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

(1) The credibility of a witness may be impeached by evidence that has a tendency in reason to discredit the truthfulness or accuracy of the witness's testimony.

(2) (a) Evidence of impeachment may be used in the cross-examination of a witness. The party examining the witness is bound by the witness's answer unless the evidence of impeachment is not collateral.

(b) Evidence is not collateral when it is directly relevant to one or more issues in the action, or to the capacity of the witness to testify pursuant to rule 6.01 (Competency of a Witness to Testify) and rule 6.05 (Oath or Affirmation for a Witness to Testify); or is evidence admissible pursuant to rule 6.13 (Impeachment by Bias, Hostility, Interest), rule 6.15 (Impeachment by Prior Inconsistent Statement), or rule 6.20 (Impeachment by Recent Fabrication); or is otherwise clearly probative of a witness's ability to recall or observe the details of the relevant event accurately.

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

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

(4) Except as set forth in rule 6.15 (Impeachment by Prior Inconsistent Statement), a party may not impeach its own witness. A party may, however, through examination, elicit testimony that an adverse

party is expected to argue impeaches the witness's credibility, and a party is not precluded from presenting a witness whose testimony is not consistent with one of that party's other witnesses.

Note

Subdivision (1). The rule stated in this subdivision is derived from Court of Appeals precedent. Impeachment evidence is designed "to discredit the witness and to persuade the fact finder that the witness is not being truthful." (*People v Walker*, 83 NY2d 455, 461 [1994].) It may be accomplished on cross-examination or in particular instances by extrinsic evidence. Extrinsic evidence means evidence "adduced by means other than cross-examination." (Black's Law Dictionary [11th ed 2019], extrinsic evidence.)

The Court of Appeals has commented that the credibility of a witness is "a many faceted concept, of course, requiring a careful assessment of a number of subtle factors before testimony can be labeled as believable or unbelievable." (*People v Wise*, 46 NY2d 321, 325 [1978].) The Court has explained that whether particular facts or matters are a proper subject of impeachment is an issue of relevance, namely, whether "[a]s a matter of reason and common experience" they bear on the witness's credibility. (*See Walker*, 83 NY2d at 462.)

Subdivision (2) sets forth the general rule that permits the use of evidence of impeachment to cross-examine a witness and that the party examining the witness is bound by the witness's answers unless the evidence of impeachment is not collateral. (*See e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990]; *People v Pavao*, 59 NY2d 282, 288-289 [1983]; *Halloran v Virginia Chems.*, 41 NY2d 386, 390, 393 [1977]; *People v Schwartzman*, 24 NY2d 241, 245 [1969]; *Potter v Browne*, 197 NY 288, 293 [1910].) Impeaching evidence is not collateral when directly relevant to one or more issues in the case (*see People v Cade*, 73 NY2d 904 [1989]); or independently admissible to impeach the witness, e.g. show the witness's bias, hostility or impaired ability to perceive or understand the nature of an oath or affirmation (*see Badr*, 75 NY2d at 635; *Schwartzman*, 24 NY2d at 245); or "where evidence is clearly probative of [a] witness's ability to accurately recall or to observe the details of the relevant event, it is not collateral and it is admissible." (*People v Deverow*, 38 NY3d 157, 165 [2022] [internal quotation marks omitted].)

Thus, if the matter is collateral, the cross-examiner may inquire into it, but must take the witness's answer and is not free to put in independent proof about the collateral matter. (*Wise*, 46 NY2d at 328.) "This rule," the Court of Appeals has observed, "is premised on sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness' answers. The resulting length of the trial would by far outweigh the limited

probative value of such evidence." (*Pavao*, 59 NY2d at 289; *Deverow*, 38 NY3d at 165.)

Impeachment is subject to the control of the trial court's exercise of sound discretion. (*See Schwartzman*, 24 NY2d at 245; *Langley v Wadsworth*, 99 NY 61, 63 [1885] [noting when the object of cross-examination "is to ascertain the accuracy or credibility of a witness, its method and duration are subject to the discretion of the trial judge, and unless abused, its exercise is not the subject of review"].) While the Confrontation Clause of the Sixth Amendment to the United States Constitution guarantees the defendant in a criminal trial an opportunity for cross-examination, it does not guarantee a cross-examination "that is effective in whatever way, and to whatever extent, the defense might wish." (*Delaware v Fensterer*, 474 US 15, 20 [1985]; *People v Burns*, 6 NY3d 793, 795 [2006].) Thus, it is generally within the court's sound discretion to limit the scope of cross-examination of the criminal defendant when questions are irrelevant, concern collateral issues, or risk misleading the jury. (*Id.*)

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

Subdivision (4). The first portion of subdivision (4) is derived from Court of Appeals precedent that sets forth a rule against a party impeaching the party's own witnesses upon any credibility ground, except as the rule has been statutorily modified with respect to impeachment by use of the witness's prior inconsistent statement. (*See e.g. People v Fitzpatrick*, 40 NY2d 44, 49-53 [1976]; *Carlisle v Norris*, 215 NY 400, 408-409 [1915]; *Cross v Cross*, 108 NY 628, 629 [1888] [rule is applicable when a party calls an adverse party]; *Becker v Koch*, 104 NY 394, 401-402 [1887].) This rule "descends to us from the ancient time when a party's witnesses were brought into court not to swear to facts in a case but rather to a party's own credibility. Not surprisingly, it then was considered ill befitting for a

party to question the veracity of his own witnesses." (*Fitzpatrick*, 40 NY2d at 49; *see also People v Minsky*, 227 NY 94, 99-100 [1919] ["A party should not be permitted, after having unsuccessfully taken a chance to secure favorable testimony, to attack his own witness and ask the jury to infer the contrary of what has been sworn to, because the falsity of the evidence is to be presumed from the general character of the witness"]; *Carlisle*, 215 NY at 409 [by calling a witness the party "vouched for his reliability and credibility"].)

The remaining portions of the subdivision are also derived from Court of Appeals precedent. Thus, the Court has cautioned that the party is not bound by the testimony of a witness the party calls and that the party may always contradict the witness's testimony on a relevant issue by proof from other sources. (*See Spampinato v A.B.C. Consol. Corp*., 35 NY2d 283, 287 [1974]; *Carlisle*, 215 NY at 410 [rule does not prevent the party from asking to have the "truthfulness or accuracy" of the witness's testimony submitted to the jury].) The Court has also held the rule against impeaching the party's own witness does not prohibit a party from preemptively bringing out on direct examination facts to take the "sting" out of an expected cross-examination. (*See Minsky*, 227 NY at 98 ["The law does not . . . compel a party to conceal the bad record of his witnesses from the jury, to have it afterwards revealed by the opposing party with telling effect. Such a rule would be unfair alike to the party calling the witness and the jury"].)

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