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RULE 607: WHO MAY IMPEACH

Federal Rule of Evidence 607 states:

> The credibility of a witness may be attacked by any party, including the party calling the witness.[1]

The underlying policy behind Rule 607 is that the impeachment of a witness' credibility is essential to bring out the truth of a matter in a particular case.[2] Hence, under Rule 607 one may attack the credibility of any witness, including one's own witness.[3] Moreover, "the right to impeach one's own witnesses [under Rule 607 is] without special restriction."[4]

The United States Court of Appeals for the Second Circuit recently clarified Rule 607 in *United States* v. *Rosa*.[5] In *Rosa*, the court held that the district court erred in not allowing defense counsel the opportunity to impeach the credibility of their own witness.[6] The court found that the trial court's ruling conflicted with Rule 607.[7]

In another recent Second Circuit case, *United States* v. *Eisen*,[8] the prosecution called hostile witnesses to give testimony, which was the "affirmative proof . . . necessary to construct [their] case," and then attempted to impeach the witnesses.[9] The court

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1. FED. R. EVID. 607.

2. *See* FED R. EVID. 607 advisory committee's note (denying a party the right to impeach a witness' credibility "leaves the party at the mercy of the witness and the adversary").

3. FED. R. EVID. 607.

4. United States v. DeLillo, 620 F.2d 939, 947 (2d Cir.), *cert. denied*, 449 U.S. 835 (1980). *See also* United States v. Freeman, 302 F.2d 347, 351 (2d Cir. 1962) (holding that the impeachment rule should not be limited to cases in which the witness "is an 'adverse party' or 'hostile'"), *cert. denied*, 375 U.S. 958 (1963).

5. 11 F.3d 315 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1565 (1994). Five defendants appealed their convictions for various offenses including narcotics distribution, firearms sales and possession and racketeering. *Id.* at 323-25.

6. *Id.* at 336-37.

7. *Id.* at 337.

8. 974 F.2d 246 (2d Cir. 1992), *cert. denied*, 113 S. Ct. 1840 (1993).

9. *Id.* at 263.

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held that under Rule 607, the prosecution "was entitled to question these witnesses and to invite the jury to disbelieve that portion of their accounts that contradicted the prosecution's theory of the case."[10] One caveat to the evidentiary holding in *Eisen* is that the strategy of eliciting positive testimony followed by damaging testimony and impeachment "makes sense . . . only where the jury can separate the question of the credibility of the witness on the positive testimony from [the witness'] credibility on the negative testimony."[11]

It should be noted that this distinction can be a subtle one. For example, in *United States v. Webster*,[12] the defendant argued that the prosecution presented inadmissible hearsay evidence by intentionally calling a hostile witness and then using that witness' out of court statements for purposes of impeachment.[13] The court held, however, that the prosecution had not acted in bad faith because a voir dire of the witness had been requested and, as a result of the defendant's objection, was denied.[14] In agreement with the application of a good faith standard, the court stated that "it would be an abuse of [Rule 607] . . . for the prosecution to call a witness that it knew would not give useful evidence, just so it could introduce hearsay evidence against the defendant in the hope that the jury would miss the subtle distinction between impeachment and substantive evidence . . . ."[15] Therefore, *Webster* suggests that a good faith standard should be adhered to when impeachment is sought under Rule 607.

In contrast to Federal Rule 607, the right to impeach one's own witness in New York is more restrictive. In a criminal case, under New York Criminal Procedure Law [hereinafter C.P.L.]

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10. *Id.*

11. 27 CHARLES A. WRIGHT & VICTOR J. GOLD, FEDERAL PRACTICE AND PROCEDURE § 6093, at 503 n.28 (1990).

12. 734 F.2d 1191 (7th Cir. 1984).

13. *Id.* at 1192.

14. *Id.* at 1192-93.

15. *Id.* at 1192. "Impeachment by prior inconsistent statement may not be permitted where employed as a mere subterfuge to get before the jury evidence not otherwise admissible." *Id.* (quoting United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975)).

section 60.35, a party may impeach its own witness when the witness gives testimony that "tends to disprove the position" of that party.[16] Recently, the Supreme Court, Appellate Division, Second Department, held that the "tends to disprove" requirement is met when the witness' testimony "affirmatively damages" the position of the party.[17] This rule prohibits admitting evidence of prior contradictory statements "for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts [when the] witness' testimony does not tend to disprove the position of the party who called" the witness.[18] In addition, the evidence

16. N.Y. CRIM. PROC. LAW § 60.35(1) (McKinney 1992). Section 60.35(1) provides:

> When, upon examination by the party who called him, a witness in a criminal proceeding gives testimony upon a material issue of the case which tends to disprove the position of such party, such party may introduce evidence that such witness has previously made either a written statement signed by him or an oral statement under oath contradictory to such testimony.

Id.

17. People v. Mercado, 162 A.D.2d 722, 723, 557 N.Y.S.2d 123, 124 (2d Dep't 1990), *appeal denied*, 77 N.Y.2d 841, 568 N.E.2d 659, 567 N.Y.S.2d 210 (1991). In *Mercado*, the court stated that "when the People call a witness who gives testimony at trial upon a material issue which tends to disprove the People's position at trial, they may introduce prior written signed statements or oral sworn testimony made by that party which contradict his trial testimony." *Id.*; *see also* People v. Saez, 69 N.Y.2d 802, 804, 505 N.E.2d 945, 946, 513 N.Y.S.2d 380, 381 (1987) (stating that "[a] party may impeach its own witness if such witness' testimony on a material fact tends to disprove the party's position or affirmatively damages the party's case") (citations omitted); People v. Fitzpatrick, 40 N.Y.2d 44, 51, 351 N.E.2d 675, 679, 386 N.Y.S.2d 28, 32 (1976) (stating that impeachment is permitted only when the witness testimony "*affirmatively damages* the case of the party calling him.") (footnote omitted) (emphasis in original); People v. Faulkner, 632 N.Y.S.2d 189, 190 (2d Dep't 1995) (holding that the prosecution could impeach their own witness at trial with different statements made by the witness to the grand jury because the testimony satisfied the "tend to disprove" or "affirmatively damage" requirements).

18. N.Y. CRIM. PROC. LAW § 60.35(3) (McKinney 1992). Section 60.35(3) provides:

introduced to impeach the witness must have been "previously made either [by] a written statement signed by [a witness] . . . or an oral statement under oath contradictory to such testimony."[19] Moreover, the evidence that is introduced may only be used for impeachment purposes and cannot be admitted as substantive evidence.[20] Finally, under early New York common law, the credibility of one's own witness could be attacked if the court were to call a witness to the stand or if the individual was a compulsory witness, for example, a witness to a will.[21]

When a witness has made a prior signed or sworn statement contradictory to his testimony in a criminal proceeding upon a material issue of the case, but his testimony does not tend to disprove the position of the party who called him and elicited such testimony, evidence that the witness made such prior statement is not admissible, and such party may not use such prior statement for the purpose of refreshing the recollection of the witness in a manner that discloses its contents to the trier of the facts.

Id.

19. N.Y. CRIM. PROC. LAW § 60.35(1).

20. N.Y. CRIM. PROC. LAW § 60.35(2) (McKinney 1992). Section 60.35(2) provides:

Evidence concerning a prior contradictory statement introduced pursuant to subdivision one may be received only for the purpose of impeaching the credibility of the witness with respect to his testimony upon the subject, and does not constitute evidence in chief. Upon receiving such evidence at a jury trial, the court must so instruct the jury.

Id.

21. *See In re* Will of Bogart, 67 How. Pr. 313 (N.Y. Sur. Ct. 1884). In *Bogart*, the court was faced with a will that had an allegedly faulty attestation clause because "it omits to state that the witnesses signed at the request of the testator." *Id.* at 314. One witness to the faulty clause, called by the proponent, alleged that he could not state whether or not he would benefit by the will being rejected. *Id.* at 314-15. The court allowed the proponent to "ask for a finding in opposition to [the] uncontradicted testimony" and stated that "[w]here the law obliges one to call a witness he may be impeached, and a party is at liberty to contradict the testimony of his own witness, though indirectly he may be impeached thereby." *Id.* at 317 (citations omitted); *see also In re* Will of Cottrell, 95 N.Y. 335 (1884) (holding that a proponent of a will may submit evidence that the witness signed the attestation clause of a will even though such evidence contradicts the proponent's witness who testifies that he cannot recall whether or not he signed the will).

The difference between Federal Rule 607 and its New York counterpart is readily apparent. Under Rule 607, a party is specifically allowed to attack the credibility of their own witness. However, under New York law a party is prohibited from impeaching one's own witness unless the requirements of C.P.L. section 60.35 are fulfilled.