

4.11 Character Evidence¹

(1) Admissibility. Evidence of a person’s character is not admissible to prove that the person acted in conformity therewith on a particular occasion except:

(a) In a civil or criminal proceeding, evidence of a person’s character is admissible where that character is an essential element of a crime, charge, claim, or defense.

(b) In a criminal proceeding, a defendant may offer evidence of character that is relevant to prove the defendant acted in conformity therewith on a particular occasion, and, if the evidence is admitted, the People may rebut that evidence.

(c) In a criminal proceeding where the defendant interposes a defense of justification based on the defense of self or another:

(i) evidence of the victim’s reputation for violence and prior specific acts of violence by the victim against the defendant or others, if known to the defendant and reasonably related to the crime charged, is admissible on the issue of the defendant’s belief of the necessity of defending himself or herself or another person from impending harm;

(ii) evidence of the victim’s prior threats against the defendant, whether known to the defendant or not, is admissible to prove that the victim was the initial aggressor;

(iii) evidence of the victim’s reputation for violence is not admissible to prove that the victim was the “initial aggressor”; and

(iv) evidence of the defendant’s reputation for violence is not admissible to prove that the defendant was the “initial aggressor.”

(d) In a civil or criminal proceeding, evidence of the character of a witness may be admissible to impeach the witness as provided in Guide to New York Evidence article six.

(2) Method of Proof. When evidence of a person’s character is admissible, proof thereof may only be by testimony as to that person’s reputation for the relevant character as set forth in Guide to New York Evidence rule 8.39 (1), except:

(a) If evidence of character is admissible under subdivision (1) (a) of this rule, the relevant character may be proved by testimony as to that person’s reputation for the relevant character as set forth in rule 8.39 (1) and by proof of relevant specific acts.

(b) If a defendant in a criminal proceeding, through the testimony of a witness called by the defendant, offers evidence of his good character, the People may independently prove any previous conviction of the defendant for an offense that would tend to negate any character trait or quality attributed to the defendant in that witness’ testimony.

(3) Cross-Examination. If a witness offers reputation evidence as to a person’s character, that witness may be asked on cross-examination whether the witness has heard that the person has been convicted of a crime or engaged in conduct, other than the crime(s) or conduct with which the defendant is charged, that is inconsistent with that reputation.

Note

Subdivision (1). The general rule stated in subdivision (1) is derived from Court of Appeals precedent that has long recognized that in civil and criminal proceedings the character or a character trait of a person may not be proved to raise an inference that the person acted in conformity therewith on the occasion in issue (*see e.g. People v Zackowitz*, 254 NY 192, 197 [1930]; *Noonan v Luther*, 206 NY 105, 108 [1912]; *McKane v Howard*, 202 NY 181, 186-187 [1911]). In the words of the Court of Appeals: “This court has declared that ‘[i]nflexibly the law has set its face against the endeavor to fasten guilt upon [a defendant] by proof of character or experience predisposing to an act of crime . . . The endeavor has been often made, but always it has failed’ ” (*People v Mullin*, 41 NY2d 475, 479 [1977]). This exclusionary rule is “one, not of logic, but of policy” (*Zackowitz*, 254 NY at 198).

Evidence of a rape victim’s prior sexual conduct to prove conduct, e.g., consent, is governed by CPL 60.42; and evidence of a victim’s sexual conduct in prosecutions for any offense is governed by CPL 60.43.

The remaining paragraphs of subdivision (1) set forth the exceptions to the rule’s bar to character evidence.

Subdivision (1) (a). Paragraph (a) of subdivision (1) sets forth the common-law rule that where the character or a trait of character of a person is, as a matter of substantive law, an essential element of a crime, charge, claim, or defense, that character or trait of character may be proved (*see e.g. People v Mann*, 31 NY2d 253 [1972]; *Park v New York Cent. & Hudson Riv. R.R. Co.*, 155 NY 215, 219 [1898]; *Cleghorn v New York Cent. & Hudson Riv. R.R. Co.*, 56 NY 44, 46-47 [1874]).

Subdivision (1) (b). Paragraph (b) of subdivision (1) is derived from Court of Appeals precedent which gives a defendant in a criminal proceeding the option to introduce reputation evidence as to defendant’s own good character for the purpose of raising an inference that defendant would not be likely to commit the crime charged (*see e.g. People v Aharonowicz*, 71 NY2d 678, 681 [1988] [“The principle has long been that in a criminal prosecution, the accused may introduce evidence as to his own good character to show that it is unlikely that he committed the particular offense charged”]; *People v Van Gaasbeck*, 189 NY 408, 413-414 [1907]). When the defendant opts to introduce evidence of good character, “such testimony must relate to the traits involved in the charge against him” (*People v Miller*, 35 NY2d 65, 68 [1974]).

Additionally, the rule as stated recognizes that when the defendant puts his or her character in issue, the People may, in rebuttal, challenge the “good” character or character trait elicited by defendant (*see e.g. People v Richardson*, 222 NY 103, 107 [1917]; *People v Hinksman*, 192 NY 421, 430-431 [1908]).

Subdivision (1) (c). Paragraph (c) of subdivision (1) is derived from Court of Appeals decisions holding that when the defendant interposes a justification defense of self-defense, evidence of the victim’s *reputation* for being a violent person and evidence of the victim’s prior violent acts against others, when known to the defendant, are admissible to show the defendant’s state of mind as to the necessity of defending himself or herself (*People v Rodawald*, 177 NY 408, 423 [1904]); and further, that evidence of the victim’s past violent *acts* against others, when known to the defendant, is admissible as to the reasonableness of defendant’s conduct, provided the evidence is reasonably related to the crime charged (*see e.g. Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543, 551-552 [1976]).

On the question of who was the “initial aggressor,” *People v Petty* (7 NY3d 277 [2006]) permits evidence of the victim’s threats against the defendant, whether the defendant was aware of the threats or not. That evidence permits an inference of the victim’s “intent” to “act upon [the uttered threats]” and that he or she did so as the initial aggressor (*id.* at 285).

The “general reputation” of the victim as “quarrelsome, vindictive or violent,” however, is “not received to show” that the victim “was the aggressor” nor is similar evidence of the reputation of the defendant admissible to show the defendant was the aggressor (*People v Rodawald*, 177 NY 408, 423 [1904]; Prince, Richardson on Evidence § 4-409 at 172 [Farrell 11th ed]; *cf. Matter of Robert S.*, 52 NY2d 1046 [1981]; *People v Miller*, 39 NY2d 543 [1976]; *but see Williams v Lord*, 996 F2d 1481, 1484 [2d Cir 1993, concurring op]).

Subdivision (1) (d) notes that when character evidence is admitted for impeachment purposes, it may be admissible under the rules set forth in this Guide’s article six.

Subdivision (2). This subdivision is derived from the well-established rule in New York that when a person’s character or character trait is admissible it must be proved by reputation testimony as set forth in Guide to New York Evidence rule 8.39 (1). Reputation testimony is the only form of proof permitted, and that reputation evidence must relate to the trait or traits involved in the charge against the defendant (*see e.g. People v Miller*, 35 NY2d 65, 68 [1974]; *People v Kuss*, 32 NY2d 436, 443 [1973]; *People v Van Gaasbeck*, 189 NY 408, 413-415 [1907]).

The witness may testify, upon an adequate foundation, that “I have heard the reputation for the relevant character or character trait is good,” or to the fact that since the witness has never heard anything contrary to the relevant character or character trait, defendant’s reputation must be “good” (*Van Gaasbeck*, 189 NY at 420; *see also People v Bouton*, 50 NY2d 130, 140 [1980] [“And, the fact that the offer 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”]).

The opinions of those who know defendant personally and have firsthand knowledge of defendant's character as well as proof of defendant's commission of specific acts that may implicate the trait are inadmissible (*Van Gaasbeck*, 189 NY at 415-416). The basis for this limitation as stated by the Court of Appeals in *Van Gaasbeck* is that "its admission 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" (*id.* at 418).

Additionally, the rule as stated in subdivision (2) recognizes that, when the defendant puts his or her character in issue pursuant to subdivision (1) (b), the People may now, in rebuttal, challenge the "good" character or character trait elicited by defendant. As derived from the common law, the People may introduce reputation evidence that defendant's reputation for the relevant character or character trait placed in issue is "bad." (*See e.g. Richardson*, 222 NY at 107; *Hinksman*, 192 NY at 430-431.)

The remaining paragraphs sets forth specific proof rules applicable in limited situations.

Subdivision (2) (a). Paragraph (a) of subdivision (2) is derived from Court of Appeals precedent that, where a person's character is an element of a crime, charge, claim, or defense, the character may be proved by relevant specific acts (*see e.g. Mann*, 31 NY2d at 259; *Park*, 155 NY at 219; *Cleghorn*, 56 NY at 46-47). Although the case law is limited, courts have also permitted the character to be proved by reputation. (*See e.g. Wuensch v Morning Journal Assn.*, 4 App Div 110, 115-116 [1st Dept 1896].) However, the Court of Appeals has held to the contrary in an action where the defendant was alleged to have been negligent in hiring or retaining an incompetent employee. (*See Park*, 155 NY at 218-219 ["We are aware that in some states the courts have permitted incompetency of servants to be shown by general reputation, but we have never gone to that extent in this state. It appears to us that the safer and better rule is to require incompetency to be shown by the specific acts of the servant, and then, that the master knew or ought to have known of such incompetency. The latter may be shown by evidence tending to establish that such incompetency was generally known in the community"].)

It should also be noted that CPL 60.40 (3) states the rule that where a prior criminal conviction is an element of the charged crime, the prior conviction necessary to the proof of the charged crime may be independently proved unless the defendant has availed himself or herself of the procedural protections set forth in CPL 200.60 or CPL 200.63. (*See William C. Donnino, Practice Commentary, McKinney's Cons Laws of NY, CPL 60.40 at subd three.*)

Subdivision (2) (b). Paragraph (b) of subdivision (2) restates CPL 60.40 (2), which provides an additional avenue of proof to rebut the reputation evidence

admitted when the defendant puts his or her character in issue pursuant to subdivision (1) (b). (See William C. Donnino, Practice Commentary, McKinney’s Cons Laws of NY, CPL 60.40 at subd two.)

Subdivision (3). This subdivision is derived from Court of Appeals precedent which holds that the witness providing reputation testimony may be asked on cross-examination whether the witness has heard about particular events that are derogatory to the reputation testified to by the witness (*People v Kuss*, 32 NY2d 436, 443 [1973] [(I)t is well established that they may be asked as to the existence of rumors or reports of particular acts allegedly committed by the defendant which are inconsistent with the reputation they have attributed to him]). Specifically, the witness may only be asked whether the witness heard of the event and not whether the witness has personal knowledge of such an event. (*People v Kennedy*, 47 NY2d 196, 206 [1979] [“Assuming, *arguendo*, that Mrs. Kennedy did indeed serve as a character witness, any impeachment cross-examination should have been limited to her knowledge of defendant’s reputation, and should not have extended to her personal knowledge of the underlying acts”].) In *Kuss*, the Court emphasized that there are certain limitations, namely, “[t]he inquiry cannot be used to prove the truth of the rumors, but only to show the ability of the witness to accurately reflect the defendant’s reputation in the community. And the prosecutor must act in good faith; there must be some basis for his questions” (*Kuss*, 32 NY2d at 443).

And, if the witness is solely a character witness, he or she may not be questioned about the crimes or underlying conduct of the crimes of which the defendant is accused (*People v Lopez*, 67 AD2d 624, 624 [1st Dept 1979] [“The district attorney also should not have asked defendant’s character witness whether he would change his opinion of defendant’s character if he heard that defendant had committed a cold-blooded murder, obviously referring to the case on trial. The question improperly assumed that the defendant was guilty of the crime with which he was charged, the very issue toward the determination of which the character evidence was offered”]; *People v Lowery*, 214 AD2d 684, 685 [2d Dept 1995], *mod on other grounds* 88 NY2d 172 [1996] [“We agree with the defendant that the prosecutor’s cross-examination of a defense character witness exceeded the bounds of propriety insofar as the prosecutor utilized hypothetical questions which assumed the defendant’s guilt of the crimes for which he was on trial”]; *People v Gandy*, 152 AD2d 909, 909 [4th Dept 1989] [“The court erred in permitting the People to cross-examine defendant’s character witnesses concerning whether their opinions of defendant’s reputation would change if they knew that defendant had committed the crimes at issue”]).

¹ In December 2022, subparagraphs (iii) and (iv) of subdivision (1) (c) were added.