NOTICE

Correction to the Commentary to Section 8-6 of the Connecticut Code of Evidence

On December 14, 2017, the justices of the Supreme Court adopted the revisions to the Connecticut Code of Evidence published in the Law Journal of January 2, 2018, including the revisions to the commentary to Section 8-6, contained herein. These pages replace and supersede the commentary to Section 8-6, pages 153 PB to 164 PB, of the January 2, 2018 Law Journal, due to an inadvertent omission. The revisions are subject to certain editorial changes of a technical, nonsubstantive nature. A final version of the Code will be available in the coming months both in print and on the Judicial Branch's website.

Attest:

Hon. Chase T. Rogers

Chief Justice, Supreme Court

NTRODUCTION

The following revision to the commentary to Section 8-6 of the Connecticut Code of Evidence was adopted by the Supreme Court on December 14, 2017. Revisions are indicated by brackets for deletions and underlines for added language.

Supreme Court

AMENDMENT TO THE CONNECTICUT CODE OF EVIDENCE

ARTICLE VIII—HEARSAY

Commentary to Section 8-6, Hearsay Exceptions: Declarant Must Be Unavailable

The [common thread running through] fundamental threshold requirement of all Section 8-6 hearsay exceptions is [the requirement] that the declarant be unavailable as a witness. At common law, the definition of unavailability has varied with the [individual] particular hearsay exception at issue. For example, the Supreme Court has recognized death as the only form of unavailability for the dying declaration and ancient private boundary hearsay exceptions. See, e.g., *Rompe* v. *King*, 185 Conn. 426, 429, 441 A.2d 114 (1981) (boundaries); *State* v. *Manganella*, 113 Conn. 209, 215–16, 155 A. 74 (1931) (dying declarations). [But in *State* v. *Frye*, 182 Conn. 476, 438 A.2d 735 (1980),] More recently, the court has adopted the federal rule's uniform definition of unavailability. [for the statement against penal interest exception; id., 481–82; thereby recognizing other forms of unavailability such as testimonial privilege and lack of memory. See Fed. R. Evid. 804 (a); see also *State* v. *Schiappa*, 248 Conn. 132, 142–45, 728 A.2d 466 (1999). The court has yet to determine whether the definition of unavailability recognized in *Frye* applies to other hearsay exceptions requiring the unavailability of the declarant.] See *Maio* v. *New Haven*, 326 Conn. 708, 726–27, 167 A.3d 338 (2017); see also *State* v. *Schiappa*, 248 Conn. 132, 141–42, 728 A.2d 466 (1999).

[In keeping with the common law,] At this point, however, Section 8-6 [eschews a] contains no uniform definition of unavailability. [Refer-

ence should be made to common-law cases addressing the particular hearsay exception.**]**

The proponent of evidence offered under Section 8-6 carries the burden of proving the declarant's unavailability. E.g., *State* v. *Aillon*, 202 Conn. 385, 390, 521 A.2d 555 (1987); *State* v. *Rivera*, 220 Conn. 408, 411, 599 A.2d 1060 (1991). To satisfy this burden, the proponent must show that a good faith, genuine effort was made to procure the declarant's attendance by process or other reasonable means. "[S]ubstantial diligence" is required; *State* v. *Lopez*, 239 Conn. 56, 75, 681 A.2d 950 (1996); but the proponent is not required to do "everything conceivable" to secure the witness' presence. (Internal quotation marks omitted.) *State* v. *Wright*, supra, 107 Conn. App. 89–90. A trial court is not precluded from relying on the representations of counsel regarding efforts made to procure the witness' attendance at trial if those representations are based on counsel's personal knowledge. See *Maio* v. *New Haven*, supra, 326 Conn. 729.

With respect to deposition testimony, Practice Book § 13-31 (a) (4) expands the scope of Section 8-6 by permitting the admissibility of depositions in certain circumstances where the deponent is deemed unavailable for purposes of that rule. Among other things, the rule covers situations where a deponent is dead, at a greater distance than thirty miles from the trial or hearing, out of state until the trial or hearing terminates, or unable to attend due to age, illness, infirmity, or imprisonment; where the party offering the deposition is unable to procure the attendance of the deponent by subpoena; or under exceptional circumstances in the interest of justice. See *Gateway Co.*

v. *DiNoia*, 232 Conn. 223, 238 n.11, 654 A.2d 342 (1995) (observing that Practice Book § 248 [d], now § 13-31 [a], ''broadens the rules of evidence by permitting otherwise inadmissible evidence to be admitted''). See Section 8-2 (a) and the commentary thereto regarding situations where the Code contains provisions that may have conflicted with the Practice Book.

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

(1) Former testimony.

Connecticut cases recognize the admissibility of a witness' former testimony as an exception to the hearsay rule when the witness subsequently becomes unavailable. E.g., *State* v. *Parker*, 161 Conn. 500, 504, 289 A.2d 894 (1971); *Atwood* v. *Atwood*, 86 Conn. 579, 584, 86 A. 29 (1913); *State* v. *Malone*, 40 Conn. App. 470, 475–78, 671 A.2d 1321, cert. denied, 237 Conn. 904, 674 A.2d 1332 (1996). 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. 729.

In addition to showing unavailability; e.g., *Crochiere* v. *Board of Education*, 227 Conn. 333, 356, 630 A.2d 1027 (1993); *State* v. *Aillon*, supra, 202 Conn. 391 **[**, 521 A.2d 555 (1991)**]**; the proponent must establish two foundational elements. First, the proponent must show that the issues in the proceeding in which the witness testified and

the proceeding in which the witness' former testimony is offered are the same or substantially similar. E.g., *State* v. *Parker*, supra, 161 Conn. 504; *In re Durant*, 80 Conn. 140, 152, 67 A. 497 (1907); *Perez* v. *D & L Tractor Trailer School*, 117 Conn. App. 680, 690, 981 A.2d 497 (2009), cert. denied, 294 Conn. 923, 985 A.2d 1062 (2010). The similarity of issues is required primarily as a means of ensuring that the party against whom the former testimony is offered had a motive and interest to adequately examine the witness in the former proceeding. See *Atwood* v. *Atwood*, supra, 86 Conn. 584.

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

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

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

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

(2) Dying declaration.

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

v. *Yochelman*, supra, 155; *Daily* v. *New York & New Haven R. Co.*, supra, 358**[**;see also C. Tait & J. LaPlante, supra, § 11.7.2, p. 353**]**.

Section 8-6 (2), in accordance with common law, limits the exception to statements concerning the cause of or circumstances surrounding what the declarant considered to be his or her impending death. *State* v. *Onofrio*, supra, 179 Conn. 43–44; see *State* v. *Smith*, supra, 49 Conn. 379. A declarant is ''conscious of his or her impending death'' within the meaning of the rule when the declarant believes that his or her death is imminent and abandons all hope of recovery. See *State* v. *Onofrio*, supra, 44; *State* v. *Cronin*, 64 Conn. 293, 304, 29 A. 536 (1894). This belief may be established by reference to the declarant's own statements or circumstantial evidence such as the administration of last rites, a physician's prognosis made known to the declarant or the severity of the declarant's wounds. *State* v. *Onofrio*, supra, 44–45; *State* v. *Swift*, 57 Conn. 496, 505–506, 18 A. 664 (1888); *In re Jose M.*, 30 Conn. App. 381, 393, 620 A.2d 804, cert. denied, 225 Conn. 921, 625 A.2d 821 (1993). Dying declarations in the form of an opinion are subject to the limitations on lay opinion testimony set forth in Section 7-1. See *State* v. *Manganella*, supra, 113 Conn. 216.

(3) Statement against civil interest.

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

(4) Statement against penal interest.

In *State* v. *DeFreitas*, 179 Conn. 431, 449–52, 426 A.2d 799 (1980), the Supreme Court recognized a hearsay exception for statements against penal interest, abandoning the traditional rule rendering such

statements inadmissible. See, e.g., *State* v. *Stallings*, 154 Conn. 272, 287, 224 A.2d 718 (1966). Section 8-6 (4) embodies the hearsay exception recognized in *DeFreitas* and affirmed in its progeny. E.g., *State* v. *Lopez*, 239 Conn. 56, 70–71, 681 A.2d 950 (1996); *State* v. *Mayette*, 204 Conn. 571, 576–77, 529 A.2d 673 (1987). The exception applies in both criminal and civil cases. See *Reilly* v. *DiBianco*, 6 Conn. App. 556, 563–64, 507 A.2d 106, cert. denied, 200 Conn. 804, 510 A.2d 193 (1986).

Recognizing the possible unreliability of this type of evidence, admissibility is conditioned on the statement's trustworthiness. E.g., *State* v. *Hernandez*, 204 Conn. 377, 390, 528 A.2d 794 (1987). Section 8-6 (4) sets forth three factors a court shall consider in determining a statement's trustworthiness, factors well entrenched in the common-law analysis. E.g., *State* v. *Rivera*, 221 Conn. 58, 69, 602 A.2d 571 (1992). Although the cases often cite a fourth factor, namely, the availability of the declarant as a witness; e.g., *State* v. *Lopez*, supra, 239 Conn. 71; *State* v. *Rosado*, 218 Conn. 239, 244, 588 A.2d 1066 (1991); this factor has been eliminated because the unavailability of the declarant is always required, and, thus, the factor does nothing to change the equation from case to case. Cf. *State* v. *Gold*, 180 Conn. 619, 637, 431 A.2d 501 (''application of the fourth factor, availability of the declarant as a witness, does not bolster the reliability of the [statement] inasmuch as [the declarant] was unavailable at the time of trial''), cert. denied, 449 U.S. 920, 101 S. Ct. 320, 66 L. Ed. 2d 148 (1980).

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

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

When a narrative contains both disserving statements and collateral, self-serving or neutral statements, the Connecticut rule admits the entire narrative, letting the ''trier of fact assess its evidentiary quality

in the complete context.'' *State* v. *Bryant*, supra, 202 Conn. 697; accord *State* v. *Savage*, supra, 34 Conn. App. 173–74.

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

(5) Statement concerning ancient private boundaries.

Section 8-6 (5) reflects the common law concerning private boundaries. See *Porter* v. *Warner*, 2 Root (Conn.) 22, 23 (1793). Section 8-6 (5) captures the exception in its current form. *Wildwood Associates, Ltd.* v. *Esposito*, 211 Conn. 36, 44, 557 A.2d 1241 (1989); *DiMaggio* v. *Cannon*, 165 Conn. 19, 22–23, 327 A.2d 561 (1973); *Koennicke* v. *Maiorano*, 43 Conn. App. 1, 13, 682 A.2d 1046 (1996).

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

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

nevertheless, may be excluded if the court finds that the declarant would not qualify as a witness had he testified in court.

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

(6) Reputation of a past generation.

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

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

Because the hearsay exception for reputation or traditionary evidence was disfavored at common law; id., 615; Section 8-6 (6) is not intended to expand the limited application of this common-law exception.

(7) Statement of pedigree and family relationships.

Out-of-court declarations describing pedigree and family relationships have long been excepted from the hearsay rule. *Ferguson* v.

Smazer, 151 Conn. 226, 230–31, 196 A.2d 432 (1963); *Shea* v. *Hyde*, 107 Conn. 287, 289, 140 A. 486 (1928); *Chapman* v. *Chapman*, 2 Conn. 347, 349 (1817). Statements admissible under the exception include not only those concerning genealogy, but those revealing facts about birth, death, marriage and the like. See *Chapman* v. *Chapman*, supra, 349.

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

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

(8) Forfeiture by wrongdoing.

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

procure the unavailability of the declarant as a witness.'' Section 8-6 (8) requires more than mere acquiescence.

The preponderance of evidence standard should be employed in determining whether a defendant has procured the unavailability of a witness for purposes of this exception. See *State* v. *Thompson*, 305 Conn. 412, 425, 45 A.3d 605 (2012), cert. denied, 568 U.S. 1146, 133 S. Ct. 988, 184 L. Ed. 2d 767 (2013). A defendant who wrongfully procures the unavailability of a witness forfeits any confrontation clause claims with respect to statements made by that witness. See id., 422–23.