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Guilt Assuming Hypotheticals: Basic Character Evidence Rules

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The accused in a criminal case has the right to offer evidence of a pertinent character trait in order to cast doubt on whether he or she would commit the crime charged by the government. This right gives the accused an opportunity to offer predisposition evidence that is otherwise generally inadmissible. Federal Rule of Evidence 404(a)(1) illustrates the general rule against character evidence and the exception for the accused.

> (a) Character evidence generally
> Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:
> (1) Character of accused
> Evidence of a pertinent trait of character offered by an accused. . . .

If the accused takes advantage of this right, the accused may call a character witness to testify about the reputation of the accused or, in most jurisdictions, to provide an opinion as to the accused's character. Calling a character witness is not without risk, however. The principal risk is that the witness may be cross-examined about specific acts that are inconsistent with the character to which the witness attests. Federal Rule of Evidence 405(a) sets forth the basic rules for the direct examiner and recognizes the right of the cross-examiner to inquire about specific acts.

> (a) Reputation or opinion
> In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

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Aside from the fact that Rule 405 permits character testimony to be cast in terms of opinion as well as reputation, the rule codifies the common law approach to character evidence. That approach was summarized and approved by the United States Supreme Court in *Michelson v. United States*, 335 U.S. 469 (1948).

The *Michelson* case

Michelson illustrates how an accused may seek to benefit from character evidence. It also addresses the risk assumed by the accused when a character witness is called for the defense.

Michelson was charged with bribing a federal revenue agent. The government proved that Michelson made a large payment to the agent, but Michelson testified that he did not offer a bribe but merely responded to the agent's threats and inducements. To prove that he was not the kind of person to bribe an agent, Michelson called five witnesses to testify as to his reputation. Two witnesses testified that they had known Michelson for about 30 years while the other three had known him for at least 15 years. The Court quotes a typical direct examination of three of the character witnesses.

> **Q.** Do you know the defendant, Michelson?
> **A.** Yes.
> **Q.** How long do you know Mr. Michelson?
> **A.** About 30 years.
> **Q.** Do you know other people who know him?
> **A.** Yes.
> **Q.** Have you had occasion to discuss his reputation for honesty and truthfulness and for being a law-abiding citizen?
> **A.** It is very good.
> **Q.** You have talked to others?
> **A.** Yes.
> **Q.** And what is his reputation?
> **A.** Very good.

(335 U.S. at 471-72).

Two other character witnesses testified that they had never heard anything bad about Michelson.

The prosecutor asked the witnesses the following question: "Did you ever hear that Mr. Michelson on March 4, 1927, was convicted of a violation of the trademark law in New York City in regard to watches?" (*Id.* at 472.) Michelson did not object to the question, as he had brought out his conviction on direct examination. But the prosecutor asked, in substance, another question of four of the witnesses:

"Did you ever hear that on October 11, 1920, the defendant, Solomon Michelson, was arrested for receiving stolen goods?" (*Id.*) The trial judge, outside the presence of the jury, ensured that the prosecutor had a good-faith basis for believing that Michelson had been arrested. None of the witnesses had heard of the arrest, and the trial judge instructed the jury that it was not to assume that the arrest actually occurred. Michelson was convicted and complained in the Supreme Court about the prosecutor's question.

Justice Jackson described the basic rule that the accused is given the right to offer character evidence of a type that the prosecution is forbidden from offering, and added that "the law extends helpful but illogical options to a defendant." (*Id.* at 478.) In 1948, the defendant could only offer reputation evidence, not opinion evidence as Rule 405 now permits. Justice Jackson noted that this was at least a little odd: "The witness may not testify about defendant's specific acts or courses of conduct or his possession of a particular disposition or of benign mental and moral traits; nor can he testify that his own acquaintance, observation, and knowledge of defendant leads to his own independent opinion that defendant possesses a good general or specific character, inconsistent with commission of acts charged. The witness is, however, allowed to summarize what he has heard in the community, although much of it may have been said by persons less qualified to judge than himself." (*Id.* at 477.)

Having recognized that the defendant's witnesses must rely on hearsay rather than their own knowledge of the defendant, Justice Jackson observed that "[a]nother hazard is that his own witness is subject to cross-examination as to the contents and extent of the hearsay on which he bases his conclusions, and he may be required to disclose rumors and reports that are current even if they do not affect his own conclusion." (*Id.* at 479.) The procedures that courts use, Justice Jackson suggested, create their own problems.

Technically, a prosecutor should be able to ask a character witness whether he or she had heard that someone like Michelson had been arrested even if no arrest had taken place: "The relevant information that it is permissible to lay before the jury is talk or conversation about the defendant's being arrested. That is admissible whether or not an actual arrest had taken place; it might even be more significant of repute if his neighbors were ready to arrest him in rumor when the authorities were not in fact." (*Id.* at 481 n.18.) But, Justice Jackson noted that "before this relevant and proper inquiry can be made, counsel must demonstrate privately to the court an irrelevant and possibly unprovable fact—the reality of arrest." (*Id.*)

Justice Jackson recognized the reality facing a defendant like Michelson: "From this permissible inquiry about reports of arrest, the jury is pretty certain to infer that defendant had in fact been arrested and to draw its own conclusions as to character from that fact." (*Id.*) Later in the opinion he reiterated that it is doubtful that juries can follow limiting instructions. (*Id.* at 484-85.)

In the end, Justice Jackson conceded that "much of this law is archaic, paradoxical and full of compromises and compensations by which an irrational advantage to one side is offset by a poorly reasoned counterprivilege to the other." (*Id.* at 486.) But he concluded that the system somehow has worked and that "[t]o pull one misshapen stone out of the grotesque structure is more likely simply to upset its present balance between adverse interests than to establish a rational edifice." (*Id.*)

Federal Rule of Evidence 405(a)

Rule 405(a) codifies *Michelson* while also expanding the character testimony to include opinion as well as reputation. The expansion, like the rest of the law of character evidence, gives the defendant an advantage while expanding the risk associated with calling a character witness. The risk increases because, when the Court decided *Michelson*, Justice Jackson emphasized that a cross-examiner could ask a character witness what he or she had "heard," but not what he or she "knew." Once Rule 405(a) opened the door to opinion evidence based upon the witness's personal knowledge, cross-examiners may ask a witness whether he or she "knows" about an arrest, conviction, or other event. The form of the question increases the likelihood that the jury will assume the event actually occurred irrespective of the instructions of the trial judge.

The general rule that a cross-examiner can question a character witness about what he or she has heard and an opinion witness about what he or she knows does not mean that any and all such questions are permissible. In *Michelson*, the cross-examination focused on a 20-year-old conviction and on a 27-year-old arrest. The prosecutor did not attempt to ask the witnesses whether they had heard about Michelson's arrest for the bribery charged by the government or to assume that he was guilty of bribery.

When a prosecutor cross-examines a character witness about the very charges for which the defendant is on trial, the cross-examination may be inconsistent with the presumption of innocence to which the defendant is entitled. Consider, for example, *United States v. Pirani*, 406 F.3d 543 (8th Cir. 2005) (en banc). During a federal investigation into allega-

tions that county deputies were stealing money seized at drug interdiction points, FBI and IRS agents interviewed former deputy Louis Pirani. Pirani denied an ownership interest in a ski boat and an airplane, assets that investigators doubted he could afford based on legitimate sources of income. The investigators discovered that Pirani had an interest in both assets, and the government charged Pirani with making false statements to the investigators in violation of 18 U.S.C. § 1001(a).

Pirani called a reputation character witness, Linda Graham, to testify that he had a good reputation for truthfulness. Graham added on direct examination that she knew her son "was in good hands" when he was with Pirani. (*Id.* at 554.) On cross-examination, the prosecutor asked Graham a series of nine questions. Each question began, "Would your opinion of Louis Pirani's reputation for truthfulness change if you knew," and ended with various instances of alleged misconduct addressed in the government's case-in-chief. (*Id.*)

Pirani failed to object at trial to the questions and thus could only seek plain error review on appeal. He complained that the prosecutor was asking the witness to assume that the allegations made by the government were true. The court noted that "[a] number of courts have condemned prosecutor questions that assume the defendant's guilt of the offense being tried as contrary to the accused's presumption of innocence," and cited as an example, *United States v. Guzman*, 167 F.3d 1350, 1352 (11th Cir. 1999). (*Id.*) *Guzman* held that guilt assuming questions were improper whether directed at reputation or opinion witnesses.

In *Pirani*, it is not clear precisely what assumptions the prosecutor asked Graham to make in the first eight questions, but the ninth question was plainly a guilt assuming hypothetical: "Would your opinion of Louis Pirani's reputation for truthfulness change if you knew that Louis Pirani has said that his brother, not he, was the sole owner of an airplane [when] Pirani's own records show that he paid $ 9,300 in cash on the plane, not counting his half of the down payment?" (*Id.*) This is really another way of asking the witness, "would your opinion change if you knew that Pirani was guilty?" That type of question seems clearly inconsistent with the presumption of innocence.

When asked the last question, Graham answered as follows: "These are allegations that until I receive something that convinced me that they were truthful, it just doesn't add up." Because she refused to accept the hypothetical, that is that Pirani was guilty, the court was able to find that there was no prejudice and therefore no plain error.

Lessons

Pirani serves as a reminder of several important principles. First, a federal defendant has the option of calling a character witness to testify as to reputation, opinion, or both. The choice of what type of testimony can be important, because it should dictate the cross-examination that will be permitted.

Second, a witness called as a reputation witness may end up offering opinion testimony by volunteering support for the defendant, as Graham did in *Pirani*. Once the witness offers opinion testimony, "did you know" questions are permissible on cross-examination.

Third, guilt assuming questions are now perceived by many courts to be inconsistent with the presumption of innocence. But timely objections need to be made to such questions or review for plain error will be the only recourse.

Fourth, wholly aside from the fact that the ninth question to Graham was guilt assuming, it was a confusing and inappropriate question. Consider the introductory part of the question again: "Would your opinion of Louis Pirani's reputation for truthfulness change if you knew . . ." When a witness testifies to "reputation for truthfulness," what the witness "knew" is not relevant; only what the community is talking about matters. Thus, it always is improper to cross-examine a reputation witness by asking whether, if the witness assumes something to be true, reputation would change. The only proper cross-examination of a reputation witness addresses what the witness has heard in the community. ■