

6.23. Impeachment by Reputation for Untruthfulness and Rebuttal

(1) The credibility of a witness who has given substantive evidence may be impeached by evidence of the witness’s reputation for untruthfulness in the community. A witness who testifies to another witness’s reputation for untruthfulness may be asked whether the witness has heard of prior specific conduct that bears on the truthfulness of the witness who was the subject of the character testimony.

(2) When a witness’s character for truthfulness is impeached by reputation evidence or otherwise, the party who called the witness may, in the discretion of the court, introduce evidence, in rebuttal, of that witness’s reputation for truthfulness in the community. In the exercise of its discretion, the court may consider whether permitting the rebuttal evidence may result in confusion or cause the trial to be unduly extended in length. On cross-examination of the rebuttal witness, the witness may be asked whether the witness has heard of prior specific conduct that bears on the untruthfulness of the witness who was the subject of the character testimony.

Note

Subdivision (1). The rule stated in subdivision (1) is derived from *People v Hanley* (5 NY3d 108, 112 [2005]) and *People v Pavao* (59 NY2d 282 [1983]), where the Court of Appeals explained that “ ‘a party has a right to call a witness to testify that a key opposing witness, who gave substantive evidence and was not called for the purposes of impeachment, has a bad reputation in the community for truth and veracity’ ” (*Hanley* at 112, quoting *Pavao* at 290; *see also People v Fernandez*, 17 NY3d 70, 76 [2011]; *People v Hinksman*, 192 NY 421, 432 [1908]). The purpose of this rule is to “ensure[] that the jury is afforded a full picture of the witnesses presented, allowing it to give the proper weight to the testimony of such witnesses.” (*Hanley*, 5 NY3d at 112; *see also Pavao*, 59 NY2d at 290 [the rule provides “an effective means of testing and assessing the credibility of witnesses and reaching a proper verdict”].) The Court has noted that this form of impeachment is limited to a “key witness” or “key prosecution witness.” (*Pavao*, 59 NY2d at 290-291.)

The Court of Appeals has instructed that proof of a witness's untruthful character must be confined strictly to reputation evidence, rather than opinion testimony. (*Hanley*, 5 NY3d at 112; *Carlson v Winterson*, 147 NY 652, 656 [1895].) In this connection, the character witness may not testify to specific acts of untruthful character by the witness being impeached. (*Pavao*, 59 NY2d at 290.) Furthermore, the reputation evidence must also be confined strictly to reputation for "truth and veracity." (*Hanley*, 5 NY3d at 112; *Hinksman*, 192 NY at 435 ["We think that evidence of general bad character, which is nothing but evidence of general reputation, should not be considered competent to decide the issue whether a defendant who testifies in his own behalf is worthy of belief . . ."].)

Guide to New York Evidence rule 8.39 (Reputation Evidence) sets forth the rule on the evidence authorized to prove reputation.

The reputation evidence need not refer to the witness's reputation for untruthfulness at the time of the trial but may refer to a time prior to trial, provided that time is not so remote as to negate the probative value of an inference of a reputation of untruthfulness at the requisite time. (*See* Guide to NY Evid rule 4.07, Exclusion of Relevant Evidence; *Dollner v Lintz*, 84 NY 669, 669 [1881] ["General reputation is not usually the growth of a day or month, but results in most cases from a course of life or conduct for a period of time. . . . The trial judge may control the range of the inquiry"].)

The Court of Appeals in dictum has approved the practice of asking witnesses called to impeach another whether, from their knowledge of the testified to bad reputation for truthfulness, they would believe the witness about whom they testified under oath. (*See Carlson*, 147 NY at 656; *Elmendorf v Ross*, 221 App Div 376, 377 [3d Dept 1927]; *Spira v Holoschutz*, 38 Misc 754, 755 [App Term 1902].)

The instant rule is simply one specific form of impeachment of a witness for untruthfulness. It doesn't exclude using any other rule of evidence to impeach the untruthful witness. For example, untruthful character can be shown by prior acts of misconduct; criminal convictions; as well as by an untruthful reputation.

Subdivision (2). The rule stated in subdivision (2) is derived from Court of Appeals decisions which hold that when a witness's character for truthfulness is impeached, the party calling the witness may, in the discretion of the court, seek to support the witness's credibility by evidence of the witness's character for truthfulness in the community. (*See e.g. Pavao*, 59 NY2d at 290 ["Whether the opposing party may call witnesses to rebut the impeaching witness' statement is a question best left to the discretion of the Trial Judge for it is he who can best assess whether doing so may result in confusion or cause the trial to be unduly extended in length"]; *Derrick v Wallace*, 217 NY 520, 525 [1916] [rebuttal evidence of good reputation]; *Stape v People*, 85 NY 390, 393 [1881].) This rule permits such character witness to testify that the witness has never heard the impeached witness's veracity questioned (*see People v Van Gaasbeck*, 189 NY 408, 419-420 [1907];

People v Davis, 21 Wend 309, 315 [Sup Ct of Judicature 1839]) and that the witness would believe the impeached witness under oath. (*See Adams v Greenwich Ins. Co.*, 70 NY 166, 170-171] [1877].)

The Court of Appeals has emphasized that the “court’s discretion arises only when a party seeks to rebut [the testimony of untruthfulness]. It is at that point that the judge may determine whether the admission of further testimony or the calling of additional witnesses is proper. This assures that the court will not be inundated with competing witnesses that will cause undue delay in bringing a trial to conclusion.” (*Hanley*, 5 NY3d at 114 [citation omitted]; *see also Pavao*, 59 NY2d at 290.)

Reasons for the introduction of rebuttal evidence of reputation evidence for truthfulness include not only when a witness is impeached by reputation for untruthfulness (*Stape*, 85 NY at 393) but also when a witness is impeached by criminal conviction or other instances of misconduct (*Derrick*, 217 NY at 525 [“Evidence of conviction thus impeaches the general character for truth and veracity and may be met by evidence of general good character”]).

Impeachment by proof of prior inconsistent statements, however, does not permit the admission of evidence of the witness’s reputation for truthfulness. (*See Frost v McCarger*, 29 Barb 617, 620, 621 [Sup Ct, Gen Term 1859].) Similarly, the New York courts have held that evidence contradicting a witness’s factual testimony does not permit evidence of the witness’s reputation for truthfulness. (*Kravitz v Long Is. Jewish-Hillside Med. Ctr.*, 113 AD2d 577, 584 [2d Dept 1985] [“contradictions and improbabilities . . . did not constitute an attempt to prove bad character”]; *People v Rector*, 19 Wend 569, 586 [Sup Ct of Judicature 1838]; *see Derrick*, 217 NY at 525.)