

8.39. Reputation Evidence

(1) Character Trait. Evidence of reputation among a “community of individuals” of a person’s character trait is admissible when that character trait is provable.

(a) A “community of individuals” exists wherever the person’s associations are of such quantity and quality as to permit the person to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability of that reputation.

(b) The foundation for the admission of such reputation evidence requires that a witness testify to views of a sufficient number of individuals who have had sufficient experience with the person whose reputation is being testified to.

(c) Reputation may not be proved by evidence of specific acts of a person, or by a witness’s opinion of a person’s character.

(d) Notwithstanding subdivision (1) (a), evidence of a defendant’s bad reputation for a relevant character trait is not admissible unless the defendant first offers evidence of his or her good reputation for that character trait.

(2) Pedigree. Evidence of reputation within a family, before the controversy in issue arose, as to matters of pedigree, such as birth, death, lineage, marriage, legitimacy and relationships between and among family members, is admissible.

(3) Lands. Evidence of long-standing reputation in the relevant community as to boundaries of, or customs affecting, lands in issue, existing before the controversy arose, is admissible.

Note

Subdivision (1) (a) is derived from Court of Appeals precedents which hold that reputation evidence of a person's relevant character trait when otherwise admissible may be used for its truth. (See *People v Bouton*, 50 NY2d 130, 139 [1980] [reputation evidence when admissible "may in and of itself give rise to a reasonable doubt of guilt where none would otherwise exist"], citing *People v Trimarchi*, 231 NY 263, 266 [1921]; *People v Colantone*, 243 NY 134, 136 [1926] ["This court has frequently stated that evidence of good character is a matter of substance, not of form, in criminal cases, and must be considered by the jury as bearing upon the issue of guilt".])

Subdivision (1) (b) is derived from *People v Fernandez* (17 NY3d 70, 76 [2011]) wherein the Court of Appeals noted:

"[W]e rejected [in *People v Bouton*] the notion that one's community was restricted to 'one's residential neighborhood.' Rather, we observed 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' " (citations omitted).

In *People v Bouton* (50 NY2d at 139), the Court had observed that a person "might be better known in the community of his employment and in the circle of his vocational fellows, where opportunities to evidence the traits at stake may occur with greater frequency than in the environs of his dwelling place, nestled in the anonymity of a large city or suburb."

Subdivision (1) (c) is derived from *People v Fernandez* (17 NY3d at 77 [a proper foundation is laid when a witness reports "views of a sufficient number of people" who have had "sufficient experience" with the person in question]) and *People v Hanley* (5 NY3d 108, 113-114 [2005] [a proper foundation was laid when the witness "worked in a close setting with (the person) and regularly interacted and communicated with the same group of people"]).

Subdivision (1) (d) and (e) reflect the Court of Appeals statement in *People v Kuss* (32 NY2d 436, 443 [1973]) that "[w]hether the defendant's character will become an issue in the trial is the defendant's option, for until he introduces evidence of good character the People are precluded from showing that it is otherwise. And although character is the issue (i.e., the unlikelihood of the defendant's committing the crime), reputation is the only proof which the law allows. Neither the defendant nor the prosecutor may introduce evidence of particular acts tending to prove or rebut the defendant's good character" (citations omitted). (See also *People v Bouton*, 50 NY2d at 139 [wherein the Court stated that

reputation is “the aggregate tenor of what others say or do not say about him” and “is the raw material from which that character may be established”].)

Subdivision (2) is derived from *Badger v Badger* (88 NY 546, 556 [1882] [the application of reputation evidence “to cases of pedigree . . . is justified by difficulties of proof, and (is) confined generally to the family and relatives whose knowledge is assumed, and who have spoken before a controversy arisen”]) and *McKinnon v Bliss* (21 NY 206, 217 [1860] [“That hearsay or reputation is admissible as evidence, upon questions of pedigree or family relationship, . . . is a familiar doctrine”]).

The proof of pedigree by means other than reputation evidence is governed by Guide to New York Evidence rule 8.33.

Subdivision (3) is derived from *McKinnon v Bliss* (21 NY at 217), wherein the Court of Appeals stated: “That hearsay or reputation is admissible . . . upon questions respecting the boundaries of lands . . . is a familiar doctrine.” (*See also Village of Oxford v Willoughby*, 181 NY 155, 160-161 [1905] [“accepted belief of the community” as to location of public road]; *Hannah v Baylon Holding Corp.*, 34 AD2d 792 [2d Dept 1970] [in action to determine boundary lines, Court held evidence of reputation regarding boundaries insufficient to invoke “reputation” exception], *revd on other grounds* 28 NY2d 89 [1971] [declarations of a deceased person who owned or was in possession of land, as to the boundary line between him and the land of another, were admissible as an exception to the hearsay rule and were sufficient to establish boundary lines]; *Gardner v Town of Claverack*, 22 NYS2d 265, 268-269 [Sup Ct, Columbia County 1940], *affd* 259 App Div 1111 [3d Dept 1940].)