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Rule 608: Evidence of Character and Conduct of Witnesses

RULE 608: EVIDENCE OF CHARACTER AND CONDUCT OF WITNESSES

Federal Rule of Evidence 608 states:

> (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of an opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.
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> The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters which relate only to credibility.[1]

In the federal courts, Rule 608 strictly limits the admissibility of evidence of a witness' character in order to establish reputation for veracity.[2] This examination is limited to the witness' character for veracity, not because other character evidence is irrelevant, but because inclusion of other character evidence would create a "substantial risk of a distortion of the

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1. FED. R. EVID. 608.

2. *See* FED. R. EVID. 608 advisory committee's note; *see also* United States v. Greer, 643 F.2d 280, 283 (5th Cir.), *cert. denied*, 454 U.S. 854 (1981) (finding that inquiry as to truth and veracity is limited to reputation testimony and that questioning as to reputation in the community is improper).

accuracy of the fact-finding process."[3] For this reason, evidence that tends to establish the veracity of a witness "may be admitted only after the principal witness's *character* has in fact been attacked by opinion or reputation evidence or by other impeachment evidence which represents an attack on character."[4] The circuit courts have recognized that such testimony under Rule 608 "must relate to the witness's reputation at the time of trial--rather than at the time he committed the acts charged."[5]

The purpose of admitting character evidence is to give the jury a gauge by which they may weigh testimony elicited in court.[6] Since the inquiry is strictly limited to the witness's character for veracity, "[t]he impeachment may not extend to an exploration of the primary witness's general character . . . ."[7] This rule is in accord with the common law prior to the promulgation of the Federal Rules of Evidence.[8]

Rule 608 is not without limitations. Rule 608 expressly provides that specific instances of dishonest acts may be proven through cross-examination, but the examiner may not introduce extrinsic evidence to show that there was a dishonest act.[9]

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3. GLEN WEISSENBERGER, WEISSENBERGER'S FEDERAL EVIDENCE § 608.1, at 266 (2d ed. 1995).

4. *Id.* at 270.

5. JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN ON EVIDENCE ¶ 608 [03], at 608-23,24. *See also* United States v. Watson, 669 F.2d 1374, 1382 n.5 (11th Cir. 1982) (concluding that the lower court properly excluded reputation testimony where an impeachment witness only knew the person for which she was offering reputation testimony a short duration which was too remote in time at the beginning of the trial); United States v. Lewis, 482 F.2d 634, 640 n.44 (D.C. Cir. 1973) (stating that "one's reputation for testimonial honesty--whether he be a non-party witness or the accused himself--is to be established by evidence of his community reputation at the time of trial and during a prior period not remote thereto").

6. *See* United States v. Lashmett, 965 F.2d 179, 183 (7th Cir. 1992) (holding that it was harmless error to exclude opinion testimony that the witnesses "were scoundrels" because the jury already had sufficient evidence to measure their character and could conclude that the witnesses "were not paragons of virtue").

7. WEISSENBERGER, *supra* note 3, § 608.4, at 269.

8. *Id.*

9. *Lashmett*, 965 F.2d at 184.

Although the examiner may not call other witnesses to prove misconduct after a witness has denied the allegations, the cross-examiner may continue to press for an admission directly from the witness.[10] As such, specific instances of misconduct that do not culminate in a conviction are not provable by extrinsic evidence.[11] Additionally, Rule 608 prohibits interrogation as to prior criminal conduct which would violate a witness' privilege against self-incrimination.[12]

Unlike Federal Rule 608, New York evidence law generally does not permit a witness' character to be proven by opinion testimony.[13] An exception to the rule exists where "the subject matter of the testimony [is] such that it would be impossible to accurately describe the facts without stating an opinion or impression."[14] Thus, New York courts have long held that a witness' character for truthfulness may be attacked (or once attacked, supported) only by reputation evidence.[15] However,

10. WEINSTEIN & BERGER, *supra* note 5, at ¶ 608[05], at 49. *See also* United States v. Simpson, 709 F.2d 903 (5th Cir.), *cert. denied*, 464 U.S. 942 (1983) (holding that the lower court was in its discretion to permit cross-examination into the defendant's failure to advise his probation officer of his knowledge of illegal drug transactions).

11. WEINSTEIN & BERGER, *supra* note 5, at ¶ 608[05], at 34. *See also* United States v. Weiss, 930 F.2d 185 (2d Cir.), *cert. denied*, 502 U.S. 842 (1991) (prohibiting the use of extrinsic evidence to prove specific instances of misconduct in order to attack a witness' credibility); United States v. Schatzle, 901 F.2d 252 (2d Cir. 1990) (holding that the district court did not err in disallowing the testimony of an arresting officer because such testimony constituted extrinsic evidence to attack a witness' credibility).

12. FED. R. EVID. 608 advisory committee's note. *See also* U.S. CONST. amend. V, which states in pertinent part, "[n]o person shall be . . . compelled in any criminal case to be a witness against himself." *Id.*

13. Kravitz v. Long Island Jewish-Hillside Medical Ctr., 113 A.D.2d 577, 582, 497 N.Y.S.2d 51, 55 (2d Dep't 1985). In this case, a witness' opinion testimony of plaintiff's veracity was held inadmissible because there had been no prior attack on plaintiff's character for veracity. *See also* People v. Barber, 74 N.Y.2d 653, 541 N.E.2d 394, 543 N.Y.S.2d 365 (1989).

14. *Kravitz*, 113 A.D.2d at 581-82, 497 N.Y.S.2d at 55 (citations omitted).

15. People v. Pavao, 59 N.Y.2d 282, 289, 451 N.E.2d 216, 220, 464 N.Y.S.2d 458, 461 (1983). *See also* People v. Tai, 145 Misc. 2d 599, 605,

this rule has been criticized "because the opinion of a person's character held by those who know him is clearly probative and relevant and, viewed realistically, reputation evidence is . . . often no more than thinly veiled opinion."[16]

Another distinction between Rule 608 and New York law concerns impeachment by specific instances of conduct. Under Rule 608, specific instances of conduct may not be proven by extrinsic evidence unless, in the court's discretion, the instances are probative of "the witness' character for truthfulness or untruthfulness," or "[concern] the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified."[17] Under New York law, however, courts will allow an inquiry into a witness' prior bad acts if the acts merely bear on credibility, provided that the questions are asked in good faith and have some basis in fact.[18] In *People v. Sorge*,[19] the New York Court of Appeals held that "[a] defendant, like any other witness, may be 'interrogated upon cross-examination in regard to any vicious or criminal act of his

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547 N.Y.S.2d 989, 993 (Sup. Ct. New York County 1989) (holding that "fundamental fairness requires the admission of negative character evidence to impeach the character of a non-testifying witness whose hearsay statements have been admitted").

16. *Kravitz*, 113 A.D.2d at 582-83, 497 N.Y.S.2d at 55. Because of such criticism, the Proposed Code of Evidence, if enacted, would allow for opinion and reputation evidence, subject to two limitations. THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 608(a), at 131 (1991). First, only evidence referring to the character for truthfulness may be introduced. Second, such evidence may be admitted only after the character of the witness has been attacked. *Id.*

17. FED. R. EVID. 608(b).

18. People v. Steele, 168 A.D.2d 937, 565 N.Y.S.2d 339 (4th Dep't 1990), *appeal denied*, 77 N.Y.2d 967, 573 N.E.2d 589, 570 N.Y.S.2d 501 (1991). In *Steele*, the court held that defense questions pertaining to a prosecution witness' prior bad acts were properly disallowed where defense counsel could not establish a good faith basis for the inquiry. *Id.* at 938, 565 N.Y.S.2d at 339. Currently, this rule disallows questioning of a witness' prior conduct leading to a criminal charge which results in an acquittal. THE NEW YORK STATE LAW REVISION COMMISSION, A CODE OF EVIDENCE FOR THE STATE OF NEW YORK § 608(b), at 132 (1991).

19. 301 N.Y. 198, 93 N.E.2d 637 (1950).

life' that has a bearing on his credibility as a witness."[20] More recently, the New York Appellate Division has also upheld the right of a party to "impeach an opposing witness by questioning him with respect to any criminal, vicious, and disgraceful acts in his life bearing on his credibility."[21] The court, in *People v. Jones*,[22] held that where the witness' credibility is "a critical issue," it is vital that information of that witness' "capacity for truthfulness be placed before the jury."[23]

The policy reasons for the exclusion of prior bad acts are substantially similar to those cited for the federal rule and include protecting the jury from collateral issues which may confuse a jury, and "avoidance of surprise attacks upon witnesses who cannot be expected to enter court prepared to defend every act of their past lives against charges which may never previously have been made."[24] As the Second Department in *Kravitz* explained, "it is both unnecessary and unwise to encumber the trial with a potential morass of such evidence unless character per se is disputed."[25] Thus, unless an effort is made to impeach a witness' character and not merely discredit the witness' testimony, policy considerations require that affirmative evidence to establish good character be excluded.[26]

There is a similarity between Federal Rule 608 and New York case law. Both Rule 608 and New York law prohibit the

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20. *Id.* at 200, 93 N.E.2d at 638 (citations omitted).

21. People v. Jones, 115 A.D.2d 302, 303, 495 N.Y.S.2d 823, 824 (4th Dep't 1985) (holding that the lower court erred in limiting the defendant's inquiry of a prosecution witness' credibility to only "prior bad acts" because the witness had made prior inconsistent statements and had a criminal history).

22. 115 A.D.2d 302, 495 N.Y.S.2d 823 (4th Dep't 1985).

23. *Id.* at 303, 495 N.Y.S.2d at 824. *See also* People v. Ayrhart, 101 A.D.2d 703, 475 N.Y.S.2d 687 (4th Dep't 1984) (overturning the defendant's conviction because the lower court denied a defense request to cross-examine two prosecution witnesses whose credibility was at issue).

24. People v. Coleman, 75 Misc. 2d 1090, 1093, 349 N.Y.S.2d 298, 303 (Sup. Ct. Nassau County 1973).

25. Kravitz v. Long Island Jewish-Hillside Medical Ctr., 113 A.D.2d 577. 583-84, 497 N.Y.S.2d 51, 56 (2d Dep't 1985) (citations omitted).

26. *Id.*

introduction of general character testimony where only the witness' character for truth and veracity is at issue. Both federal and New York cases have held that where evidence for truth and veracity are introduced, the general character of the witness is not at issue.[27] As such, "[t]estimony elicited in rebuttal must be relevant to the character trait put in issue."[28]

While there are some significant differences between Federal Rule of Evidence 608 and the New York case law, the policy reasons behind the rules are essentially the same. Fundamental to both rules is the necessity that the trier of fact be able to accurately gauge a witness' credibility for truthfulness, while not confusing the proceedings with unrelated facts or exposing the witness to attacks not relevant to his or her veracity for truthfulness.

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27. United States v. Darland, 626 F.2d 1235 (5th Cir. 1980), *aff'd*, 659 F.2d 70 (5th Cir. 1981), *cert. denied*, 454 U.S. 1157 (1982); People v. Viloria, 160 A.D.2d 499, 554 N.Y.S.2d 163 (1st Dep't 1990).

28. *Viloria,* 160 A.D.2d at 499, 554 N.Y.S.2d at 164. The court held that the prosecution's rebuttal testimony, stating that the defendant had "wandering hands," was prejudicial because the defendant, accused of sodomy, did "not place his general character in issue" after introducing evidence of his "truthfulness and honesty." *Id.*