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Rule 405: Methods of Proving Character

ARTICLE IV. RELEVANCY

RULE 405: METHODS OF PROVING CHARACTER

Federal Rule of Evidence 405 states:

> (a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
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> (b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.[1]

The purpose of Rule 405 is to determine the proper form of character evidence once the court has decided, pursuant to Federal Rules of Evidence 404[2] and 403,[3] that such evidence is

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1. FED. R. EVID. 405.
2. FED. R. EVID. 404. Rule 404 provides in pertinent part:

> (a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
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> (1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;
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> (2) Character of victim. Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;
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> (3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

Id.

3. FED. R. EVID. 403. Rule 403 states that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.*

admissible.[4] Under Rule 404, evidence of character or a character trait of the accused, the victim, or a witness may be admissible in certain situations.[5] Thus, Rule 405 is applied to determine the proper method of proving character when the character of an individual is admissible.[6] Federal Rule of Evidence 405 potentially allows three methods of proving character: "testimony as to reputation," "testimony in the form of an opinion," and testimony as to "specific instances of conduct."[7] Normally, character can be shown only by evidence of reputation or opinion.[8] Evidence of specific instances may only be admitted when a person's character is in issue under the substantive law because this type of evidence is "the most convincing" and "possesses the greatest capacity to arouse prejudice, to confuse, [and] to surprise."[9] Thus, when character

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4. United States v. Keiser, 57 F.3d 847, 855 (9th Cir.) (stating that "[a]fter a court determines that character evidence is admissible under Rule 404, it must next turn to Rule 405 to determine what *form* that evidence may take"), *cert. denied*, 116 S. Ct. 676 (1995); United States v. Talamante, 981 F.2d 1153, 1156 (10th Cir. 1992) (stating that "Federal Rule of Evidence 405 establishes the permissible methods of proving character under Rule 404(a)(2)"), *cert. denied*, 507 U.S. 1041 (1993); United States v. Barry, 814 F.2d 1400, 1402-03 (9th Cir. 1987) (stating that "[a] defendant may offer evidence of 'a pertinent trait of his character' under Rule 404(a)(1); this evidence may take the form of testimony as to reputation . . . or . . . opinion . . . under Rule 405(a)"); Government of the Virgin Islands v. Grant, 775 F.2d 508, 511 (3d Cir. 1985) (stating that "[t]he methods by which character evidence may be introduced are prescribed by Fed.R.Evid. 405").

5. FED. R. EVID. 404.

6. FED. R. EVID. 405 advisory committee's note. The Advisory Committee's Note states that "[t]he rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404." *Id.*

7. FED. R. EVID. 405.

8. *Id.*

9. FED. R. EVID. 405 advisory committee's note. It should also be noted that evidence in the form of opinion and reputation is also available if the character of the person is the primary issue. *Id.* In addition, the rule provides that questions pertaining to particular instances of conduct can be asked on cross-examination if they are relevant. FED. R. EVID. 405.

is not directly in issue, character evidence is limited to testimony concerning reputation or opinion.[10]

The admission of reputation testimony pursuant to Rule 405 is consistent with the federal common law.[11] Under the early common law, testimony concerning the defendant's reputation was confined to the reputation in the community in which the defendant lived.[12] The common law now allows reputation testimony from any community that the person is actively a part of.[13] In addition, reputation testimony may be limited to the time when the alleged offense was committed.[14]

The admissibility of opinion testimony, however, departs from the common law doctrine.[15] The distinction between reputation

10. FED. R. EVID. 405 advisory committee's note. The Advisory Committee has stated that "[w]hen character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion." *Id. See also* Michelson v. United States, 335 U.S. 469 (1948). In *Michelson*, the Court distinctly stated when referring to character evidence that "[t]he witness may not testify about defendant's specific acts or courses of conduct . . . ." *Id.* at 477. However, the Court noted that the witness may testify as to "what he has heard in the community . . . ." *Id.*

11. FED. R. EVID. 405 advisory committee's note (stating that "[t]his treatment is, with respect to . . . reputation, conventional contemporary common law doctrine").

12. The scope of the term "community" initially applied to the defendant's reputation in the community where he resided. *See* Baugh v. State, 117 So. 426, 429 (Ala. 1928) (stating that "[t]here was nothing in the evidence to show that the defendant had a known reputation outside of the community where he lived, and the court will not be put in error for limiting the inquiry to that neighborhood or community").

13. 1 MCCORMICK ON EVIDENCE § 191, at 815 (John William Strong ed., 4th ed. 1992) (collecting cases). McCormick asserts that "increas[ed] urbanization has prompted the acceptance of evidence as to reputation within other substantial groups of which the accused is a constantly interacting member, such as the locale where defendant works." *Id.*

14. *Id.*; United States v. Curtis, 644 F.2d 263, 268 (3d. Cir 1981) (stating that "[i]n dealing with community reputation for a trait of character . . . it has long been settled that reputation reasonably contemporaneous with the acts charged is relevant, but that reputation after the criminal charge under consideration is not"), *cert. denied*, 459 U.S. 1018 (1982).

15. FED. R. EVID. 405 advisory committee's note (stating that "[i]n recognizing opinion as a means of proving character, the rule departs from

and opinion evidence is clear. Reputation evidence is testimony as to the general reputation of the person in the community, whereas opinion evidence is the personal opinion of the witness concerning the person's character.[16] Any such opinion testimony must be limited to "the nature and extent of observation and acquaintance upon which the opinion is based."[17]

Once the character of a person has been placed in issue on direct examination, Rule 405 authorizes inquiries into particular instances of conduct by the person during cross-examination of the character witness.[18] The purpose of these questions is to help the jury determine the reliability of the testimony given by the character witness.[19] This rationale is based on the premise that because the witness has related opinion testimony or reputation

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usual contemporary practice in favor of that of an earlier day"). *See* United States v. Jannotti, 673 F.2d 578, 620 (3d Cir.) (Aldisert, J., dissenting) (stating that "[e]vidence of opinion is competent to prove character or a trait of character under the Federal Rules of Evidence [which constitutes] a major departure from the common law"), *cert. denied*, 457 U.S. 106 (1982).

16. Securities & Exch. Comm'n v. Peters, 978 F.2d 1162, 1169 (10th Cir. 1992) (distinguishing between reputation and opinion evidence, but concluding that Rule 405 also permits inquiry into specific instances of conduct on cross-examination regardless of whether the witness is testifying as to reputation or opinion). *See* Michelson v. United States, 335 U.S. 469, 477 (1948) (describing opinion as a person's "own acquaintance, observation, and knowledge of defendant [that] leads to his own independent opinion that defendant possesses a good general or specific character[,]" while stating that reputation is "what [the person] has heard in the community, although much of it may have been said by persons less qualified to judge than himself").

17. FED. R. EVID. 405 advisory committee's note.

18. FED. R. EVID. 405(a). *See* MCCORMICK, *supra* note 13, § 191 at 816 ("[O]nce the defendant gives evidence of pertinent character traits to show that he is not guilty, his claim of possession of these traits - but only these traits - is open to rebuttal by cross-examination . . . .") (citations omitted).

19. FED. R. EVID. 405 advisory committee's note. *See* United States v. Curtis, 644 F.2d 263, 268 (3d Cir. 1981) (stating that "relevant specific instances of conduct [that are admissible on cross-examination] are only instances going to the accuracy of the character wintesses' testimony"), *cert. denied*, 459 U.S. 1018 (1982).

testimony, the cross-examination should "shed light on the accuracy of [the witness'] hearing and reporting."[20]

United States v. Talamante[21] illustrates the application of Rule 405. In *Talamante*, a defendant charged with assault attempted to introduce testimony of specific instances of conduct which would indicate that the victim was the first aggressor.[22] The Tenth Circuit held that the testimony was inadmissible.[23] The court reasoned that when testimony is used to "create an inference that a person acted in conformity with his or her character, Rule 405 allows proof of character only by reputation and opinion," and not through specific instances of conduct.[24]

In *United States v. Oshatz*,[25] the defendant, a tax attorney, was charged in a sixteen-count indictment for his role in the securities trading activities of several partnerships.[26] The charges included conspiring to defraud the government of the United States, engaging in securities transactions that were fraudulent, and filing bogus tax returns for different partnerships.[27] The Second Circuit held that the trial court properly allowed the testimony of a character witness who gave opinion testimony concerning the defendant's truthfulness and honesty during cross-examination by defense counsel.[28] However, the court determined that cross-

20. *Id.* It has been asserted, however, that "[t]he extent and nature of the cross-examination demands restraint and supervision . . . [and] [t]he court should . . . determine whether there is a substantial basis for the cross-examination." MCCORMICK, *supra* note 13, § 191 at 817 (citations omitted).

21. 981 F.2d 1153 (10th Cir. 1992), *cert. denied*, 507 U.S. 1041 (1993). In *Talamante*, the defendant was arrested and convicted for assaulting an acquaintance after an altercation occurred between the two men. *Id.* at 1154-55.

22. *Id.* at 1155. The testimony consisted of statements alleging that the defendant was stabbed by two friends of the victim on two separate occasions, that the defendant's brother killed a friend of the victim, and that the victim assaulted a number of individuals. *Id.*

23. *Id.* at 1157.

24. *Id.*

25. 912 F.2d 534 (2d Cir. 1990), *cert. denied*, 500 U.S. 910 (1991).

26. *Id.* at 536.

27. *Id.*

28. *Id.* at 537. The court of appeals affirmed the conviction. *Id.* at 543.

examination of non-expert character witnesses with hypothetical questions that assume the guilt of the defendant is prohibited, even though the questions could be relevant to the reliability of the testimony of the character witness.[29]

The Second Circuit has also addressed the issue of whether questions regarding specific instances of conduct are permissible on cross-examination. In *United States v. Wallach*,[30] the court held that, pursuant to Rule 405, it is permissible "to ask questions of character witnesses concerning their knowledge of specific instances of the defendant's conduct" on cross-examination.[31] However, the court noted that the district court must exercise its discretion before admitting such collateral evidence "to ensure that the jury does not convict the defendant for conduct with which he has not been charged."[32] In *Wallach*, the prosecutor was permitted to introduce evidence during cross-

29. *Id.* at 539-41. The court of appeals found that, although "a guilt-assuming hypothetical question might be probative of the credibility of testimony given by a non-expert character witness[,] . . . such cross-examination is nevertheless to be prohibited because it creates too great a risk of impairing the presumption of innocence." *Id.* at 539. Thus, the court of appeals found that the trial court erred in repeatedly allowing the prosecution to cross-examine the defendant's character witness as to "aspects of the wrongdoing alleged to constitute the offenses for which [the defendant] was on trial." *Id.* at 537. *See* United States v. Mason, 993 F.2d 406, 409 (4th Cir. 1993) (stating that "[w]e are in harmony with all circuits, except one, that . . . condemned the use of guilt-assuming hypothetical questions asked of lay character witnesses . . . ."); United States v. Morgan, 554 F.2d 31, 34 (2d Cir.) (stating that "[i]nsofar as non-expert character witnesses are concerned . . . the probative value of a hypothetical question . . . is negligible and . . . [they] should not be asked"), *cert. denied*, 434 U.S. 965 (1977).

30. 935 F.2d 445 (2d Cir. 1991), *aff'd*, 979 F.2d 912 (1992), *cert. denied*, 113 S. Ct. 2414 (1993). In *Wallach*, the court of appeals reversed the convictions of the defendants who were charged with mail fraud, racketeering, transporting stolen property interstate, and conspiracy to violate federal law. *Id.* at 449-50.

31. *Id.* at 472.

32. *Id.* "The district court always has the authority and discretion to exclude such evidence under . . . [Rule] 403." *Id.* Rule 403 states in pertinent part that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." FED. R. EVID. 403.

examination regarding the defendant's performance as the attorney in a personal injury case involving two young children who were severely burned.[33] More specifically, the government elicited evidence that the defendant agreed to a $1.7 million settlement, while retaining a fee of $1 million.[34] Additionally, the prosecutor, characterizing the defendant's actions as an "outrage," invited the jurors "to stand in the shoes of the parents of the [burned] children."[35] The court held that although the evidence was "technically" admissible, the prosecutor's attempts to blatantly prejudice the jury went "well beyond the bounds of propriety and relevance" and should not have been admitted for this purpose.[36]

New York follows a different rule regarding the permissible methods of proving character or a trait of character. New York allows a defendant to establish good character only through his or her "general reputation in the community."[37] Thus, New York does not allow evidence in the form of an opinion.

The New York rule originates from *People v. Van Gaasbeck*,[38] where the court of appeals held that "'character means the estimate in which the individual is held by the community, and not the private opinion . . . of . . . the witnesses . . . .'"[39] In

33. *Wallach*, 935 F.2d at 472.

34. *Id.*

35. *Id.* at 472-73.

36. *Id.*

37. People v. Barber, 74 N.Y.2d 653, 655, 541 N.E.2d 394, 395, 543 N.Y.S.2d 365, 366 (1989) (Titone, J., dissenting). The majority in *Barber* held that the defendant was not entitled to submit a supplemental pro se appellate brief addressing admissibility of character evidence. *Id.* at 654, 541 N.E.2d at 394, 543 N.Y.S.2d at 365. In his dissent, Judge Titone stated that he could not concur without "commenting upon the significant evidentiary argument defendant has made." *Id.* at 655, 541 N.E.2d at 394, 543 N.Y.S.2d at 365. Judge Titone then proceeded to intensely criticize the New York common law rule regarding the methods of proving character. *Id.* at 656-57, 541 N.E.2d at 395-96, 543 N.Y.S.2d at 366-67 (Titone, J., dissenting).

38. 189 N.Y. 408, 82 N.E. 718 (1907).

39. *Id.* at 416, 82 N.E. at 720 (citing Jackson v. State, 78 Ala. 471 (1885)).

deciding that evidence based on the observation and personal knowledge of a witness is not admissible, the court reasoned that, if admissible, the truth of specific instances of the defendant's conduct relied on by the witness would be difficult to ascertain.[40] Further, the court believed that the admission of such evidence "would lead to the introduction into the case of innumerable collateral issues which could not be tried out without introducing the utmost complication and confusion into the trial, tending to distract the minds of the jurymen and befog the chief issue in litigation."[41]

The *Van Gaasbeck* rule was upheld by the New York Court of Appeals in *People v. Bouton.*[42] The court in *Bouton* noted that "[w]hile the nature of the defendant's character is the object of the proof, reputation . . . is the raw material from which that character may be established."[43] In addition, in determining that reputation evidence does not have to be confined to the community the person lives in, the court stated that "[a] reputation may grow wherever an individual's associations are of such quantity and quality as to permit him to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability."[44] The court also decided that "the fact that the [testimony] consisted solely of 'negative evidence' -- i.e., the absence of adverse comment on the pertinent aspects of defendant's character -- could not in itself be the basis for an exclusionary ruling."[45]

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40. *Id.* at 418, 82 N.E. at 721.

41. *Id.*

42. 50 N.Y.2d 130, 405 N.E.2d 699, 428 N.Y.S.2d 218 (1980). In *Bouton*, the defendant was convicted of sodomy in the first and second degrees and two counts of sexual abuse in the first degree. *Id.* at 134, 405 N.E.2d at 700, 428 N.Y.S.2d at 219.

43. *Id.* at 139, 405 N.E.2d at 703, 428 N.Y.S.2d at 222. *See also* People v. Alamo, 23 N.Y.2d 630, 634, 246 N.E.2d 496, 497, 298 N.Y.S.2d 681, 683 (stating that "[r]eputation, from the speech of people, is treated as a fact . . . established by witnesses in a position to have knowledge"), *cert. denied*, 396 U.S. 879 (1969).

44. *Bouton*, 50 N.Y.2d at 139-40, 405 N.E.2d at 704, 428 N.Y.S.2d at 223 (citations omitted).

45. *Id.* at 140, 405 N.E.2d at 704, 428 N.Y.S.2d at 223.

In *People v. Kuss*,[46] the court of appeals stated that the New York rule is "slightly different" when dealing with the cross-examination of character witnesses.[47] The court held that when the credibility of the witness is at issue, the witness may be cross-examined as to the "existence of rumors or reports of *particular acts* allegedly committed by the defendant which are inconsistent with the reputation [the witness has] attributed to him."[48] The court warned that the use of specific instances can only be used to indicate "the ability of the witness to accurately reflect the defendant's reputation in the community," and "cannot be used to prove the truth of the rumors."[49] This policy is in accord with Rule 405 and its justifications.

There is a clear distinction between Federal Rule of Evidence 405 and New York law concerning the introduction of evidence proving the character of both witnesses or parties. Under federal law, a witness who is attempting to prove the character or a character trait of a person is permitted to do so by either opinion or reputation testimony.[50] New York's evidentiary principle, by comparison, only permits a witness to testify as to the person's reputation.[51] New York law does not permit testimony in the form of an opinion.[52] The New York rule has been criticized as

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46. 32 N.Y.2d 436, 299 N.E.2d 249, 345 N.Y.S.2d 1002 (1973), *cert. denied*, 415 U.S. 913 (1974). In *Kuss*, the defendant, a councilman and Town Board member, and his co-defendant were convicted of taking unlawful fees. *Id.* at 440, 442, 299 N.E.2d at 251, 252, 345 N.Y.S.2d at 1004, 1006. The trial court allowed "[twelve] character witnesses to testify as to [the co-defendant's] good reputation for honesty and integrity." *Id.* at 442, 299 N.E.2d at 252, 345 N.Y.S.2d at 1006. Eleven of these witnesses were asked during cross-examination if they were aware of "certain reports indicating that [the co-defendant] had committed two acts of misconduct while serving as Town Attorney . . . ." *Id.* The court of appeals affirmed the convictions. *Id.* at 446, 299 N.E.2d at 255, 345 N.Y.S.2d at 1010.

47. *Id.* at 443, 299 N.E.2d at 253, 345 N.Y.S.2d at 1007.

48. *Id.* (emphasis added).

49. *Id.*

50. FED. R. EVID. 405.

51. *See supra* notes 37-42 and accompanying text.

52. *See supra* notes 37-41 and accompanying text.

not promoting "the truth-seeking process" because it "requires rejection of the more reliable form of proof [which is] the opinions of those in a position to know the accused's character, while exposing the trier of fact to unverifiable hearsay of unknown origin."[53] Although the concerns of *Van Gaasbeck* regarding the difficulty of determining whether or not the facts upon which an opinion is based are well noted, it has been argued that they can be eliminated by narrowly fashioning rules concerning character evidence.[54] It has been asserted that Federal Rule of Evidence 405 is tailored to "effectively eliminate[] any prejudice or unfair surprise."[55]

Federal Rule of Evidence 405 and the New York rule do, however, have their similarities. Both rules, while allowing evidence concerning a person's reputation, no longer limit the evidence to the reputation in the community in which that person lives. Moreover, the rules are similar regarding the type of evidence admissible on cross-examination. Both allow inquiries into specific instances of the defendant's conduct during the cross-examination of a witness. Both rules also indicate that questioning a witness about specific instances of conduct is done to illustrate to the jury the reliability of the testimony of the character witness.

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53. People v. Barber, 74 N.Y.2d 653, 657, 541 N.E.2d 394, 396, 543 N.Y.S.2d 365, 367 (1989) (Titone, J., dissenting).

54. *Id.* (Titone, J., dissenting).

55. *Id.*