probative value on the issue of fault because the fact that a person does or does not carry liability insurance does not imply that that person is more or less likely to act negligently. Walker v. New Haven Hotel Co., supra, 95 Conn. 235–36. Second, Section 4-10, by excluding evidence of a person’s liability coverage or lack thereof, prevents the jury from improperly rendering a decision or award based upon the existence or nonexistence of liability coverage rather than upon the merits of the case. See id., 235.

(b) Exception.
In accordance with common law, Section 4-10 permits evidence of liability coverage or the lack thereof to be admitted if offered for a purpose other than to prove negligent or wrongful conduct. Muraszki v. William L. Clifford, Inc., 129 Conn. 123, 128, 26 A.2d 578 (1942) (to show agency or employment relationship); Nesbitt v. Mulligan, supra, 11 Conn. App. 358–60 (to show motive or bias of witness); see Holbrook v. Casaszza, 204 Conn. 336, 355–56, 528 A.2d 774 (1987) (same), cert. denied, 484 U.S. 1006, 108 S. Ct. 699, 98 L. Ed. 2d 651 (1988); see also Vasquez v. Rocco, 267 Conn. 59, 68–69, 836 A.2d 1158 (2003) (evidence of insurance admissible under "‘substantial connection’ test" to prove expert witness potential interest in outcome of case). The list of purposes for which evidence of insurance coverage may be offered is meant to be illustrative rather than exhaustive.
Sec. 4-11. Admissibility of Evidence of Sexual Conduct

“In any prosecution for sexual assault under sections 53a-70, 53a-70a, and 53a-71 to 53a-73a, inclusive, no evidence of the sexual conduct of the victim may be admissible unless such evidence is (1) offered by the defendant on the issue of whether the defendant was, with respect to the victim, the source of semen, disease, pregnancy or injury, or (2) offered by the defendant on the issue of credibility of the victim, provided the victim has testified on direct examination as to his or her sexual conduct, or (3) any evidence of sexual conduct with the defendant offered by the defendant on the issue of consent by the victim, when consent is raised as a defense by the defendant, or (4) otherwise so relevant and material to a critical issue in the case that excluding it would violate the defendant’s constitutional rights. Such evidence shall be admissible only after an in camera hearing on a motion to offer such evidence containing an offer of proof. If the proceeding is a trial with a jury, such hearing shall be held in the absence of the jury. If, after a hearing, the court finds that the evidence meets the requirements of this section and that the probative value of the evidence outweighs its prejudicial effect on the victim, the court may grant the motion. The testimony of the defendant during a hearing on a motion to offer evidence under this section may not be used against the defendant during the trial if such motion is denied, except that such testimony may be admissible to impeach the credibility of the defendant if the defendant elects to testify as part of the defense.” General Statutes § 54-86f (a).

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

Section 4-11 quotes General Statutes § 54-86f (a), which covers the admissibility of evidence of a victim’s sexual conduct in prosecutions for sexual assault and includes a procedural framework for admitting such evidence. In 2015, § 54-86f was amended with the addition of subsections (b) through (d). Those subsections address procedural matters rather than admissibility and, therefore, are not included in Section 4-11. See General Statutes (Rev. to 2015) § 54-86f, as amended by Public Acts 2015, No. 15-207, § 2 (concerning, inter alia, sealing transcripts and motions filed in association with hearing under § 54-86f and limiting disclosure by defense of state disclosed evidence).

Although Section 4-11, by its terms, is limited to criminal prosecutions for certain enumerated sexual assault offenses, the Supreme Court has applied the exclusionary principles of § 54-86f to prosecutions for risk of injury to a child brought under General Statutes § 53-21, at least when the prosecution also presents sexual assault charges under one or more of the statutes enumerated in § 54-86f. See State v. Kulmac, 230 Conn. 43, 54, 644 A.2d 887 (1994). The court reasoned that the policies underlying the rape shield statute were equally applicable when allegations of sexual assault and abuse form the basis of both the risk of injury and sexual assault charges. See id., 53–54. Although the Code expresses no position on the issue, Section 4-11 does not preclude application of the rape shield statute’s general precepts, as a matter of common law, to other situations in which the policies underlying the rape shield statute apply. See State v. Rolon, 257 Conn. 156, 183–85, 777 A.2d 604 (2001) (five part test for determining admissibility of evidence of child’s previous sexual abuse to show alternative source of child’s sexual knowledge).
Sec. 5-1. General Rule

A person may not be compelled to testify or to produce other evidence that he or she is privileged or obligated by privilege not to divulge by the constitution of the United States, the constitution of Connecticut, relevant federal statutes, the General Statutes, the common law or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code.

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

The rules in Article V retain Connecticut law concerning privileges. All constitutional, statutory and common-law privileges remain in force, subject to change by due course of law.

As the rules of privilege inhibit the fact-finding process, they “must be applied . . . cautiously and with circumspection . . . .” (Internal quotation marks omitted.) State v. Christian, 267 Conn. 710, 727, 841 A.2d 1158 (2004); see also Harrington v. Freedom of Information Commission, 323 Conn. 1, 12, 144 A.3d 405 (2016). The person asserting a privilege has the burden of establishing its foundation. State v. Mark R., 300 Conn. 590, 598, 17 A.3d 1 (2011); see PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 330, 838 A.2d 135 (2004); State v. Hanna, 150 Conn. 457, 466, 191 A.2d 124 (1963). Whether a claimed privilege covers particular testimony or other evidence as to which it is asserted is a preliminary question to be determined by the court. See Section 1-3 (a). Privileges shall apply at all stages of all proceedings in the court. Section 1-1 (c).

Further, evidentiary privileges and confidential matters can have different meanings and legal effects. State v. K enamah, 289 Conn. 411, 417 n.7, 957 A.2d 852 (2008); see also State v. Orr, 291 Conn. 642, 673–74, 969 A.2d 750 (2009) (Palmer, J., concurring in part and in the judgment). “Evidentiary privileges should be sharply distinguished from information that is protected from public disclosure because the information was obtained under a statute or procedure that made it confidential.” (Internal quotation marks omitted.) C. Tall & E. Prescott, Connecticut Evidence (5th Ed. 2014) § 5.2, p. 248. Therefore, this rule does not apply to confidential matters. The following is a brief, nonexhaustive description of several privileges that are most commonly invoked and honored in the courts of this state.

Health-care provider privileges

In Connecticut, there is no common-law physician-patient privilege. Rather, a form of physician-patient privilege has been enacted in General Statutes § 52-146o (a). It should be noted that the provisions of § 52-146o apply to civil actions but not to criminal prosecutions. State v. Anderson, 74 Conn. App. 633, 653–54, 813 A.2d 1039, cert. denied, 263 Conn. 901, 819 A.2d 837 (2003); see also State v. Legrand, 129 Conn. App. 239, 262–63, 20 A.3d 52, cert. denied, 302 Conn. 912, 27 A.3d 371 (2011).

The General Assembly has also enacted analogous privileges for communications with certain other health-care providers, counselors or social workers. These include privileges for communications between psychiatrist and patient; General Statutes §§ 52-146d and 52-146e; psychologist and patient; General Statutes § 52-146b (b); domestic violence/sexual assault counselor and victim; General Statutes § 52-146k; see In re Robert H., 199 Conn. 693, 706, 509 A.2d 475 (1986); marital/family therapist and individual seeking diagnosis or treatment; General Statutes § 52-146p (b); and licensed professional counselor and individual seeking diagnosis or treatment. General Statutes § 52-146s (b). Each of these statutes has its own provisions governing the assertion or the waiver of the privilege and should be consulted.

Privileged communications made to clergy

While Connecticut common law does not recognize privileged communications to clergy; State v. Mark R., supra, 300 Conn. 597; see Cox v. Miller, 236 F.3d 89, 102 (2d Cir. 2002), cert. denied, 537 U.S. 1192, 123 S. Ct. 1273, 154 L. Ed. 2d 1026 (2003); a related privilege has been codified at General Statutes § 52-146b. That statute protects from disclosure, in any civil or criminal case, or in any administrative or legislative proceeding, confidential communications made to a member of the clergy of any “religious denomination” who is accredited by “the religious body to which he belongs, who is settled in the work of the ministry . . . .” General Statutes § 52-146b. For such a privilege to apply, the person asserting it must establish that there was a communication, the communication was confidential, the communication was made to a member of the clergy within the meaning of § 52-146b, it was made to the clergy member in his or her professional capacity, the disclosure was sought as part of a criminal or civil case, and the privilege was not waived. State v. Mark R., supra, 597–98; State v. Rizzo, 266 Conn. 171, 283, 833 A.2d 363 (2003); cf. State v. Mark R., supra, 598–601 (clergy-penitent privilege was not established when defendant lacked reasonable expectation that inculpatory statements would be held in confidence).

Privilege against self-incrimination

The fifth and fourteenth amendments to the constitution of the United States, article first, § 8, of the constitution of Connecticut and General Statutes §§ 51-35 (b) and 52-199 all protect a person from being compelled to give potentially incriminating evidence against himself or herself that would expose such person to criminal liability. A criminal defendant cannot be forced to testify as a witness in his or her own case. While Connecticut common law does not recognize privileges made to clergy, the privilege against self-incrimination “not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”
221 Conn. 194, 198, 602 A.2d 1011 (1992). No evidence of invocation of the privilege by a nonparty if the court determines
Conn. 902, 99 A.3d 1167 (2014). This rule extends to the Federal Statutes §§ 46b-138a and 52-146k (f)), cert. denied, 314
909 (noting exceptions to drawing adverse inference in Gen-
vceeding if prior notice of adverse inference had been given);
inference could be drawn in termination of parental rights pro-
rule of practice instead of constitutional privilege, adverse
inference may be drawn against party in civil
missal of complaint);
who invokes privilege at deposition in civil action risks dis-
Hospital
person asserting it. See, e.g.,
PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267
The privilege protects both the confidential giving of advice by an attorney and the provision of information to the attorney by the client or the client's agent. Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co., 249 Conn. 36, 52, 730 A.2d 51 (1999); State v. Cascone, 195 Conn. 183, 186–87, 487 A.2d 186 (1985). To be protected, the communications must be in connection with and necessary for the seeking or giving of legal advice. PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., supra, 267 Conn. 330; Ulman v. State, 230 Conn. 688, 713, 647 A.2d 324 (1994). The privilege belongs to the client and usually can be waived only with the client's consent. See Rules of Professional Conduct 1.6; but see Olson v. Accessory Controls & Equipment Corp., 254 Conn. 145, 170–71, 757 A.2d 14 (2000) (discussion of crime fraud exception, which is also contained in Rule 1.6 of Rules of Professional Conduct).
The privilege does not protect communications made in the presence of or made available to third parties. E.g., State v. Burak, 201 Conn. 517, 526, 518 A.2d 639 (1986); State v. Gordon, 197 Conn. 413, 423–24, 504 A.2d 1020 (1985). There are various exceptions to this rule whereby communications to or in the presence of a third party will be protected by the privilege. These include: when the third party is deemed to be an agent or employee of the client or attorney who is involved with or necessary to the giving or effectuating of the legal advice; State v. Gordon, supra, 424; communications made to or in the presence of employees of the attorney (e.g., paralegals, secretaries, clerks); Goddard v. Gardner, supra, 28 Conn. 175; experts retained by counsel; State v. Toste, 178 Conn. 626, 628, 424 A.2d 293 (1979); cf. Stanley Works v. New Britain Redevelopment Agency, 155 Conn. 86, 94–95, 230 A.2d 9 (1967); or certain officers or employees of the client, including in-house counsel. Shaw v. Freedom of Information Commission, 245 Conn. 149, 158 n.11, 714 A.2d 664 (1998). Also, communications made to other clients or counsel who have an established common interest in the prosecution or defense of an action can be protected. See State v. Cascone, supra, 195 Conn. 186–87.

Sec. 5-2. Attorney-Client Privilege

Communications when made in confidence between a client and an attorney for the purpose of seeking or giving legal advice are privileged.


COMMENTARY

The attorney-client privilege is a privilege protecting confidential communications between an attorney and client for the purpose of seeking or giving legal advice. E.g., Blumenthal v. Kimber Mig., Inc., 265 Conn. 1, 10, 826 A.2d 1088 (2003); Doyle v. Reeves, 112 Conn. 521, 523, 152 A. 882 (1931); see Goddard v. Gardner, 28 Conn. 172, 174 (1859). The term “client” also includes prospective clients. See Rules of Professional Conduct 1.18. “Because the application of the attorney-client privilege tends to prevent the full disclosure of information and the true state of affairs, it is both narrowly applied and strictly construed.” Harrington v. Freedom of Information Commission, 323 Conn. 1, 12, 144 A.3d 405 (2016); see also PSE Consulting, Inc. v. Frank Mercede & Sons, Inc., 267 Conn. 279, 330, 838 A.2d 135 (2004).

Settlement, mediation and negotiation privilege

Privileges related to specific negotiation and mediation processes are recognized by statute, elsewhere in this Code, and by rules of practice.

General Statutes § 31-96 (when respondent invoked the privilege, § 52-199, serves only to codify the common law and constitutional limitations, corporations in Connecticut do not enjoy a privilege against self-incrimination. See id. A corporate officer or agent, however, can claim the privilege against self-incrimination on his or her own behalf “when summoned to testify or produce documentary material in connection with a suit in which his [or her] corporation is a party.” Id., 674.

Additionally, while the privilege against self-incrimination is absolute, unless waived, when it is invoked in a civil proceeding, its invocation may have adverse consequences for the person asserting it. See, e.g., Pavlínkov v. Yale-New Haven Hospital, 192 Conn. 138, 147, 470 A.2d 246 (1984) (plaintiff who invokes privilege at deposition in civil action risks dismissal of complaint); Olin Corp. v. Castells, supra, 180 Conn. 53–54 (adverse inference may be drawn against party in civil action who invokes privilege); cf. In re Samantha C., 268 Conn. 614, 663, 666, 847 A.2d 883 (2004) (when respondent invoked rule of practice instead of constitutional privilege, adverse inference could be drawn in termination of parental rights proceeding if prior notice of adverse inference had been given); Greenan v. Greenan, 150 Conn. App. 289, 298 n.8, 91 A.3d 909 (noting exceptions to drawing adverse inference in General Statutes §§ 46b-138a and 52-146k (f)); cert. denied, 514 Conn. 902, 99 A.3d 1167 (2014). This rule extends to the invocation of the privilege by a nonparty if the court determines that “the probative value of admitting the [evidence] exceeds the prejudice to the party against whom it will be used . . . .” Rhode v. Milla, 287 Conn. 731, 738, 949 A.2d 1227 (2008); see Section 4-3. A defendant always may waive this privilege and choose to testify. See, e.g., James v. Commissioner of Correction, 74 Conn. App. 13, 20, 810 A.2d 290 (2002), cert. denied, 262 Conn. 946, 815 A.2d 675 (2003).

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Also, confidential communications between a government attorney and a public official or employee in connection with civil or criminal cases, or legislative or administrative proceedings are privileged. General Statutes § 52-146r. Moreover, the attorney-client privilege can be waived when “a party specifically pleads reliance on an attorney’s advice as an element of a claim or defense, voluntarily testifies regarding portions of the attorney-client communication, or specifically places [in] issue . . . [some matter concerning] the attorney-client relationship” (e.g., claim of legal malpractice). Metropolitan Life Ins. Co. v. Aetna Casualty & Surety Co., supra, 249 Conn. 52–53; see Pierce v. Norton, 82 Conn. 441, 445–46, 74 A. 686 (1909); see also Rules of Professional Conduct 1.6 (d).

If the privileged communication is later disclosed to a third party, the privilege is waived unless the disclosure is shown to be inadvertent. See Harp v. King, 266 Conn. 747, 767–70, 835 A.2d 953 (2003).

The common law has long recognized that making a statement through an interpreter to one’s own attorney does not waive or abrogate the attorney-client privilege due to the presence of the interpreter. State v. Christian, 267 Conn. 710, 749, 841 A.2d 1158 (2004); Olson v. Accessory Controls & Equipment Corp., supra, 254 Conn. 158; Goddard v. Gardner, supra, 28 Conn. 175; see also General Statutes § 52-146l. There is nothing in the law that would indicate that this definition of the privilege is not applicable to other common-law or statutory privileges. Thus, whenever a deaf or non-English speaking person communicates through an interpreter to any person under such circumstances that the underlying communication would be privileged, such person should not be compelled to testify as to the communication. Nor should the interpreter be allowed to testify as to the communication unless the privilege has been waived.

Sec. 5-3. Marital Privileges

(a) A person in a criminal proceeding may refuse to testify against his or her lawful spouse unless the criminal proceeding involves criminal conduct jointly undertaken by both spouses or a claim of bodily injury, sexual assault or other violence attempted, committed or threatened against the other spouse or minor child of, or in the custody or care of, either spouse, including risk of injury to such minor child. See General Statutes § 54-84a.

(b) A spouse may not be compelled to testify, or be allowed to testify, if the other spouse objects, about confidential communications made during the marriage unless the confidential communication is in a criminal proceeding involving joint participation in criminal conduct or conspiracy to commit a crime at the time of the communication, or a claim of bodily injury, sexual assault or other violence attempted, committed or threatened against the other spouse or any minor child of, or in the custody or care of, either spouse, including risk of injury to such minor child. See General Statutes § 54-84b.


COMMENTARY

There are two separate, distinct privileges pertaining to one spouse testifying in court against the other spouse: the adverse spousal testimony privilege and the marital communications privilege. Under the adverse spousal testimony privilege, the witness spouse in a criminal prosecution has the privilege to refuse to testify against the other spouse, as long as they are still married at the time of trial. General Statutes § 54-84a; State v. Christian, 267 Conn. 710, 724, 841 A.2d 1158 (2004). The privilege does not apply if the proceeding involves the claims enumerated in § 54-84a (b) (i.e., joint criminal participation, personal violence against spouse or minor child of either spouse). Cf. General Statutes § 52-146. The spouse still may invoke other applicable privileges available to any witness (e.g., privilege against self-incrimination).

The marital communications privilege “permits an individual to refuse to testify, and to prevent a spouse or former spouse from testifying, as to any confidential communication made by the individual to the spouse during their marriage.” (Emphasis omitted; internal quotation marks omitted.) State v. Christian, supra, 267 Conn. 725. Section 54-84b embodies the common-law requirements for recognizing the privilege and adds the requirement that the communication must be “induced by the affection, confidence, loyalty and integrity of the marital relationship.” General Statutes § 54-84b (a); accord State v. Davalloo, 320 Conn. 123, 140, 128 A.3d 492 (2016). As in the case of the adverse spousal testimony privilege, the testimony of the witness spouse may be compelled under the marital communications privilege for any of the reasons enumerated in § 54-84b (c).

While § 54-84b (b) codified and amended the common-law spousal privilege as it relates to criminal prosecutions, the privilege, when invoked in a civil matter, is still defined by common law. See State v. Christian, supra, 267 Conn. 728–30; State v. Saia, 172 Conn. 37, 43, 372 A.2d 144 (1976).
Sec. 6-1. General Rule of Competency

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

(As amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

Section 6-1 establishes a general presumption of competency subject to exceptions. Ct. State v. Weinberg, 215 Conn. 231, 243–44, 575 A.2d 1003, cert. denied, 498 U.S. 967, 111 S. Ct. 112, 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.

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); 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.

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 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
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.

COMMENTS

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.

COMMENTS

Section 6-5 reflects 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 (1970); 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, 326, 618 A.2d 32 (1993); State v. Asherman, 182 Conn. 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. Jack 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 action arising out of the same events giving rise to the criminal trial at which the witness testifies against the defendant. State v. Airline, 223 Conn. 552, 555, 623 A.2d 755 (1993).

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 are 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 offered evidence; or (3) “stating a ‘good faith belief that there is an adequate factual basis for 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) 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 addresses when such evidence is admissible and the appropriate methods of proof.

(a) Opinion and reputation evidence of character.

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, 587 A.2d 1295 (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.

Impeachment through the use of specific instance evidence under subdivision (1) is committed to the trial court's discretion. State v. Vitale, 197 Conn. 396, 401, 497 A.2d 956 (1985). The trial court must, however, exercise its discretion 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, subdivision (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) covers only 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 subdivision (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; Shailler v. Bullock, 78 Conn. 65, 69, 70, 61 A. 65 (1900). 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. See State v. McGraw, 204 Conn. 444–47, 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.


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 or not the witness personally knows of the principal witness' truthful or untruthful conduct. See State v. McGraw, supra, 447.
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.


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 Corp. 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. See, e.g., Label Systems Corp. 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; see also Label Systems Corp. v. Aghamohammadi, supra, 309 ("unless a conviction [has] 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 Label Systems Corp. v. Aghamohammadi, supra, 307; 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.

(b) Methods of proof.

Subsection (b) restates the two common-law methods of proving a witness' criminal conviction. E.g., 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, 194 Conn. 1, 16, 480 A.2d 489 (1984).

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.


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) recognizes the discretion afforded the trial judge in determining the scope of cross-examination and subsequent examinations. E.g., State v. Prouleau, 235 Conn. 274, 302, 664 A.2d 793 (1995) (cross-examination); see State v. Conrad, 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).

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) (nervous minor victim of assault who needed repeated reassurances from court); 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. 921, 733 A.2d 846 (1999); State v. Parsons, 28 Conn. App. 91, 104, 612 A.2d 73 (minor victims of sexual assault who had been “hesitant to testify, and had difficulty testifying in open court”), cert. denied, 223 Conn. 920, 614 A.2d 829 (1992); or to a witness who has trouble communicating. See State v. Salamon, supra, 559–60 (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 Fasaneli v. Terzo, 150 Conn. 349, 359, 189 A.2d 500 (1963); see also Mendez v. Dorman, supra, 151 Conn. 196–98.

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. Kam, 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 written and the refreshed testimony. See State v. Masse, 24 Conn. Supp. 45, 56, 186 A.2d 553 (1962); 1 C. McCormick, Evidence (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. 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, 343 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.

Impeachment of a witness' in-court testimony with the witness' prior inconsistent statements is proper only if the prior inconsistent 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. Wheeler, 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.


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 denied or stated that he or she did not recall having made prior statement, extrinsic evidence establishing making of that statement could 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 to 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 Complainant

(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 complainant.

(1) If the defense impeaches the credibility of a sexual assault complainant regarding any out-of-court complaints or delayed reporting of the alleged sexual assault, the state shall be permitted to call constancy of accusation witnesses. Such witnesses may testify that the allegation was made and when it was made, provided that the complainant has testified to the facts of the alleged assault and to the identity of the person or persons to whom the alleged assault was reported. Any testimony by the witnesses about details of the alleged assault shall be limited to those details necessary to associate the complainant’s allegations with the pending charge. The testimony of the witnesses is admissible only with regard to whether the complaint was made and not to corroborate the substance of the complaint.

(2) If the complainant’s credibility is not impeached by the defense regarding any out-of-court complaints or delayed reporting of the alleged sexual assault, constancy of accusation testimony shall not be permitted, but, rather, the trial court shall provide appropriate instructions to the jury regarding delayed reporting.

(Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

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, 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-F-3), 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. See 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, 18–20, 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; see also 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 complainant.

Subsection (c) reflects the Supreme Court’s recent modification of the constancy of accusation rule in State v. Daniel W. E., 322 Conn. 593, 142 A.3d 265 (2016).

Evidence introduced under subsection (c) is admissible “only for the purpose of negating any inference that, because there was a delay in reporting the offense, the offense did not occur, and, therefore, such evidence may be used only in considering whether the complaint was made, and not to corroborate the substance of the complaint.” Id., 616. The admissibility of constancy of accusation testimony under Daniel W. E. is subject to the limitations established in State v. Troupe, 237 Conn. 284, 304, 677 A.2d 917 (1996) (testimony of constancy witness strictly limited to details necessary to associate complaint with pending charge, such as time and place of alleged assault and identity of alleged assailant). See State v. Daniel W. E., supra, 322 Conn. 629. Evidence may be introduced substantively only when permitted elsewhere in the Code. See, e.g., Section 8-3 (2) (spontaneous utterance hearsay exception); see also State v. Troupe, supra, 304 n.19.

Upon request, the court shall give a limiting instruction prior to the admission of constancy of accusation testimony from any of the individuals to whom a complainant had reported the alleged sexual assault. See, e.g., State v. Salazar, 151 Conn. App. 463, 475–76, 93 A.3d 1192 (2014), cert. denied, 323 Conn. 914, 149 A.3d 496 (2016).

If the defense does not challenge the complainant’s credibility regarding out-of-court complaints or delayed reporting, constancy evidence is not admissible, but the court shall instruct the jury that (1) there are many reasons why sexual assault victims may delay officially reporting the offense, and (2) to the extent that the complainant delayed reporting the alleged offense, the delay should not be considered by the jury in evaluating the complainant’s credibility. State v. Daniel W. E., supra, 322 Conn. 629; see Connecticut Criminal Jury Instructions 7.2-1, available at http://www.jud.ct.gov/JI/Criminal/Criminal.pdf.
ARTICLE VII—OPINIONS AND EXPERT TESTIMONY

Sec. 7-1. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue.

COMMENTARY

Section 7-1 sets forth standards for the admissibility of nonexpert opinion testimony. Section 7-1 is based on the traditional rule that witnesses who did not testify as experts generally were required to limit their testimony to an account of the facts and, with but a few exceptions, could not state an opinion or conclusion. E.g., Robinson v. Faulkner, 163 Conn. 365, 371–72, 306 A.2d 857 (1972); Stephanofsky v. Hill, 136 Conn. 379, 382, 71 A.2d 560 (1950); Sydlemans v. Beckwith, 43 Conn. 9, 11 (1875). Section 7-1 attempts to preserve the common-law preference for testimony of facts but recognizes there may be situations in which opinion testimony will be more helpful to the fact finder than a rendition of the observed facts only.

In some situations, a witness may not be able to convey sufficiently his or her sensory impressions to the fact finder by a mere report of the facts upon which those impressions were based and, instead, may use language in the form of a summary characterization that is effectively an opinion about his or her observation. See State v. McGinnis, 158 Conn. 124, 130–31, 256 A.2d 241 (1969). As a matter of practical necessity, this type of nonexpert opinion testimony may be admitted because the facts upon which the witness’ opinion is based “are so numerous or so complicated as to be incapable of separation, or so evanescent in character [that] they cannot be fully recollected or detailed, or described, or reproduced so as to give the trier the impression they gave the witness . . . .” Atwood v. Atwood, 84 Conn. 169, 173, 79 A. 59 (1911); accord State v. Spigaro, 210 Conn. 359, 371, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); Stephanofsky v. Hill, supra, 136 Conn. 382; Sydlemans v. Beckwith, supra, 43 Conn. 12.

Some of the matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the owner of the property; Misisco v. LaMata, 150 Conn. 680, 684, 192 A.2d 891 (1963); the appearance of persons or things; State v. McGinnis, supra, 158 Conn. 130–31; Maclaren v. Bishop, 113 Conn. 312, 313–15, 155 A. 210 (1931); sound; Johnson v. Newell, 160 Conn. 269, 277–78, 278 A.2d 776 (1971); the speed of an automobile; Acampora v. Asselin, 179 Conn. 425, 427, 426 A.2d 797 (1980); Stephanofsky v. Hill, supra, 136 Conn. 382–83; physical or mental condition of others; Atwood v. Atwood, supra, 84 Conn. 172–75; and safety of common outdoor objects, such as a fence or the state of repair of a road. See Czajkowski v. YMCA of Metropolitan Hartford, Inc., 149 Conn. App. 436, 446–47, 89 A.3d 904 (2014) (citing cases).

In other contexts, however, nonexpert opinion testimony has been held inadmissible. See, e.g., Pickel v. Automated Waste Disposal, Inc., 65 Conn. App. 176, 190, 782 A.2d 231 (2001) (trial court properly excluded lay opinion testimony regarding cause of accident).

Whether nonexpert opinion testimony is admissible is a preliminary question for the court. See Section 1-3 (a); see also, e.g., Turbert v. Mather Motors, Inc., 165 Conn. 422, 434, 334 A.2d 903 (1973) (admissibility of nonexpert opinion testimony within court’s discretion).

Sec. 7-2. Testimony by Experts

A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue.

COMMENTARY

The subject matter upon which expert witnesses may testify is not limited to the scientific or technical fields but extends to all areas of specialized knowledge. See, e.g., State v. Edwards, 325 Conn. 97, 126–28, 156 A.3d 506 (2017) (explaining what qualifies as expert testimony); see also State v. Corea, 241 Conn. 322, 355, 696 A.2d 944 (1997) (federal agent properly allowed to testify about local cocaine distribution and its connection with violence); State v. Hasan, 205 Conn. 485, 494–95, 534 A.2d 877 (1987) (podiatrist properly allowed to testify about physical match between shoe and defendant’s foot).

Section 7-2 requires a party offering expert testimony, in any form, to show that the witness is qualified and that the testimony will be of assistance to the trier of fact. A three part test is used to determine whether these requirements are met. E.g., Sullivan v. Metro-North Commuter Railroad Co., 292 Conn. 150, 158, 971 A.2d 676 (2009). First, the expert must possess knowledge, skill, experience, training, education or some other source of learning directly applicable to a matter in issue. E.g., Weavers v. McNulty, 313 Conn. 393, 406–409, 97 A.3d 920 (2014); State v. Borrelli, 227 Conn. 153, 165–67, 629 A.2d 1105 (1993); State v. Girolamo, 197 Conn. 201, 214–15, 496 A.2d 948 (1985). Second, the witness’ skill or knowledge must not be common to the average person. See, e.g., State v. Guilbert, 306 Conn. 218, 230, 49 A.3d 705 (2012); State v. Borrelli, supra, 167–71. Third, the testimony must be helpful to the fact finder in considering the issues. See, e.g., State v. Hasan, supra, 205 Conn. 484 (“[t]he value of [the witness’] expertise lay in its assistance to the jury in reviewing and evaluating the evidence”). The inquiry is often summarized in the following terms: “The true test of the admissibility...
of [expert] testimony is not whether the subject matter is common or uncommon, or whether many persons or few have some knowledge of the matter; but it is whether the witnesses offered as experts have any peculiar knowledge or experience, not common to the world, which renders their opinions founded on such knowledge or experience any aid to the court or the jury in determining the questions at issue." (Internal quotation marks omitted.) *Going v. Pagani*, 172 Conn. 29, 35, 372 A.2d 516 (1976).

The case law imposes an additional admissibility requirement with respect to some—but not all—types of scientific expert testimony. This additional requirement derives from *State v. Porter*, 241 Conn. 57, 73, 698 A.2d 739 (1997), cert. denied, 523 U.S. 1058, 118 S. Ct. 1384, 140 L. Ed. 2d 645 (1998), which directs trial judges, in considering the admission of certain types of scientific expert testimony, to serve a gatekeeper function in determining whether such evidence will assist the trier of fact. *Porter* adopted an approach similar to that taken by the United States Supreme Court in construing the analogous federal rule of evidence in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993). (Emphasis omitted; internal quotation marks omitted.) *Going v. Pagani*, supra, 31 Conn. 414–15; *Maher v. Quest Diagnostics, Inc.*, 269 Conn. 154, 168, 847 A.2d 978 (2004). This fourth requirement itself has two parts. *State v. Porter*, supra, 63–64; see also *Weaver v. McKnight*, supra, 413–14. The proffering party first must establish that the scientific expert testimony is reliable. *State v. Porter*, supra, 64. Scientific expert testimony is reliable if the underlying reasoning or methodology is scientifically valid. Id. *Porter* identifies several factors that should be considered by a trial judge to help decide whether scientific expert testimony is reliable. Id., 84–86. This list of factors is not exclusive; id., 84; and the operation of each factor varies depending on the specific context of each case. Id., 86–87.

The second part of the *Porter* analysis requires the trial judge to determine whether the proffered scientific evidence is relevant to the case, meaning that the reasoning or methodology underlying the scientific theory or technique in question properly can be applied to the facts in issue. Id., 64–65. "In other words, proposed scientific testimony must be demonstrably relevant to the facts of the particular case in which it is offered, and not simply be valid in the abstract." Id., 65; accord *Weaver v. McKnight*, supra, 414. This is sometimes called the "fit requirement" of *Porter*. (Emphasis omitted; internal quotation marks omitted.) *State v. Guilbert*, supra, 306 Conn. 232; accord *State v. Porter*, supra, 83. The relevance and prejudice analysis under Article IV of the Code also remains fully applicable to scientific expert testimony. See, e.g., *State v. Kelly*, 256 Conn. 23, 74, 770 A.2d 908 (2001).

The *Porter* analysis applies only to certain types of scientific expert testimony. See *State v. Reid*, 254 Conn. 540, 546, 757 A.2d 482 (2000); see also *Maher v. Quest Diagnostics, Inc.*, supra, 269 Conn. 170 n.22 ("certain types of evidence, although ostensibly rooted in scientific principles and presented by expert witnesses with scientific training, are not 'scientific' for the purposes of our admissibility standard but are 'scientific evidence, either before or after *Porter*'.").

*Sec. 7-3. Opinion on Ultimate Issue*

(a) General rule. Testimony in the form of an opinion is inadmissible if it embraces an ultimate issue to be decided by the trier of fact, except that, other than as provided in subsection (b), an expert witness may give an opinion that embraces an ultimate issue where the trier of fact needs expert assistance in deciding the issue.

(b) Mental state or condition of defendant in a criminal case. "No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto, except that such expert witness
may state his diagnosis of the mental state or condition of the defendant. The ultimate issue as to whether the defendant was criminally responsible for the crime charged is a matter for the trier of fact alone.” General Statutes § 54-86i.

COMMENTARY

(a) General rule.

An ultimate issue is one that cannot “reasonably be separated from the essence of the matter to be decided [by the trier of fact].” (Internal quotation marks omitted.) State v. Finan, 275 Conn. 60, 66, 881 A.2d 187 (2005). The common-law rule concerning the admissibility of a witness’ opinion on the ultimate issue is phrased in terms of a general prohibition subject to numerous exceptions. E.g., State v. Spigarolo, 210 Conn. 359, 373, 556 A.2d 112, cert. denied, 493 U.S. 933, 110 S. Ct. 322, 107 L. Ed. 2d 312 (1989); State v. Vilalastra, 207 Conn. 35, 41, 540 A.2d 42 (1988). Subsection (a) adopts the general bar to the admission of nonexpert and expert opinion testimony that embraces an ultimate issue.

Subsection (a) recognizes an exception to the general rule for expert witnesses in circumstances in which the jury needs expert assistance in deciding the ultimate issue. A common example is a case involving claims of professional negligence. See, e.g., Pivel v. Stamford Hospital, 180 Conn. 314, 328–29, 430 A.2d 1 (1980). When there is particular concern about invading the province of the fact finder, courts may allow the expert to testify regarding common behavioral characteristics of certain types of individuals; State v. Vilalastra, supra, 207 Conn. 45 (behavior of drug dealers); but will prohibit the expert from opining as to whether a particular individual exhibited that behavior. See, e.g., State v. Taylor G., 315 Conn. 734, 762–63, 110 A.3d 338 (2015) (behavior of child victim of sexual abuse). Expert opinion on the ultimate issue admissible under subsection (a) also must satisfy the admissibility requirements applicable to all expert testimony set forth in Sections 7-2 and 7-4.

(b) Mental state or condition of defendant in a criminal case.

Subsection (b), including its use of the term “opinion or inference,” is taken verbatim from General Statutes § 54-86i. The Code attaches no significance to the difference between the term “opinion or inference,” as used in subsection (b), and the term “opinion” or “opinions,” without the accompanying “or inference” language, used in other provisions of Article VII of the Code.

Sec. 7-4. Opinion Testimony by Experts; Bases of Opinion Testimony by Experts; Hypothetical Questions

(a) Opinion testimony by experts. An expert may testify in the form of an opinion and give reasons therefor, provided sufficient facts are shown as the foundation for the expert’s opinion.

(b) Bases of opinion testimony by experts. The facts in the particular case upon which an expert bases an opinion may be those perceived by or made known to the expert at or before the proceeding. The facts need not be admissible in evidence if of a type customarily relied on by experts in the particular field in forming opinions on the subject. The facts relied on pursuant to this subsection are not substantive evidence, unless otherwise admissible as such evidence.

(c) Hypothetical questions. An expert may give an opinion in response to a hypothetical question provided that the hypothetical question: (1) presents the facts in such a manner that they bear a true and fair relationship to each other and to the evidence in the case; (2) is not worded so as to mislead or confuse the jury; and (3) is not so lacking in the essential facts as to be without value in the decision of the case. A hypothetical question need not contain all of the facts in evidence.

COMMENTARY

(a) Opinion testimony by experts.

Connecticut case law requires disclosure of the “factual basis” underlying an expert witness’ opinion before the expert witness may render that opinion. (Internal quotation marks omitted.) Borkowski v. Blue Castle, 228 Conn. 729, 638 A.2d 1060 (1994); accord State v. John, 210 Conn. 652, 677, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 84, 107 L. Ed. 2d 50 (1989); State v. Asherman, 193 Conn. 695, 716, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); see also Practice Book § 13-4 (b) (1); Going v. Pagani, 172 Conn. 29, 34, 372 A.2d 516 (1976). Subsection (a) incorporates this principle by requiring the party offering the evidence to show that the expert’s opinion rests upon an adequate factual foundation. This requirement applies whether the expert’s opinion is based on personal knowledge or secondhand facts made known to the expert at or before trial. E.g., State v. John, supra, 676–78 (secondhand data customarily relied on by other experts); Going v. Pagani, supra, 32 (firsthand observation); Floyd v. Fruit Industries, Inc., 144 Conn. 659, 666, 136 A.2d 918 (1957) (secondhand facts made known to expert through use of hypothetical question).

Subsection (a) contemplates that disclosure of the “foundational” facts will, in most cases, occur during the examination undertaken by the party calling the expert and before the expert states his or her opinion. The requirement of preliminary disclosure, however, is subject to the trial court’s discretionary authority to admit evidence upon proof of connecting facts or subject to later proof of connecting facts. Section 1-3 (b); see John V. Schaefer, Jr. & Co. v. Ely, 84 Conn. 501, 509, 80 A. 775 (1911). Nothing in subsection (a) precludes further exploration into the factual basis for the expert’s opinion during cross-examination of the expert. Whether sufficient facts are shown as the foundation for the expert’s opinion is a preliminary question to be decided by the trial court. Lisiewicz v. LeBlanc, 5 Conn. App. 136, 141, 497 A.2d 86 (1985); see Section 1-3 (a).

The admissibility of expert testimony rendered by a physician—whether a treating or nontreating physician—is governed by the same evidentiary standard applied to the testimony of expert witnesses generally. George v. Ericson, 210 Conn. 312, 317, 736 A.2d 865 (1999); Smith v. Connecticut Valley Hospital, 557 A.2d 93, cert. denied, 493 U.S. 824, 110 S. Ct. 1749, 84 L. Ed. 2d 814 (1985); see also Practice Book § 13-4 (b) (1); Going v. Pagani, supra, 32 (firsthand observation); Floyd v. Fruit Industries, Inc., 144 Conn. 659, 666, 136 A.2d 918 (1957) (secondhand facts made known to expert through use of hypothetical question).

Subsection (b) allows an expert witness to base his or her opinion on “facts” derived from one or more of three possible sources. First, the expert’s opinion may be based on facts “perceived by” the expert at or before trial, in other words, facts the expert observes firsthand. E.g., State v. Conroy, 194 Conn. 623, 628–29, 484 A.2d 448 (1984); Donch v. Kardos,

Second, the expert’s opinion may be based on facts “made known” to the expert at trial. This category includes facts that the expert learned while attending the trial and listening to the testimony of other witnesses prior to rendering his or her own opinion. See DiBlase v. Garnsey, 106 Conn. 86, 89, 136 A. 871 (1927). It also includes facts presented to the expert in the form of a hypothetical question. See, e.g., Keeney v. L & S Construction, 226 Conn. 205, 213, 626 A.2d 1299 (1993); State v. Auclair, 33 Conn. Supp. 704, 713, 368 A.2d 235, cert. denied, 171 Conn. 747, 364 A.2d 235 (1976).

Finally, the expert’s opinion may be based on facts, of which the expert has no firsthand knowledge, made known to the expert before trial, regardless of the admissibility of those facts themselves. See, e.g., State v. Gonzalez, 206 Conn. 391, 408, 538 A.2d 210 (1988) (expert’s opinion was based on autopsy report of another medical examiner); State v. Cosgrove, 181 Conn. 562, 584, 436 A.2d 33 (1980) (expert’s opinion was derived from reports that included observations of other toxicologists).

Although the factual basis for expert opinions resting on the first two sources of information (i.e., facts gleaned from firsthand observation or facts made known to the expert at trial) normally do not encounter obstacles to admissibility, case law is inconsistent with respect to the admissibility of expert opinion based on facts in the last category (i.e., facts themselves that are inadmissible at trial and of which the expert has no firsthand knowledge). In accordance with the modern trend in Connecticut, subsection (b) provides that an expert may offer an opinion based on facts that are not themselves admissible if those facts are of a type customarily relied on by experts in the particular field in forming their opinions. E.g., George v. Ericson, supra, 250 Conn. 324–25; State v. Gonzalez, supra, 206 Conn. 408; State v. Cuvelier, 175 Conn. 100, 107–108, 394 A.2d 185 (1978). Facts of this nature may come from sources such as conversations, informal opinions, written reports and data compilations. Whether these facts are of a type customarily relied on by experts in forming opinions is a preliminary question to be decided by the trial court. See Section 1-3 (a).

In a criminal case, when an expert opinion is based on facts not in evidence, the court and parties should be aware of constitutional concerns. See State v. Singh, 59 Conn. App. 638, 652–53, 757 A.2d 1175 (2000) (opinion based on information provided by others does not violate confrontation clause if expert is available for cross-examination concerning nature and reasonableness of reliance), rev’d on other grounds, 259 Conn. 693, 793 A.2d 226 (2002); cf. In re Barbara J., 215 Conn. 31, 42–44, 574 A.2d 203 (1990) (admission of expert’s report in termination of parental rights proceeding). This additional requirement, which is not included in subsection (b) as an independent prerequisite under the Code, has been mentioned in dicta in civil cases as well. See, e.g., R.L. Pools, Inc. v. Paramount Concrete, Inc., 149 Conn. App. 839, 849, 89 A.3d 993 (“[a]n expert may give an opinion based on sources not in themselves admissible in evidence, provided [1] the facts or data not in evidence are of a type reasonably relied on by experts in the particular field, and [2] the expert is available for cross-examination concerning his or her opinion” [internal quotation marks omitted]), cert. denied, 312 Conn. 920, 94 A.3d 1200 (2014); Birkhamshaw v. Socha, 156 Conn. App. 453, 484, 115 A.3d 1 (same), cert. denied, 317 Conn. 913, 116 A.3d 812 (2015).

Subsection (b) expressly states that the facts forming the basis of the expert opinion are not thereby made admissible as substantive evidence (i.e., for their truth) unless otherwise admissible as such under other provisions of the Code. See Millun v. New Milford Hospital, 510 Conn. 711, 726, 728, 80 A.3d 887 (2013). Thus, subsection (b) does not constitute an exception to the hearsay rule or any other exclusionary provision of the Code. However, because subsection (a) requires disclosure of a sufficient factual basis for the expert’s opinion, and because the cross-examiner often will want to explore the expert’s factual basis further, subsection (b) does not preclude the trial court, in its discretion, from admitting the underlying facts relied on by the expert for the limited purpose of explaining the factual basis for the expert’s opinion. DeNunzio v. DeNunzio, 151 Conn. App. 403, 413, 95 A.3d 557 (2014), aff’d, 320 Conn. 178, 128 A.3d 901 (2016).

(c) Hypothetical questions.

Subsection (c) embraces the common-law rule concerning the admissibility of a hypothetical question and, necessarily, the admissibility of the ensuing expert’s opinion in response to the hypothetical question. Floyd v. Fruit Industries, Inc., supra, 144 Conn. 666; accord Sheinitz v. Greenberg, 200 Conn. 58, 77, 509 A.2d 1023 (1986); Schwartz v. Westport, 170 Conn. 223, 225, 365 A.2d 1151 (1976). In accordance with case law, subsection (c) recognizes that the hypothetical question must contain the essential facts of the case; see State v. Gaynor, 182 Conn. 501, 509–10, 438 A.2d 739 (1980); see also Keeney v. L & S Construction, supra, 226 Conn. 213 (“the stated assumptions on which a hypothetical question is based must be the essential facts established by the evidence”); but need not contain all the facts in evidence. E.g., Donch v. Kardos, supra, 149 Conn. 201; Stephanofsky v. Hill, 136 Conn. 379, 384, 71 A.2d 560 (1950).

Subsection (c) states the rule concerning the framing of hypothetical questions on direct examination. See, e.g., Schwartz v. Westport, supra, 170 Conn. 224–25. The rules governing the framing of hypothetical questions on direct examination and for the purpose of introducing substantive evidence are applied with increased liberality when the hypothetical question is framed on cross-examination and for the purpose of impeaching and testing the accuracy of the expert’s opinion testimony given on direct examination. See, e.g., State v. Gaynor, supra, 182 Conn. 510–11; Kirchner v. Yale University, 150 Conn. 623, 629, 192 A.2d 641 (1963); Livingstone v. New Haven, 125 Conn. 123, 127–28, 3 A.2d 836 (1939); Rice v. Dowling, 23 Conn. App. 460, 465, 581 A.2d 1061 (1990), cert. denied, 217 Conn. 805, 584 A.2d 1190 (1991).

Common law shall continue to govern the use of hypothetical questions on cross-examination.
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); Chemiske v. Jajen, 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); see also 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). 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. The definition does not apply in other contexts or affect definitions of “statement” in other provisions of the General Statutes or the 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 long-standing common-law recognition of that term. See, e.g., State v. Jarzbe, 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, e.g., State v. Buckland, 313 Conn. 205, 216–21, 96 A.3d 1163 (2014) (agreeing with federal cases holding that “raw data” generated by breath test machine are not hearsay because machine is not declarant), cert. denied, U.S., 153 S. Ct. 992, 190 L. Ed. 2d 837 (2015); State v. Gojcaj, 151 Conn. App. 183, 195, 200–202, 92 A.3d 1056 (holding that making of computer generated log, which was created automatically to record date and time whenever any person entered passcode to activate or deactivate security system, was not “statement by a human declarant” [internal quotation marks omitted]), 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) (fax header was not statement by declarant). 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, 202–203 n.12.

(3) “Hearsay”


Sec. 8-2. Hearsay Rule

(a) General rule. Hearsay is inadmissible, except as provided in the Code, the General Statutes or 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 that 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.

(Commented Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY

(a) General rule. Section 8-2 is consistent with common law. See, e.g., State v. Oquendo, 223 Conn. 635, 664, 613 A.2d 1300 (1992); State
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 conflict 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) (deposition of certain healthcare providers is admissible, regardless of witness’ availability); Practice Book § 13-31 (a) (3) (deposition of party or officer, director, managing agent or employee testifying on behalf of corporation, partnership or government agency is admissible when used by adverse party for any purpose); Practice Book § 13-31 (a) (4) (deposition is admissible if, inter alia, witness is more than thirty miles from place of trial); Practice Book § 25-60 (c) (report of evaluation or study in family matters prepared pursuant to Practice Book § 25-60A or § 25-61 is admissible if author is available for cross-examination); Practice Book § 35a-9 (social study in dispositional phase of child neglect and termination of parental rights proceedings is admissible, if author, if available, appears for cross-examination); see also Hibbard v. Hibbard, 139 Conn. App. 10, 15–16, 55 A.3d 301 (2012) (report and hearsay statements contained therein are 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 is admissible against a criminal defendant at trial only if the defendant had a prior opportunity to cross-examine the declarant who is otherwise unavailable to testify at trial. See U.S. Const., art. VI and XIV; 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, (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 (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, 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.


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 that 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 Zoaarski, 227 Conn. 764, 766, 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. The rule is in accord with the modern trend. E.g., Fed. R. Evid. 801 (d) (2) (A). A party statement is admissible under Section 8-3 (1), regardless of whether the person making the statement has personal knowledge of the facts stated therein. Dreier v. Upjohn Co., 196 Conn. 242, 249, 492 A.2d 164 (1985). If the statement at issue was made by a party opponent in a deposition, the statement is admissible in accordance with Practice Book § 13-37 (h) to testify on behalf of a public or private corporation, partnership, association or government agency. This rule of practice was deemed “analogous” to the hearsay exception covered by Section 8-3 (1) in Gateway Co. v. DiNoia, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (construing Practice Book [1978–97] § 248 [1] [c], predecessor to Practice Book § 13-31 (a) [3]).

(B) The second category recognizes the common-law hearsay exception for “admissibility of tacit 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); Falkner 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, 462 U.S. 610, 617–19, 96 S. Ct. 2240, 49 L. Ed. 2d 917 (1976); see, e.g., State v. Zeko, 177 Conn. 545, 554, 418 A.2d 917 (1979).

(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. 688 (1930). For this exception to apply, the speaker must have 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 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. 186, 188, 609 A.2d 1066 (1992). The authoritative cases recognize “authorized admissions.” See, e.g., Ackerman v. Sobol Family Partnership, LLP, 298 Conn. 495, 507–12, 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) (2); see generally Robles v. Lavin, 176 Conn. 281, 284, 407 A.2d 957 (1978).

(D) The fourth category encompasses the exception set forth in rule 801 (d) (2) (D) of the Federal Rules of Evidence and adopted in a majority of state jurisdictions. The notes of the advisory committee on the 1972 proposed rules express “[d]issatisfaction” 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 cites to “[a] substantial trend [that] favors admitting statements related to a matter within the scope of the agency or employment.” Grayson v. Williams, 256 F.2d 61 [66] (10th Cir. 1958); [see also Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines Holland] v. Tuller, [292 F.2d 775, 783–84 (D.C. Cir.), cert. denied, 368 U.S. 921, 82 S. Ct. 243, 7 L. Ed. 2d 136] (1961); Martin v. [Savage Truck Line, Inc.], 121 F. Supp. 417 [418–19] (D.D.C. 1954), and numerous state court decisions collected in 4 [J. Wigmore, Evidence (4th Ed. 1972) § 1078, pp. 166–69 n.2] . . . ” Fed. R. Evid. 801 (d) (2) (D), advisory committee notes. 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 that state courts and commentators, have almost universally condemned the strict [common-law rule in favor of the . . . rule set forth in [rule 801 (d) (2) (D) of the Federal Rules of Evidence”). Connecticut now adopts the modern rule as well, and, in doing so, overrules the line of cases adhering to the common law in requiring proof that the declarant was authorized to speak on behalf of the employer or principal. See, e.g., Cascella v. Jay James Camera Shop, Inc., 147 Conn. 337,

(F) The sixth category of party opponent admissions is derived from Agricultural Ins. Co. v. Keeler, 44 Conn. 161, 162–64 (1876).

(G) The final category incorporates the common-law hearsay exception applied in Pierce v. Roberts, 57 Conn. 31, 40–41, 17 A. 275 (1888), 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, 617 (1994) (relying in part on 325, 5 A.2d 705 (1939). Thus, in the previous example, 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 (1995). 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 previous example, 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.

(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 at the time the declarant 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 relevant issue in the case. See, e.g., State v. Perkins, 271 Conn. 218, 256–59, 856 A.2d 917 (2004) (defendant’s state of mind at time of hearsay statement was not relevant to any issue in case); State v. Periere, supra, 186 Conn. 606–607 (relevant to show declarant’s fear). 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. 515 (1932). The inference drawn from the 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 previous example, 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.

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, supra, 129 Conn. 618–19; but see State v. Santangelo, supra, 205 Conn. 592–93. As the advisory committee notes 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 notes, citing Shepard v. United States, 290 U.S. 96, 54 S. Ct. 22, 78 L. Ed. 196 (1933). For cases dealing with 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), and Constock 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, 552–53, 556–57, 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., 556.

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. Hasbrouck, 92 Conn. 579, 582, 103 A. 939 (1918). 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 not 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). Connecticut 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). 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.) Id.

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 healthcare 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 testifying as an expert witness. Statements made to these so-called “nontreating” physicians were not accorded substantive effect. See, e.g., Zawiska v. Quality Name Plate, Inc., 149 Conn. 115, 119, 176 A.2d 578 (1961); Rowland v. Philadelphia, Wilmington & Baltimore Railroad Co., 63 Conn. 415, 418–19, 28 A. 102 (1893). This distinction was eliminated by the court in George v. Ericson, 250 Conn. 312, 324–25, 736 A.2d 889 (1999), which held that nontreating physicians 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 (6).

(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. Giglott 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 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) (overruled in part on other grounds by State v. Ferrell, 191 Conn. 37, 463 A.2d 573 (1983)), cert. denied, 400 U.S. 1011, 91 S. Ct. 576, 27 L. Ed. 2d 625 (1971); Capone v. Sloan, 149 Conn. 538, 543, 182 A.2d 414 (1962); Hawken v. Daley, 85 Conn. 16, 19, 81 A. 1053 (1911); see also State v. Juan V., 109 Conn. App. 431, 441 n.9, 951 A.2d 651 (“[p]roving that the record was accurate at the time it was made is an essential
A memorandum or record admissible under the exception may be read in evidence and received as an exhibit. Katso- 

na 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 produc-
tion 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 exam-
ines 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. 

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.

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 
§§ 12-39b and 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 
2d 218 (1971); Section 8-3 (7) (g) leaves 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. Geremia, 
107 Conn. 670, 679–80, 142 A. 461 (1928). Proviso (B) comes 
from cases such as Gett v. Isaacs, 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. 

The “duty” under which public officials act, as contemplated 
by proviso (A), is often 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).

Statute in learned treatises.

Exception (8) explicitly permits the substantive use of state-
mements contained in published treatises, periodicals or pamph-
lets 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 omit-
ted); 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 
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 authoritative nature 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. Huttonlocher, 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. 
Aimes v. Sears, Roebuck & Co., 8 Conn. App. 642, 650–51, 
514 A.2d 352 (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. Huttonlocher, 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 Cross v. Huttonlocher, supra, 395–96; 
see also Filippelli v. Saint Mary’s Hospital, supra, 319 Conn. 
138–41 (trial court has discretion to require redaction so that 
only portion of article is admitted as full exhibit).

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, New Haven & 
Hartford Railroad Co. v. Cella, 88 Conn. 515, 520, 91 A. 972 
(1914); see Clark v. Drska, 1 Conn. App. 481, 489, 473 A.2d 

The exception, by its terms, applies to all kinds of docu-
ments, including documents produced by electronic means, 
and electronically stored information, and is not limited to 
documents affecting an interest in property. See Petromav v. 
Anderson, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map 
introduced under exception).

“[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.

Published compilations.

Connecticut cases have recognized an exception to the 
hearsay rule—or at least have assumed that 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).

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).
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.
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.


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) Identification 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, 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), cert. denied, U.S. ___ 137 S. Ct. 2263, 198 L. Ed. 2d 713 (2017); see also id., 445–46 (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 there is no factual dispute as to identity of perpetrator or ability of eyewitness to identify defendant as perpetrator).

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.

Commentary

The fundamental threshold requirement of all Section 8-6 hearsay exceptions is that the declarant be unavailable as a witness. At common law, the definition of unavailability has varied with the particular hearsay exception at issue. For example, the Supreme Court has recognized death as the fundamental threshold requirement of all Section 8-6 hearsay exceptions.

Numerous statutes also provide for the admissibility of former deposition or trial testimony under specified circumstances. See, e.g., 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. 578, 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). For purposes of the former testimony exception, the proponent must demonstrate that a good faith, genuine effort was made to procure the attendance of the witness at trial but is not required to demonstrate that efforts were made to take the deposition of the witness. See Maio v. New Haven, supra, 326 Conn. 725–28.

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; 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. Weinrich, 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. 565; Ontario v. State, 44 Conn. 243 (1879), 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), 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 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, supra, 113 Conn. 215–16; State v. Smith, 49 Conn. 376, 379 (1891). The rule 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 Railroad 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 Railroad Co., supra, 358.

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. Smith, supra, 49 Conn. 379; Lane v. Swift, 57 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 seventy 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).


Recognizing the possible unreliability of this type of evidence, admissibility is conditioned on the statement's trustworthy nature. E.g., State v. Henson, 204 Conn. 377, 390, 526 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. E.g., State v. Bryant, 202 Conn. 567, 595, 523 A.2d 451 (1987); State v. Savage, 34 Conn. App. 620, 640, 637 A.2d 836 (1992), cert. denied, 229 Conn. 922, 642 A.2d 1216 (1994). A statement is not against the declarant's penal interest if it is 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 1067 (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 incriminate the declarant but exculpate the defendant, and statements that incriminate both the declarant and the defendant. Connecticut v. Terrizzano, supra, 239 Conn. 57, cert. denied, 229 Conn. 922, 642 A.2d 1216 (1994). When a narrative contains both disavowing statements and collateral, self-serving or neutral statements, the Connecticut rule admits the entire narrative, letting the "trier of fact assess


“Unavailability,” for purposes of this hearsay exception, is limited to the declarant’s death. See Wildwood Associates, Ltd. v. Esposito, supra, 211 Conn. 44; Romeo v. King, supra, 185 Conn. 222–23. 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 if he were testifying at trial. E.g., Wildwood Associates, Ltd. v. Esposito, supra, 211 Conn. 44; Putnam, Coffin & Burr, Inc. v. Halpem, 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. Halpem, 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 “traditional” 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).

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 traditional 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. See Chapman v. Smazer, supra, 151 Conn. 230–31; 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. Girasulo, 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 How. St. Tr. 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, 533–37, 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 when the party against whom the statement is offered “wrongfully caused—or acquiesced in wrongfully causing—the declarant’s unavailability as a witness, and did so intending that result.” Section 8-6 (8) requires more than mere acquiescence.

The preponderance of the 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, 558 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013). A defendant who intentionally procures the unavailability of a witness in order to prevent the witness from testifying forfeits any confrontation clause claims with respect to statements made by that witness. See Giles v. California, 554 U.S. 353, 361, 128 S. Ct. 2678, 171 L. Ed. 2d 488 (2008).

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 that qualifies under the business records exception; see Section 8-4; and that 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

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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

The weight a fact finder gives a witness’ in-court testimony often depends on the witness’ credibility. So too can a declarant’s credibility affect the weight accorded that declarant’s hearsay statement admitted at trial. Consequently, Section 8-8 permits the credibility of a declarant, whose hearsay statement has been admitted in evidence, to be attacked or supported as if the declarant had taken the stand and testified. See State v. Calabrese, 279 Conn. 393, 409–10, 902 A.2d 1044 (2006) (evidence tending to show bias, prejudice or interest); State v. Mills, 80 Conn. App. 662, 667–68, 837 A.2d 808 (2003) (evidence of prior criminal convictions), cert. denied, 268 Conn. 914, 847 A.2d 311 (2004); cf. State v. Torres, 210 Conn. 631, 640, 556 A.2d 1013 (1989); State v. Onofrio, 179 Conn. 23, 31, 425 A.2d 560 (1979); State v. Segar, 96 Conn. 429, 440–43, 114 A. 389 (1921).

Treating the hearsay declarant the same as an in-court witness would seem to pose a problem when impeachment by inconsistent statements is employed. Section 6-10(b) provides that when examining a witness about a prior inconsistent statement, “the statement should be shown . . . or [its] contents . . . disclosed to the witness at that time.” Showing or disclosing the contents of the inconsistent statement to the declarant will usually be impossible or impracticable because the declarant may not be a witness at trial, or may not be on the witness stand at the time the hearsay statement is offered. The second sentence in Section 8-8 relieves the examiner from complying with Section 6-10(b).

By using the terminology “[e]vidence of a statement . . . made at any time’’ (emphasis added); Section 8-8 recognizes the possibility that impeachment of a hearsay declarant may involve the use of a subsequent inconsistent statement, i.e., an inconsistent statement made after the hearsay declaration statement to be impeached. See generally State v. Torres, supra, 210 Conn. 635–40 (statements made subsequent to and inconsistent with probable cause hearing testimony, which was admitted at trial, were used to impeach hearsay declarant).

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, 390–91, 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. In re Taylor 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 falsely; 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).

To date, the court has not confronted the issue of whether an evidentiary proffer that comes close to but fails to fit precisely within a hearsay exception enumerated in the Code (i.e., “near miss”) could nevertheless be admitted under the residual exception. 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 n.12, 140 A.3d 402 (suggesting that residual exception would be unavailable for hearsay statement deemed inadmissible under Whelans exception; see Section 8-5 [1], cert. granted, 323 Conn. 911, 149 A.3d 980 (2016), and 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

“(a) Notwithstanding any other rule of evidence or provision of law, a statement by a child twelve years of age or younger at the time of the statement relating to a sexual offense committed against that child, or an offense involving physical abuse committed against that child by the child’s parent or guardian or any other person exercising comparable authority over the child at the time of the offense, 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 twelve years of age or younger 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 § 54-86l.


COMMENTARY
This section, which parallels General Statutes § 54-86l, addresses the unique and limited area of statements made by children concerning alleged acts of sexual assault or other sexual misconduct against a 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) sets forth the factors that must be applied in considering the admissibility of such a statement. See, e.g., State v. Maguire, 310 Conn. 535, 565, 78 A.3d 828 (2013); State v. Griswold, 160 Conn. App. 528, 537–50, 127 A.3d 189, cert. denied, 320 Conn. 907, 128 A.3d 952 (2015).
Sec. 9-1. Requirement of Authentication
(a) Requirement of authentication. The requirement of authentication as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the offered evidence is what its proponent claims it to be.

(b) Self-authentication. Extrinsic evidence of authenticity as a condition precedent to admissibility is not required if the offered evidence is self-authenticating in accordance with applicable law.

COMMENTARY
(a) Requirement of authentication.
Before an item of evidence may be admitted, there must be a preliminary showing of its genuineness, i.e., that the proffered item of evidence is what its proponent claims it to be. The requirement of authentication applies to all types of evidence, including writings, sound recordings, electronically stored information, real evidence such as a weapon used in the commission of a crime, demonstrative evidence such as a photograph depicting an accident scene, and the like. E.g., State v. Bruno, 236 Conn. 514, 551, 673 A.2d 1117 (1996) (real evidence); Shulman v. Shulman, 150 Conn. 651, 657, 657, 193 A.2d 525 (1963) (documentary evidence); State v. Lorain, 141 Conn. 694, 700–701, 109 A.2d 504 (1954) (sound recordings); Hurlbut v. Busseymey, 101 Conn. 406, 414, 126 A. 273 (1924) (demonstrative evidence). The category of evidence known as electronically stored information can take various forms. It includes, by way of example only, e-mail, Internet website postings, text messages and “chat room” content, computer-stored records, data, metadata and computer generated or enhanced animations and simulations. As with any other form of evidence, a party may use any appropriate method, or combination of methods, described in this commentary, or any other proof to demonstrate that the proffer is what its proponent claims it to be, to authenticate any particular item of electronically stored information. See Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 545–46 (D. Md. 2007).

The proponent need only advance “evidence sufficient to support a finding” that the proffered evidence is what it is claimed to be. Once this prima facie showing is made, the evidence may be admitted, and the ultimate determination of its authenticity rests with the fact finder. See, e.g., State v. Bruno, supra, 236 Conn. 551–53; Neil v. Miller, 2 Root (Conn.) 117, 118 (1794); see also Shulman v. Shulman, supra, 150 Conn. 657. Consequently, compliance with Section 9-1 (a) does not automatically guarantee that the fact finder will accept the proffered evidence as genuine. The opposing party may still offer evidence to discredit the proponent’s prima facie showing. Shulman v. Shulman, supra, 659–60.

Evidence may be authenticated in a variety of ways. They include, but are not limited to, the following:


(2) A person with sufficient familiarity with the handwriting of another person may give an opinion concerning the genuineness of that other person’s purported writing or signature. E.g., Lyon v. Lyman, 9 Conn. 55, 59 (1831).

(3) A contested item of evidence may be authenticated by comparing it with a preauthenticated specimen. See, e.g., State v. Ralls, 167 Conn. 408, 417, 356 A.2d 147 (1974) (fingerprint, experts); Tyler v. Todd, 36 Conn. 218, 222 (1869) (handwriting, experts or triers of fact); see also Lorraine v. Markel American Ins. Co., supra, 241 F.R.D. 546 (electronically stored information).


(6) Evidence describing a process or a system used to produce a result and showing that the process or system produces an accurate result. This method of authentication, modeled on rule 901 (b) (9) of the Federal Rules of Evidence, was used in State v. Swinton, 268 Conn. 781, 811–13, 847 A.2d 921 (2004), to establish the standard used to determine the admissibility of computer simulations or animations. The particular requirements applied in Swinton were “fairly stringent”; id., 818; because that case involved relatively sophisticated computer enhancements using specialized software. See id., 798–801. In other cases, when a proponent seeks to
Sec. 9-3. Authentication of Public Records

The requirement of authentication as a condition precedent to admitting into evidence a record, report, statement or data compilation, in any form, is satisfied by evidence that (A) the record, report, statement or data compilation authorized by law to be recorded or filed in a public office has been recorded or filed in that public office, (B) the record, report, statement or data compilation, purporting to be a public record, report, statement or data compilation, is from the public office where items of this nature are maintained, or (C) the record, report, statement or data compilation, purporting to be a public record, report, statement or data compilation, is from the public office where items of this nature are maintained, or (C) is otherwise free from suspicion.

COMMENTARY

Section 9-3 embraces the common-law ancient document rule. See, e.g., Jarboe v. Home Bank & Trust Co., 91 Conn. 265, 269, 99 A. 563 (1917). Documents that satisfy the foundational requirements are authenticated without more. See id., 270. Thus, Section 9-3 dispenses with any requirement that the document’s proponent produce attesting witnesses. Borden v. Westport, 112 Conn. 152, 161, 151 A. 512 (1930); Jarboe v. Home Bank & Trust Co., supra, 269, 270.

Although common-law application of the rule mainly involved dispositive instruments, such as wills and deeds; e.g., Jarboe v. Home Bank & Trust Co., supra, 91 Conn. 269 (will); Borden v. Westport, supra, 112 Conn. 161 (deed); but see, e.g., Petrov v. Anderson, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map); the current rule applies to all documents, in any form, including those stored electronically.

Ancient documents are the subject of a hearsay exception with foundational requirements identical to those found in Section 9-2. See Section 8-3 (9).

Sec. 9-2. Authentication of Ancient Documents

The requirement of authentication as a condition precedent to admitting a document in any form into evidence shall be satisfied upon proof that the document (A) has been in existence for more than thirty years, (B) was produced from proper custody, and (C) is otherwise free from suspicion.

COMMENTARY

Section 9-2 embraces the common-law ancient document rule. See, e.g., Jarboe v. Home Bank & Trust Co., 91 Conn. 265, 269, 99 A. 563 (1917). Documents that satisfy the foundational requirements are authenticated without more. See id., 270. Thus, Section 9-2 dispenses with any requirement that the document’s proponent produce attesting witnesses. Borden v. Westport, 112 Conn. 152, 161, 151 A. 512 (1930); Jarboe v. Home Bank & Trust Co., supra, 269, 270.

Although common-law application of the rule mainly involved dispositive instruments, such as wills and deeds; e.g., Jarboe v. Home Bank & Trust Co., supra, 91 Conn. 269 (will); Borden v. Westport, supra, 112 Conn. 161 (deed); but see, e.g., Petrov v. Anderson, 105 Conn. 366, 369–70, 135 A. 391 (1926) (ancient map); the current rule applies to all documents, in any form, including those stored electronically.

Ancient documents are the subject of a hearsay exception with foundational requirements identical to those found in Section 9-2. See Section 8-3 (9).
data compilation, is made available in electronic form by a public authority.


COMMENTARY

It generally is recognized that a public record may be authenticated simply by showing that the record purports to be a public record and comes from the custody of the proper public office. State v. Calderon, 82 Conn. App. 315, 322, 844 A.2d 866, cert. denied, 270 Conn. 905, 853 A.2d 523, cert. denied, 543 U.S. 982, 125 S. Ct. 487, 160 L. Ed. 2d 361 (2004); see Whalen v. Gleeson, 81 Conn. 638, 644, 71 A. 908 (1909); Barber v. International Co. of Mexico, 73 Conn. 587, 602, 48 A. 758 (1901). Thus, although certified copies of most public records are “self-authenticating” in accordance with other provisions of the General Statutes; see, e.g., General Statutes § 7-55 (birth certificates); certification is not the exclusive means by which to authenticate a public record. The rule extends the common-law principle to public records, including electronically stored information.

Proviso (A) assumes that documents authorized by law to be recorded or filed in a public office—e.g., tax returns, wills or deeds—are public records for purposes of authentication. Cf. Kelsey v. Hamner, 18 Conn. 310, 319 (1847) (deed). Proviso (B) covers reports, records, statements or data compilations prepared and maintained by the public official or public office, whether local, state, federal or foreign.

Sec. 9-4. Subscribing Witness’ Testimony

If a document is required by law to be attested to by witnesses to its execution, at least one subscribing witness must be called to authenticate the document. If no attesting witness is available, the document then may be authenticated in the same manner as any other document. Documents that are authenticated under Section 9-2 need not be authenticated by an attesting witness.

COMMENTARY

Certain documents, such as wills and deeds, are required by law to be attested to by witnesses. See General Statutes § 45a-251 (wills); General Statutes § 47-5 (deeds). At common law, the proponent, in order to authenticate such a document, must have called at least one of the attesting witnesses or satisfactorily have explained the absence of all of the attesting witnesses.

Thereafter, the proponent could authenticate the document through the testimony of nonattesting witnesses. See, e.g., Loewenberg v. Wallace, 147 Conn. 689, 696, 166 A.2d 150 (1960); Kelsey v. Hamner, 18 Conn. 311, 317–18 (1847).

The rule requiring attesting witnesses to be produced or accounted for applies only when proving the fact of valid execution, i.e., genuineness, not when proving other things such as the document’s delivery or contents. 4 J. Wigmore, Evidence (4th Ed. 1972) § 1293, pp. 709–10.

Section 9-4 exempts ancient documents from the general rule on the theory that the genuineness of a document more than thirty years old is established simply by showing proper custody and suspicionless appearance; see Section 9-2; without more. See, e.g., Borden v. Westport, 112 Conn. 152, 161, 151 A. 512 (1930); Jarboe v. Home Bank & Trust Co., 91 Conn. 265, 269, 99 A. 563 (1917).

Dicta in two Connecticut cases suggest that it is unnecessary to call subscribing witnesses or explain their absence when the document at issue is only collaterally involved in the case. Great Hill Lake, Inc. v. Caswell, 126 Conn. 364, 369, 11 A.2d 396 (1940); see Pepe v. Aceto, 119 Conn. 282, 287–88, 175 A. 775 (1934). Another case suggests the same exemption for certified copies of recorded deeds. See Loewenberg v. Wallace, supra, 147 Conn. 696. Although these exemptions, unlike the one for ancient documents, were not included in the text of the rule, they are intended to survive adoption of Section 9-4.
ARTICLE X—CONTENTS OF WRITINGS, RECORDINGS AND PHOTOGRAPHS

Sec. 10-1. General Rule

To prove the content of a writing, recording or photograph, the original writing, recording or photograph must be admitted in evidence, except as otherwise provided by the Code, the General Statutes or any Practice Book rule adopted before June 18, 2014, the date on which the Supreme Court adopted the Code. An original of electronically stored information includes evidence in the form of a printout or other output, readable by sight, or otherwise shown to reflect the data accurately.


COMMENTARY

Section 10-1 adopts Connecticut’s best evidence rule. The rule embraces two interrelated concepts. First, the proponent must produce the original of a writing, as defined in Section 1-2(c), recording or photograph when attempting to prove the contents thereof, unless production is excused. E.g., Shellnitz v. Greenberg, 200 Conn. 58, 78, 509 A.2d 1023 (1986). Second, to prove the contents of the proffer, the original must be admitted in evidence. Thus, for example, the contents of a document cannot be proved by the testimony of a witness referring to the document while testifying.

The cases generally have restricted the best evidence rule to writings or documents. See Brookfield v. Candlewood Shores Estates, Inc., 201 Conn. 1, 11, 513 A.2d 1218 (1986). In extending the rule to recordings and photographs, Section 10-1 recognizes the growing reliance on modern technologies for the recording and storage of information.

Section 10-1 applies only when the proponent seeks to prove contents. E.g., Hotchkiss v. Hotchkiss, 143 Conn. 443, 447, 123 A.2d 174 (1956) (proving terms of contract); cf. Dyer v. Smith, 12 Conn. 384, 391 (1837) (proving fact about writing, such as its existence or delivery, is not proving contents).

The fact that a written record or recording of a transaction or event is made does not mean that the transaction or event must be proved by production of the written record or recording. When the transaction or event itself rather than the contents of the written record or recording is sought to be proved, the best evidence rule has no application. E.g., State v. Moynahan, 164 Conn. 560, 583, 325 A.2d 199, cert. denied, 414 U.S. 976, 94 S. Ct. 291, 38 L. Ed. 2d 219 (1973); State v. Tomanelli, 153 Conn. 365, 374, 216 A.2d 625 (1966).

What constitutes an “original” will be clear in most situations. “Duplicate originals,” such as a contract executed in duplicate, that are intended by the contracting parties to have the same effect as the original, qualify as originals under the rule. Cf. Lorch v. Page, 97 Conn. 66, 69, 115 A. 681 (1921); Colburn’s Appeal, 74 Conn. 463, 467, 51 A. 139 (1902).

The definition of “original” explicitly includes printouts or other forms of electronically stored information that are readable. The proponent must show only that the printed or readable version is an accurate (i.e., unaltered and unmodified) depiction of the electronically stored information. See Lorraine v. Markel American Ins. Co., 241 F.R.D. 534, 577–78 (D. Md. 2007) (under Federal Rules of Evidence, “the ‘original’ of information stored in computer is readable display of the information on the computer screen, the hard drive or other source where it is stored, as well as any printout or output that may be read, so long as it accurately reflects the data”). Although a printout or other physical manifestation of computer data is considered the original for purposes of the best evidence rule, the underlying data are significant for assessing admissibility under exceptions to the hearsay rule. See Ninth RMA Partners, L.P. v. Krass, 57 Conn. App. 1, 10–11, 746 A.2d 826 (business entry exception to hearsay rule), cert. denied, 253 Conn. 918, 755 A.2d 215 (2000); Federal Deposit Ins. Corp. v. Carabetta, 55 Conn. App. 384, 398–99, 739 A.2d 311 (same), cert. denied, 251 Conn. 928, 742 A.2d 362 (1999).

The second sentence in Section 10-1 is modeled on rule 1001 of the Federal Rules of Evidence and on parallel provisions of rules from numerous states around the country.

Sec. 10-2. Admissibility of Copies

A copy of a writing, recording or photograph, is admissible to the same extent as an original unless (A) a genuine question is raised as to the authenticity of the original or the accuracy of the copy, or (B) under the circumstances it would be unfair to admit the copy in lieu of the original.

COMMENTARY

By permitting a copy of an original writing, recording or photograph to be admitted without requiring the proponent to account for the original, Section 10-2 represents a departure from common law. See, e.g., British American Ins. Co. v. Wilson, 77 Conn. 559, 564, 60 A. 293 (1905). Nevertheless, in light of the reliability of modern reproduction devices, this section recognizes that a copy derived therefrom often will serve equally as well as the original when proof of its contents is required.

“[C]opy,” as used in Section 10-2, should be distinguished from a “duplicate original,” such as a carbon copy of a contract, which the executing or issuing party intends to have the same effect as the original. See commentary to Section 10-1.

Sec. 10-3. Admissibility of Other Evidence of Contents

The original of a writing, recording or photograph is not required, and other evidence of the contents of such writing, recording or photograph is admissible if:

1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent destroyed or otherwise failed to produce the
originals for the purpose of avoiding production of an original; or

(2) Original not obtainable. No original can be obtained by any reasonably available judicial process or procedure; or

(3) Original in possession of opponent. At a time when an original was under the control of the party against whom it is offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the proceeding, and that party does not produce the original at the proceeding; or

(4) Collateral matters. The contents relate to a collateral matter.

COMMENTARY
The best evidence rule evolved as a rule of preference rather than one of exclusion. E.g., Brookfield v. Candlewood Shores Estates, Inc., 201 Conn. 1, 12, 513 A.2d 1218 (1986).

If the proponent adequately explains the failure to produce the original, “secondary” evidence of its contents then may be admitted. Section 10-3 describes the situations under which production of the original is excused and the admission of secondary evidence is permissible.

Although the issue has yet to be directly addressed, the cases do not appear to recognize degrees of secondary evidence, such as a preference for handwritten copies over oral testimony. See Sears v. Howe, 80 Conn. 414, 416–17, 68 A. 983 (1908). Section 10-3 recognizes no degrees of secondary evidence, and thus any available evidence otherwise admissible may be utilized in proving contents once production of the original is excused under Section 10-3.

(1) Originals lost or destroyed.
Subdivision (1) reflects the rule in Woicicky v. Anderson, 95 Conn. 534, 536, 111 A. 896 (1920). A proponent ordinarily proves loss or destruction by demonstrating a diligent but fruitless search for the lost item; see State v. Castelli, 92 Conn. 58, 69–70, 101 A. 476 (1917); Elwell v. Mersick, 50 Conn. 272, 275–76 (1882); Host America Corp. v. Ramsey, 107 Conn. App. 849, 855–56, 947 A.2d 957, cert. denied, 289 Conn. 904, 957 A.2d 870 (2006); or by producing a witness with personal knowledge of destruction. See Richter v. Drenckhahn, 147 Conn. 496, 502, 163 A.2d 109 (1960).

The proponent is not precluded from offering secondary evidence when the purpose in losing or destroying the original is not to avoid production thereof. Mahoney v. Hartford Investment Corp., 82 Conn. 280, 287, 73 A. 766 (1909); Bank of the United States v. Silf, 5 Conn. 106, 111 (1823).

(2) Original not obtainable.
Subdivision (2) covers the situation in which a person not a party to the litigation possesses the original and is beyond reasonably available judicial process or procedure. See, e.g., Shepard v. Giddings, 22 Conn. 282, 283–84 (1853); Townsend v. Atwater, 5 Day (Conn.) 298, 306 (1812).

(3) Original in possession of opponent.
Common law allows the proponent from producing the original when an opposing party in possession of the original is put on notice and fails to produce the original at trial. See, e.g., Richter v. Drenckhahn, supra, 147 Conn. 501; City Bank of New Haven v. Thorp, 78 Conn. 211, 218, 61 A. 428 (1905).

Notice need not compel the opponent to produce the original but merely provides the option to produce the original or face the prospect of the proponent’s offer of secondary evidence. Whether notice is formal or informal, it must be reasonable.

See British American Ins. Co. v. Wilson, 77 Conn. 559, 564, 60 A. 293 (1905).

(4) Collateral matters.
Subdivision (4) is consistent with Connecticut law. Misisco v. La Maila, 150 Conn. 680, 685, 192 A.2d 891 (1963); Farr v. Zoning Board of Appeals, 139 Conn. 577, 582, 95 A.2d 792 (1953).

Sec. 10-4. Public Records
The contents of a record, report, statement or data compilation recorded or filed in a public office may be proved by a copy, certified in accordance with applicable law or testified to be correct by a witness who has compared it with the original.

COMMENTARY
Section 10-4 recognizes an exception to Section 10-1’s requirement of an original for certified or compared copies of certain public records. Based on the impracticability and inconvenience involved in removing original public records from their place of keeping; see Brookfield v. Candlewood Shores Estates, Inc., 201 Conn. 1, 12, 513 A.2d 1218 (1986); Gray v. Davis, 27 Conn. 447, 454 (1858); Connecticut cases have allowed the contents of these documents to be proved by certified copies. E.g., Brown v. Connecticut Light & Power Co., 145 Conn. 290, 295–96, 141 A.2d 634 (1958); Lomas & Nettleton Co. v. Waterbury, 122 Conn. 228, 234–35, 188 A. 433 (1936). Allowing proof of contents by compared copies represents a departure from prior case law that is in accord with the modern trend. E.g., Fed. R. Evid. 1005.

In addition to this Section, statutory provisions address the use of copies to prove the contents of public records. See, e.g., General Statutes § 52-181.

Sec. 10-5. Summaries
The contents of voluminous writings, recordings or photographs, otherwise admissible, that cannot be conveniently examined in court, may be admitted in the form of a chart, summary or calculation, provided that the originals or copies are available upon request for examination or copying, or both, by other parties at a reasonable time and place. (Amended Dec. 14, 2017, to take effect Feb. 1, 2018.)

COMMENTARY
Case law permits the use of summaries to prove the contents of voluminous writings that cannot be conveniently examined in court. Brookfield v. Candlewood Shores Estates, Inc., 201 Conn. 1, 12–13, 513 A.2d 1218 (1986); McCann v. Gould, 71 Conn. 629, 631–32, 42 A. 1002 (1899). Section 10-5 extends the rule to voluminous recordings and photographs in conformity with other provisions of this Article.

The summarized originals or copies must be made available to other parties upon request for examination or copying, or both, at a reasonable time and place. See Customers Bank v. Tomonto Industries, LLC, 156 Conn. App. 441, 444–48, 112 A.3d 853 (2015); see also McCann v. Gould, supra, 71 Conn. 632; cf. Brookfield v. Candlewood Shores Estates, Inc., supra, 201 Conn. 13.
Sec. 10-6. Admissions of a Party

The contents of a writing, recording or photograph may be proved by the admission of a party against whom it is offered that relates to the contents of the writing, recording or photograph.

COMMENTARY
Section 10-6 recognizes the exception to the best evidence rule for admissions of a party relating to the contents of a writing when offered against the party to prove the contents thereof. Morey v. Hoyt, 62 Conn. 542, 557, 26 A. 127 (1893). Section 10-6 extends the exception to recordings and photographs in conformity with other provisions of this Article.
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