

## **6.17 Impeachment by Instances of Misconduct<sup>1</sup>**

**(1) Subject to paragraph (c),**

**(a) the credibility of a witness may be impeached on cross-examination by asking the witness about prior specific criminal, vicious, or immoral conduct of the witness; and**

**(b) the credibility of a witness who gives evidence of a person's character also may be cross-examined about whether the witness has heard of prior specific criminal, vicious, or immoral conduct of the person who was the subject of the character testimony.**

**(c) Cross-examination authorized by paragraphs (a) and (b) is permissible only if:**

**(i) the nature of the conduct or the circumstances in which it occurred bear logically and reasonably on the witness's credibility;**

**(ii) the question has a good faith basis;**

**(iii) the question does not relate to conduct underlying a criminal charge of which the witness was acquitted; and**

**(iv) in a criminal case, a question directed to a testifying defendant about the defendant's alleged prior criminal, vicious, or immoral conduct was authorized by the court prior to trial or during trial upon a defense objection.**

**(2) Except for the admission of a criminal conviction pursuant to Guide to New York Evidence rule 6.19, extrinsic evidence is not admissible to prove prior criminal, vicious, or immoral conduct.**

**(3) A defendant in a criminal proceeding does not, by the act of testifying, waive the privilege against self-incrimination with respect to questions concerning pending unrelated criminal charges.**

**(4) When a witness is impeached pursuant to subdivision one, the party who offered that witness may in rebuttal present evidence of that witness's character for truthfulness pursuant to Guide to New York Evidence rule 6.23 (2).**

#### **Note**

**Subdivision (1).** The rule in subdivision (1) (a) on cross-examination of the witness regarding prior instances of misconduct committed by the witness is derived from substantial Court of Appeals precedent. (*See e.g. People v Smith*, 27 NY3d 652, 660, 662 [2016] [“witnesses—and indeed, even a testifying defendant—may be cross-examined on ‘prior specific criminal, vicious or immoral conduct,’ provided that ‘the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility’ ” and “a good faith basis for inquiring” is established]; *People v Sorge*, 301 NY 198, 200 [1950] [“A defendant, like any other witness, may be ‘interrogated upon cross-examination in regard to any vicious or criminal act of his life’ that has a bearing on his credibility as a witness”]; *People v Webster*, 139 NY 73, 84 [1893] [“It is now an elementary rule that a witness may be specially interrogated upon cross-examination in regard to any vicious or criminal act of his life”].) Whether the specific instance of conduct in issue logically and reasonably relates to the witness’s credibility is committed to the sound discretion of the court. (*See People v Coleman*, 56 NY2d 269, 273 [1982].) It should be noted that misconduct that demonstrates an “untruthful bent,” even though perhaps falling outside the “conventional category of immoral, vicious or criminal acts,” may be a proper subject of impeachment. (*People v Walker*, 83 NY2d 455, 461 [1994] [impeachment by defendant’s use of alias].)

**Subdivision (1) (b)** states New York’s rule permitting the cross-examination of a character witness about whether the witness had heard about prior specific instances of conduct at odds with the reputation attributed to the person who was the subject of the character testimony. (*See 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”]; *People v Kuss*, 32 NY2d 436, 443 [1973] [when the credibility of character witnesses is at issue, “it 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. However(,) as the defendant indicates, there are certain limitations. The 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" (citation omitted); *see also People v Alamo*, 23 NY2d 630 [1969].) Of note, both *Kuss* and *Alamo* cite with approval *Michelson v United States* (335 US 469 [1948]), with the Court in *Alamo* stating that *Michelson* is the

"leading modern case on character testimony and the cross-examination of a character witness . . . There, the policy problem of allowing this type of evidence at all was examined exhaustively by Justice Jackson, including a number of New York cases, and it was held that when a defendant introduces the subject of his good character it 'throw[s] open the entire subject' of his good name through cross-examination of the witnesses called as to contrary reports and rumors and by independent proof adversely affecting the reputation of defendant. The court felt that the archaic disadvantages of the rule could be overcome by 'discretionary controls in the hands of a wise and strong trial court.' " (*Alamo*, 23 NY2d at 634 [citation omitted].)

Since use of this impeachment method has the potential for unfair prejudice, especially to a defendant in a criminal proceeding, and may confuse or mislead the jury, the nature and extent of the cross-examination are subject to the sound discretion of the court. (*Smith*, 27 NY3d 652.)

When exercising its discretion regarding the potential cross-examination of a defendant in a criminal proceeding, whether with respect to a prior criminal conviction or any other criminal, vicious or immoral conduct, the trial court must, upon a request of the defendant, prior to trial, exercise its discretion in accord with the dictates of *People v Sandoval* (34 NY2d 371 [1974]), and *People v Kennedy* (47 NY2d at 205-206). *Sandoval* explained that

"[t]o the extent . . . that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand." (*Sandoval*, 34 NY2d at 377.)

And, the Court of Appeals has added that in the court's exercise of discretion "there are no per se rules requiring preclusion because of the age, nature, and number" of crimes or acts of misconduct sought to be examined about. (*People v Walker*, 83 NY2d at 459.)

**Subdivision (1) (c) (i)** restates the Court of Appeals holdings in *People v Smith* (27 NY3d at 662) and *People v Coleman* (56 NY2d 269, 273 [1982]) that the specific instance of conduct must logically and reasonably relate to the witness's credibility and that whether it does is committed to the sound discretion of the court.

**Subdivision (1) (c) (ii)** is derived from *People v Smith* (27 NY3d at 662).

**Subdivision (1) (c) (iii)** is derived from *People v Santiago* (15 NY2d 640, 641 [1964] [“prejudicial error was committed when the prosecutor on cross-examination questioned defendant about a criminal charge on which he had been acquitted”]). A witness may, however, be subject to impeachment by the underlying facts of a charge dismissed by the grand jury. (*People v Alamo*, 23 NY2d 630 [1969] [dismissal by the grand jury].)

**Subdivision (1) (c) (iv)** was derived from *People v Sandoval* (34 NY2d 371 [1974]) and former CPL 240.43, which was replaced by CPL 245.20 (3). *Sandoval* set forth a procedure and criteria for a pretrial determination as to whether any of the defendant’s criminal convictions or prior instances of misconduct may be used for impeachment purposes. *People v Syposs* (122 AD2d 600, 600-601 [4th Dept 1986]), however, held that *Sandoval* “neither enlarged nor diminished the court’s inherent and pre-existing power to exercise general control over the range of cross-examination; consequently, a defendant retains the right to object *at trial* to prejudicial cross-examination, and when his objection challenges inquiry into his prior misconduct, he is entitled to a ruling based upon the same criteria as would have been applied had the issue been raised before trial” (internal quotation marks and citations omitted).

CPL 245.20 (3) requires the prosecution to “disclose to the defendant a list of all misconduct and criminal acts of the defendant not charged in the indictment, superior court information, prosecutor’s information, information, or simplified information, which the prosecution intends to use at trial for purposes of (a) impeaching the credibility of the defendant, or (b) as substantive proof of any material issue in the case.” (See CPL 245.10 [1] [b] on the timing of the disclosure.) The defendant has the burden “of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would so far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.” (*Sandoval* at 378.)

*Sandoval* set forth the various criteria a court may consider in exercising its discretion as follows:

“Evidence of prior specific criminal, vicious or immoral conduct should be admitted if the nature of such conduct or the circumstances in which it occurred bear logically and reasonably on the issue of credibility. Lapse of time, however, will affect the materiality if not the relevance of previous conduct. The commission of an act of impulsive violence, particularly if remote in time, will seldom have any logical bearing on the defendant’s credibility, veracity or honesty at the time of trial. . . . To the extent, however, that the prior commission of a particular crime of calculated violence or of specified vicious or immoral acts significantly revealed a willingness or disposition on the part of the particular defendant voluntarily to place the advancement of his individual self-interest ahead of principle or of the interests of

society, proof thereof may be relevant to suggest his readiness to do so again on the witness stand. A demonstrated determination deliberately to further self-interest at the expense of society or in derogation of the interests of others goes to the heart of honesty and integrity. On the other hand, crimes or conduct occasioned by addiction or uncontrollable habit, as with alcohol or drugs . . . may have lesser probative value as to lack of in-court veracity. . . .

“Commission of perjury or other crimes or acts of individual dishonesty, or untrustworthiness (e.g., offenses involving theft or fraud, bribery, or acts of deceit, cheating, breach of trust) will usually have a very material relevance, whenever committed. By contrast, questions as to traffic violations should rarely, if ever, be permitted.” (*Sandoval* at 376-377.)

**Subdivision (2).** The rule stated in subdivision (2) is derived from substantial Court of Appeals precedent. (*See e.g. Badr v Hogan*, 75 NY2d 629, 635 [1990] [“Unlike material facts in dispute, or matters such as a witness’s bias, hostility, or impaired ability to perceive which may be proved independently for impeachment, plaintiff’s alleged prior misconduct had no direct bearing on any issue in the case other than credibility. If proven, it would show only that plaintiff had acted deceitfully on a prior *unrelated* occasion. The matter was, therefore, collateral and, under the settled rule, could not be pursued by the cross-examiner with extrinsic evidence to refute plaintiff’s denial” (citation omitted)]; *People v Zabrocky*, 26 NY2d 530, 535 [1970]; *Sorge*, 301 NY at 200.) In *Sorge*, the Court noted that this rule barring the admissibility of extrinsic evidence did not preclude further questioning of the witness when the witness denied committing the act, stating: “[A] negative response will not fob off further interrogation of the witness himself, for, if it did, the witness would have it within his power to render futile most cross-examination. The rule is clear that while a witness’[s] testimony regarding collateral matters may not be refuted by the calling of other witnesses or by the production of extrinsic evidence, there is no prohibition against examining the witness himself further on the chance that he may change his testimony or his answer.” (*Id.* at 200-201 [citations omitted]; compare Guide to NY Evid rule 8.35, Prior Judgment of Conviction.)

**Subdivision (3).** The rule stated in subdivision (3) is derived from *People v Betts* (70 NY2d 289, 295 [1987]) [“The policy of protecting the defendant’s opportunity to testify, while allowing the prosecution a balanced evidentiary response, is well served by the rule that the defendant’s choice to testify in the case on trial does not, by itself, effect a waiver of the privilege against self-incrimination as to pending unrelated charges. This rule will not, on the other hand, preclude prosecutors from inquiry into pending criminal charges if a defendant, in taking the stand, makes assertions that open the door and render those charges relevant for contradiction and response”]); and *People v Cantave* (21 NY3d 374, 381 [2013]) [“We hold that the prosecution may not cross-examine a defendant about the underlying facts of an unrelated criminal conviction on appeal, for the purpose of impeaching his credibility”]; *People v Smith*, 87 NY2d 715, 721 [1996] [“a prospective defendant who elects to testify before the Grand Jury does not waive

the privilege against self-incrimination as to credibility questioning regarding unrelated pending charges”]; *compare People v Brady*, 97 NY2d 233, 235 [2002] [defendant in a criminal proceeding may be cross-examined regarding his “admissions at the guilty plea allocution” to an unrelated charge for which he was awaiting sentencing]).

**Subdivision (4).** See commentary in the Note to Guide to New York Evidence rule 6.23 (2).

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<sup>1</sup> In December 2021, this rule was revised: (1) to substitute in the rule of subdivision (1) (b) the word “person” for “witness” in the phrase “conduct of the person who was the subject of the character testimony”; (2) to substitute in the rule of subdivision (1) (c) (iv) the phrase “a question directed to a testifying defendant about the defendant’s alleged. . .” for the phrase: “the question about”; (3) to add at the end of the rule in subdivision (1) (c) (iv) “or during trial upon a defense objection” per the holding in *People v Syposs* (122 AD2d 600, 600-601 [1986]) that is summarized in the third sentence of the Note to that subdivision; and (4) to explain in the first sentence of the Note to subdivision (1) (c) (iv) that CPL 240.43 was repealed and replaced by CPL 245.20 (3).