



**PROFESSOR HUTTEN
ON EVIDENCE
Impeachment of a
Witness in a Civil
Action: Proof of Prior
Misconduct (Bad Acts)**

by Professor Michael J. Hutten

I. INTRODUCTION

In the Winter 2004 issue of the *Bill of Particulars*, this column discussed the impeachment of a witness in a civil action by proof of prior criminal convictions. This column will explore as a basis for impeachment the admissibility of evidence that a witness has engaged in "misconduct" even though such conduct has not been the basis for a criminal conviction, New York's so-called "bad acts" mode of impeachment.

Using the basic hypothetical that was posited in the last column, the various "bad acts" of your client, the defendant, and the parties' fact and expert witnesses can be stated. They include: submission of a false resume to a prospective employer; passing bad checks; recreational drug use; spousal physical abuse; taking kick-backs from customers; holding foster children unlawfully; failure to pay mortgage payments which lead to a foreclosure and high speed, reckless driving. There is no doubt that the witnesses have engaged in this conduct, and that, while some of the conduct was the basis for a criminal prosecution, there was no resultant conviction.

Your question is whether any of these "bad acts" are admissible in your civil action for impeachment purposes.

While your first reaction may be, as with the previously discussed criminal convictions, that such impeachment can only occur in criminal cases, this reaction is contrary to existing law. This article will explore the various issues that arise when there is an attempt to impeach a witness by proof of the witness's prior "bad acts" in civil actions. After a discussion of the legal background, the article will explore these issues in the context of six questions: (1) What "bad acts" are potentially admissible? (2) What foundation must be established before impeaching by a "bad act"? (3) When "bad acts" are admissible, how are they admitted? (4) What discretion does a trial court have to regulate the impeachment process, and how does the court go about the exercise of that discretion? (5) When, if ever, can a witness raise the Fifth Amendment in response to questions about prior "bad acts"? and (6) What is the effect of impeachment, and how is it charged?

II. LEGAL BACKGROUND

At common law, a witness could be cross-examined as to any prior conduct engaged in, though it had not been the basis for a criminal conviction, in order to discredit the witness, subject to the discretion of the trial court.¹ The English common law at the time gave an absolute legal right to a litigant to assail the character of a witness by subjecting the witness to degrading inquiries, subject only to the discretion of the bar to avoid abuses, but this approach was flatly rejected by the Court of Appeals on the ground that it would create a rule "fraught with infinite mischief".² Instead, when an objection was made to the cross-examination of a witness regarding the witness's prior conduct for the purpose of "degrading" the witness, the trial court was "bound to permit such inquiry when it seemed to [the court], in the exercise of a sound discretion, that it would promote the ends of justice, and to exclude it when it

seemed unjust to the witness, and uncalled for by the circumstances of the case".³

In recognizing the general admissibility of non-conviction misconduct for the purpose of impeaching the witness, the Court of Appeals justified such impeachment on the ground that it will shed light on the witness's truthfulness. As the Court stated:

"It is the constant practice at the circuit to inquire of a witness, if he has not been guilty of a specific offense, for the purpose of impeaching him. It is usually a satisfactory test. If a man admits himself to have been guilty of heinous offenses, the jury would justly give him less credit than if his life had been pure, and his conduct upright. If a female witness admits herself to have broken down those barriers which the virtue and religion of every civilized country have reared for her improvement and protection, her oath would be of little value before a jury of intelligent men."⁴

While recognizing the potential for abuse, the court was of the view that such abuse would not occur because the trial court was given discretion to control the cross-examination, and the witness could exercise his/her Fifth Amendment right against self-incrimination or a "privilege" to refuse to answer any "degrading" question posed.⁵

The early decisions provided little guidance to the trial court for determining when a witness's non-conviction conduct could be inquired into on cross-examination.⁶ Gradually, the Court of Appeals set forth a workable rule. In *People v. Sorge*, the Court of Appeals stated that a witness may be cross-examined about "any vicious or criminal act of his life' that has a bearing on his credibility as a witness".⁷

Additionally, "immoral acts" that bear on credibility were included by the court as acts that a witness may be questioned about upon cross-examination.⁸ Of note, such immoral, vicious or criminal acts need not be directly probative of or involve untruthfulness.⁹ In *Badr v. Hogan*, the Court of Appeals emphasized however that all such conduct must show a lack of "moral turpitude."¹⁰ More recently, the Court of Appeals in *People v. Coleman*¹¹ and *People v. Walker*¹² has expanded its immoral, vicious or criminal acts standard to include prior conduct suggestive simply of the witness's "untruthful bent".

With this decisional law in mind, New York's "bad acts" cross-examination rule can be stated: a witness may be cross-examined about any immoral, vicious or criminal act involving moral turpitude, even though not directly or indirectly probative of truthfulness, or act suggestive of the witness's lack of truthfulness.¹³ New York's rule, it should be noted, is much broader than the Federal Evidence Rule which strictly limits "bad acts" cross-examination to acts which are probative of untruthfulness.¹⁴

III. POTENTIALLY ADMISSIBLE "BAD ACTS"

Whether a witness's prior conduct falls within New York's "bad acts" impeachment rule, i.e., whether it is suggestive of a lack of moral turpitude or untruthfulness, is a matter of trial court discretion.¹⁵ Of no surprise, in view of the rule's broad scope, a wide variety of prior conduct has been subject to the rule. However, certain conduct has been declared outside the scope of the rule. While these decisions may appear to be *ad hoc* decisions, several classifications of admissible/non-admissible conduct are discernible.

Initially, it is clear that acts which are necessarily criminal may be subject to cross-examination.¹⁶ Thus, a witness may be cross-examined as to

the commission of a murder;¹⁷ sexual offenses involving a child;¹⁸ rape;¹⁹ assault;²⁰ robbery;²¹ attempted robbery;²² burglary;²³ possession of a concealed and dangerous weapon;²⁴ theft²⁵ and drug trafficking.²⁶

The case law is also clear that conduct involving dishonesty is a proper subject for cross-examination.²⁷ Thus, a witness may be cross-examined about obtaining money by false pretenses;²⁸ false statements made in application forms;²⁹ improper billings in the witness's professional occupation;³⁰ possession of forged licenses;³¹ concealment of income and assets from government agency;³² perjury and false complaints³³ and the use of aliases.³⁴

Additionally, the New York courts have been fairly consistent in permitting cross-examination of a witness concerning the witness's engagement in acts of violence or the use of force or intimidation on the basis that such acts are antisocial in nature and thereby show a lack of moral turpitude.³⁵ Thus, it was held that a witness was properly cross-examined regarding her altercation with a nurse at a nursing home during which she twisted the nurse's hand and arm;³⁶ the use of force upon a child for whom she babysat;³⁷ a police officer witness's unprovoked physical attack upon another police officer;³⁸ a police officer witness's use of excessive³⁹ force and engagement in intentional acts of vandalism.⁴⁰

The case law is replete as well with rulings concerning the cross-examination of a witness about the witness's personal life and personal comportment. As a general proposition, a witness may be cross-examined regarding the recreational use of drugs,⁴¹ as well as drug addiction.⁴² Similarly, it was held that a witness could be cross-examined about giving a 50-year-old woman a drink containing five valium tablets.⁴³ Consistent with the drug cases, cross-examination about the witness's use of alcohol, presumably excessive, has

been upheld.⁴⁴ It has also been held that a witness's failure to renew his driver's license and continued driving without it was subject to cross-examination.⁴⁵ However, the fact that the witness is a gambler, who played cards and made bets on horses is not a proper ground of cross-examination,⁴⁶ provided the witness was not operating an illegal gambling activity.⁴⁷ As to the witness's sex life, while it may be proper to impeach a witness with questions regarding involvement in an adulterous affair,⁴⁸ a witness may not be cross-examined about the fact that the witness had lived with several women,⁴⁹ or that the witness, a married man, met a woman on a mid-day visit to a beach in the summer,⁵⁰ or that the witness had relations with various women, leaving clothes at their home and paying for their living expenses.⁵¹ Nor is the fact that the witness maintained a residence on certain streets, and that the police made several visits to her house a proper subject of cross-examination.⁵² It has also been held that a witness's employment in an unsavory business⁵³ and litigiousness cannot be the subject of inquiry.⁵⁴

As a general proposition, cross-examination regarding the witness's personal finances are not a proper subject of cross-examination. Thus, the fact that the witness filed for bankruptcy may not be cross-examined on⁵⁵ as well as the failure to pay debts,⁵⁶ and the existence of outstanding unpaid judgments.⁵⁷ However, a witness's failure to pay the fine for 44 parking tickets accumulated over two years was held to be a proper area of inquiry⁵⁸ and a witness's failure to pay taxes and practice of paying employees "off the books" was also held to be an appropriate area for cross-examination.⁵⁹

As to other types of non-conviction conduct addressed by the courts, it has been held proper to cross-examine a witness concerning the witness's retention of a public document⁶⁰ and the failure to carry a

green card.⁶¹ On the other hand, it has been held improper to cross-examine a witness as to being AWOL and using disrespectful language to a superior officer;⁶² the witness's status as a recipient of public assistance and immigrant status;⁶³ the witness's child having a "lying" problem⁶⁴ or a college rule prohibiting a freshman to operate a motor vehicle on campus.⁶⁵

Lastly, it is worthwhile noting, as discussed in our last column,⁶⁶ that while the fact of a professional disciplinary adjudication is not admissible to impeach the witness, the underlying facts of the disciplinary adjudication, to the extent that they fit within New York's "bad acts" impeachment rule, are a proper subject of cross-examination. Thus, for example, if an attorney has been suspended or disbarred as a result of conduct implying lack of moral turpitude or dishonesty, there can be no doubt that such conduct could be properly cross-examined on.⁶⁷

III. GOOD-FAITH BASIS

It is well established that a witness may not be cross-examined about "bad acts" unless the cross-examiner had a good-faith belief that there is a reasonable basis in fact that the witness committed such acts.⁶⁸ The trial court is required upon objection to have the cross-examiner establish compliance with this rule.⁶⁹

To comply with this rule, it is necessary to show that there is some proof which leads to the conclusion, directly or circumstantially, that the cross-examiner has "some reasonable basis for believing the truth of things he was asking about".⁷⁰ A mere "hunch" is not enough,⁷¹ nor is it sufficient to rely solely upon hearsay statements from individuals,⁷² or information derived from privileged documents.⁷³ Likewise, an arrest or indictment cannot alone establish the requisite basis to inquire about prior acts.⁷⁴

Where criminal proceedings are

commenced, a termination of them does not bar cross-examination of the acts underlying the proceedings unless the termination was the result of an acquittal or dismissal on the merits which, as a matter of law, bars cross-examination of the underlying acts.⁷⁵ Where there is a dismissal of criminal charges, the cross-examiner has the burden of demonstrating that the dismissal was for reasons other than an acquittal or dismissal on the merits.⁷⁶

IV. ADMITTING THE "BAD ACT"

Under New York law the "sole permissible way to introduce misconduct ... is on cross-examination of the witness being impeached".⁷⁷ In other words, inquiry can be made only on cross-examination of the witness, and if the witness admits to the commission of the "bad act", the witness is impeached. The impeaching party cannot establish the commission of the act by testimony from other witnesses or by documentary evidence, so-called "extrinsic evidence".⁷⁸

Most significantly, the prohibition against the use of extrinsic evidence to establish the commission of the "bad act" precludes the impeaching party from contradicting the witness's denial of the commission of the act.⁷⁹ As expressed by the courts, when the witness on cross-examination denies committing the "bad act", the cross-examiner or impeaching party is "bound by the [witness's] answers".⁸⁰ Moreover, innuendo or suggestion which would lead the jury to disbelieve the witness's denial is considered improper under this no extrinsic evidence rule.⁸¹

It must be noted that in New York, this prohibition on the use of extrinsic evidence comes into play even when it is evidenced by a document prepared by or signed by the witness.⁸² Other courts have held that the bar on extrinsic evidence would not be violated by the admission into evidence of the document when the witness admits to the document's

authenticity.⁸³ These courts appear to have the better argument and, further, a strong case can be made for the document's admission even when the witness denies its authenticity if the witness him/herself clearly executed the document.

New York's bar on the use of extrinsic evidence to contradict a witness's denial of the commission of the act is, as characterized by the Court of Appeals, "inflexible".⁸⁴ As observed by the Court, it is premised on:

"sound policy considerations for if extrinsic evidence which is otherwise inadmissible is allowed to be introduced to contradict each and every answer given by a witness solely for the purpose of impeaching that witness, numerous collateral minitrials would arise involving the accuracy of each of the witness's answers. The resulting length of the trial would by far outweigh the limited probative value of such evidence."⁸⁵

While the rule operates to prevent digressions, the cross-examiner is nonetheless given broad latitude in pressing the witness for an admission that s/he committed the act, notwithstanding the witness's initial denials, as long as the cross-examiner proceeds in good faith.⁸⁶ As stated by the Court of Appeals: "[T]here is no prohibition against examining the witness further on the chance he may change his testimony or his answers."⁸⁷ Additionally, it would seem that the cross-examiner may ask upon the witness's denial whether the denial is being made upon an understanding by the witness that the denial cannot be contradicted by other evidence, though there are no cases supporting such a question.

V. EXTENT OF JUDICIAL DISCRETION

The Court of Appeals has

consistently stated that the use of prior "bad acts" for impeachment of a witness is a discretionary determination for the trial court.⁸⁸ The discretion given relates to controlling both the nature and extent of such cross-examination.⁸⁹

Thus, the trial court can surely control the extent of the inquiry into the details of the "bad act".⁹⁰ Likewise, the trial court can evaluate the probative value of the "bad act" and balance it against such counterweights as unfair prejudice, its remoteness and the possibility it might confuse the issues of liability before the jury.⁹¹ Such balancing will be similar to that utilized in assessing the probative value of any offered evidence, including convictions.⁹² Needless to say, prejudice is more likely in the case of a party witness. But there may be instances with respect to a non-party witness where the trial court in its discretion could restrict questioning that unduly disgraces, degrades or embarrasses the witness or would be unfairly prejudicial to the party calling the witness.⁹³

To be sure, there are decisions where the Court of Appeals has stated that the above balancing standard is only applicable with respect to a defendant in a criminal case who testifies in his/her own behalf.⁹⁴ However, the Court of Appeals has also stated that "bad acts" impeachment is subject to the "usual rules of evidence".⁹⁵ Properly read, these decisions should be construed to hold only that the criminal defendant specific type balancing is inapplicable to non-criminal defendant witnesses, not the general probative value/prejudicial effect balancing standard.

Lastly, it must be observed that the trial court must ensure that the cross-examiner's purpose is that of impeachment and not for the purpose of improperly influencing the jury.⁹⁶ This is especially true where the witness is a party.⁹⁷

VII. FIFTH AMENDMENT

Under New York law a defendant in a criminal case does not waive his/her Fifth Amendment right against self-incrimination with respect to conduct relating solely to his/her credibility when testifying in his/her own defense.⁹⁸ However, present New York law is unclear whether other witnesses are protected by such a non-waiver rule.⁹⁹ Federal law recognizes that a witness does not waive his/her Fifth Amendment right with respect to matters relating solely to his/her credibility.¹⁰⁰ This provision is intended to encourage witnesses to testify by protecting them against disclosure of past criminal conduct which is still prosecutable. Whether as a matter of constitutional law or sound public policy, New York should follow the federal rule.

VIII. EFFECT OF ADMISSION OF "BAD ACTS"

As with criminal convictions,¹⁰¹ the impeachment of a witness by reason of the witness's commission of a "bad act" is to be considered by the jury as a factor in its determination as to whether the witness has been truthful.¹⁰² It would be error to charge otherwise.

IX. CONCLUSION

New York law provides a broad opportunity to impeach witnesses not only by proof of their criminal convictions but also by proof of their commission of "bad acts". In view of the relatively broad definition of "bad acts", the latter mode of impeachment is especially so as it will encompass a wide variety of conduct. The attorney should not overlook this mode of impeachment when considering ways to undercut a witness's credibility. With this point in mind, the reader may wish to return to the beginning of this article and consider how the

hypothetical case should be handled.

Michael J. Hutter, Jr. is a professor of law at Albany Law School and is special counsel to Powers and Santola, LLP.

Notes

1. See, e.g., *Shepard v. Parker*, 36 NY 517 (1867) (trial court's exercise of discretion in permitting the witness, a married woman, to be cross-examined regarding signal she made to a man for a "clandestine" meeting, conduct that can be described as "degrading", not subject to review); *LaBeau v. People*, 34 NY 223 (1866) (trial court's exercise of discretion in precluding the witness, a married woman, from being cross-examined regarding her adulterous affairs not subject to review).
2. *G.W. Turnpike Co. v. Loomis*, 32 NY 127 (1865).
3. *Id.* at 132.
4. *Shepard v. Parker*, 36 NY at 518, *supra*. See also *People v. Giblin*, 115 NY 196, 199 (1889) (cross-examination did not exceed "proper bounds in his endeavor to show that the defendant was not of such a character as to command entire confidence in his statements"); *People v. Cascone*, 185 NY 317, 334, 78 NE 287, 293 (1906) ("actual guilt without a conviction ... implies moral obliquity, and hence affects credibility"). More recently, the Court has noted such impeachment as having "limited probative value." *People v. Pavao*, 59 NY2d 282, 289, 464 NYS2d 458, 461 (1983).
5. See, *G.W. Turnpike Co. v. Loomis*, 32 NY at 138-139, *supra*; *Lohman v. People*, 1 NY 379 (1852); *People v. Mather*, 4 Wend. 229 (1840).
6. See, *LaBeau v. People*, 34 NY 223, *supra*. See also *Mowbray v. Gould*, 63 App. Div. 158, 163, 71 NYS 365, 369 (1st Dept., 1901) (conduct which is

BILL OF PARTICULARS

- “degrading, humiliating, or braising witness into disrepute with jury” should be excluded); *Osborne v. Seligman*, 39 Misc. 811, 812, 81 NYS 346, 347 [App. T. 1903] (conduct which indicates witness is a “lewd and debased character, void of shame or decency” should be permitted).
7. 301 NY 198, 200, 93 NE 2d 637, 638, quoting *People v. Webster*, 139 NE 73, 84, 34 NE 730, 733 (1893).
8. *Id.* at 300, 93 NE2d at 638, *supra*. See also *Badr v. Hogan*, 75 NY2d 629, 634, 555 NYS2d 249, 251 (1990) (“a witness may be cross-examined with respect to specific immoral, vicious or criminal acts which have a bearing on the witness’s credibility.”)
9. See, *People v. Jackson*, 41 AD2d 686, 342 NYS2d 567, 569 (4th Dept. 1973).
10. 75 NY2d 629, 634, 555 NYS2d 249, 251 (1990). See also *People v. Irving*, 95 NY 541 (1884).
11. 56 NY2d 269, 273, 451 NYS2d 705, 707 (1982).
12. 83 NY2d 455, 461-462, 611 NYS2d 118, 122 (1994).
13. See, generally, *Barker and Alexander*, Evidence in New York State and Federal Courts (2001 ed.) §6:59; Fisch, New York Evidence (2d ed) §455; Martin, Capra and Rossi, NY Evidence Handbook (2d ed) §6.10.2; Richardson, Evidence (11th ed) §6-406.
14. Federal Rule of Evidence 608(b); see *Barker and Alexander, supra*, n.14, § 6:60.
15. See, *People v. Coleman*, 56 NY2d at 273, 451 NYS2d at 707, *supra*; *People v. Schwartzman*, 24 NY2d 241, 244, 299 NYS2d 817, 820 (1969).
16. See, *People v. Sorge*, 301 NY at 201, 93 NE2d at 639, *supra* (“a witness may be examined properly with respect to criminal acts that have escaped prosecution”).
17. *People v. Jones*, 297 NY 459, 74 NE2d 173 (1949).
18. *People v. Bennette*, 56 NY (142, 147) 451 NYS2d 647, 649 (1982)
19. *People v. Morales*, 273 AD2d 102, 709 NYS2d 544 (1st Dept. (2000).
20. *People v. DeGarmo*, 179 NY 130, 71 NE 736 (1904); *Gedrin v. Long Island Hosp.*, 119 AD2d 799, 501 NYS2d 426 (2d Dept. 1986).
21. *People v. Matthews*, 68 NY2d 118, 506 NYS2d 149 (1986); *People v. Alamo*, 23 NY2d 630, 298 NYS2d 681 (1969).
22. *People v. Greer*, 42 NY2d 170, 397 NYS2d 613 (1977).
23. *People v. Shivers*, 21 NY2d 118, 286 NYS2d 827 (1967); *Gedrin v. Long Island Hosp.*, 119 AD2d 799, 501 NYS2d 426, *supra*.
24. *People v. Greer*, 42 NY2d 170, 397 NYS2d 613, *supra*.
25. *Gedrin v. Long Island Hosp.*, 119 AD2d 799, 501 NYS2d 426, *supra*; *People v. Rivera*, 101 AD2d 981, 477 NYS2d 732 (3rd Dept. 1984), *affd.* 65 NY2d 661, 491 NYS2d 621 (1985).
26. *People v. Gray*, 84 NY2d 709, 711, 622 NYS 2d 223, 224 (1995); *Murphy v. Vece*, 173 AD2d 445, 570 NYS2d 71 (2nd Dept. 1991).
27. See, *People v. Walker*, 83 NY2d at 465, 611 NYS2d at 122, *supra. cf. People v. Bennette*, 56 NY2d at 148, 451 NYS 2d at 649, *supra*.
28. *People v. Schwartzman*, 24 NY2d 241, 299 NYS2d 817 (1969).
29. *People v. Connelly*, 259 AD2d 1039, 688 NYS2d 352 (4th Dept. 1999) (DMV application for a purple heart license plate); *Badr v. Hogan*, 153 AD2d 826, 545 NYS2d 338 (2nd Dept. 1989), *revd. on other grounds*, 75 NY2d 629, 555 NYS2d 249, *supra*, (application for Welfare benefits); *People v. Jones*, 136 AD2d 740, 524 NYS2d 79 (2nd Dept. 1988) (employment application); *People v. Brinkworth*, 112 AD2d 799, 492 NYS2d 309 (4th Dept. 1985) (loan application) *cf., Tirschwell v. Dulan*, 21 AD2d 923, 251 NYS2d 91 (3rd Dept. 1964) (misstatement of assets in welfare application).
30. *Spanier v. NYC Trans. Auth.*, 222 AD2d 219, 634 NYS2d 122 (1st Dept. 1995) (physician expert witness).
31. *People v. Vidal*, 26 NY2d 249, 309 NYS 2d 336 (1970).
32. *People v. Squires*, 171 AD2d 893, 567 NYS2d 555 (2nd Dept. 1991).
33. *People v. Griffin*, 242 AD2d 70, 671 NYS2d 34 (1st Dept. 1998); *People v. Harris*, 132 AD2d 940, 941, 518 NYS2d 269, 270 (4th Dept. 1987)
34. *People v. Walker*, 83 NY2d 455, 611 NYS2d 118, *supra*.
35. See, *People v. Irving*, 95 NY 541, *supra*.
36. *Kleinmann v. St. Peter’s Hosp.*, 298 AD2d 675, 748 NYS2d 814 (3rd Dept. 2002).
37. *Serpe v. Rappaport*, 103 AD2d 771, 477 NYS2d 403 (2nd Dept. 1984).
38. *People v. Haserflue*, 252 AD2d 829, 675 NYS2d 464 (3rd Dept. 1998).
39. *People v. Jones*, 193 AD2d 696, 598 NYS2d 40 (2nd Dept. 1993).
40. *People v. Moore*, 42 AD2d 268, 346 NYS2d 363 (2nd Dept. 1973) (excluded here due to witness’s age at time of commission).
41. *Simon v. Indursky*, 211 AD2d 404, 630 NYS2d 2 (1st Dept. 1995) (defendant dentist)
42. *Winnant v. Callas*, 208 AD2d 618, 617 NYS2d 487 (2nd Dept. 1994) (expert witness); *but see, Goudstein v. Ankos Leasing, Inc.*, 51 AD2d 722, 379 NYS2d 153 (2nd Dept. 1976) (infant plaintiff’s cross-examination regarding use of drugs was improper).
43. *People v. Dukett*, 118 AD2d 94, 487 NYS2d 875 (3rd Dept. 1985).
44. *Cavuto v. Lilledah*, 161 AD2d 853, 555 NYS 2d 901 (3rd Dept. 1990).
45. *Martin v. Alabama 84 Truck Rental*, 47 NY2d 721, 417 NYS2d 56 (1979).
46. *People v. Hyman*, 284 App. Div. 347, 131 NYS 2d 691 (1st Dept. 1954) *affd.* 308 NY 794, 125 NE2d 597 (1955).
47. See, *People v. Batista*, 113 AD2d 890, 891, 493 NYS 2d 608, 610 (2nd Dept. 1985).
48. See, *People v. Webster*, 139 NY 73, 83-84, 34 NE 730, 733 (1893), *Shepard v. Parker*, 36 NY 517, *supra*; *People v. Fiori*, 123 App. Div. 174, 108 NYS 416 (1st Dept. 1919).
49. *Gutierrez v. City of New York*, 205 AD2d 425, 613 NYS2d 627 (1st Dept.

BILL OF PARTICULARS

- 1994); *Franchell v. Sims*, 73 AD2d 1, 424 NYS2d 959 (4th Dept. 1980).
50. *Guzzardi v. Grutas*, 98 AD2d 761, 469 NYS2d 475 (2nd Dept. 1983).
51. *Mowbray v. Gould*, 63 App. Div. 158, 71 NYS 365 (1st Dept. 1901)
52. *George v. Owners Tracking Corp.*, 264 App. Div. 831, 35 NYS 2d 475 (4th Dept. 1942).
53. *People v. Greer*, 162 AD2d 416, 557 NYS2d 68 (1st Dept. 1970) (pornography industry).
54. *Palmiri v. Manhattan Ry. Co.*, 133 NY 261, 30 NE 1001 (1892).
55. *Catalan v. Empire Storage Warehouse Inc.*, 213 AD2d 366, 623 NYS2d 311 (2nd Dept. 1995).
56. *People v. Buggs*, 109 AD2d 1052, 487 NYS2d 202 (4th Dept. 1985); *People v. Montlake*, 184 App. Div. 578, 172 NYS 102 (2nd Dept. 1918).
57. *Theodore v. Daily Mirror*, 257 App. Div. 810, 12 NYS2d 74 (1st Dept. 1939), *revd. on other grounds*, 282 NY 345, 26 NE2d 286 (1940).
58. *People v. Beavers*, 173 AD2d 348, 569 NYS2d 718 (1st Dept. 1991).
59. *People v. Charkow*, 142 AD2d 734, 531 NYS2d 120 (2nd Dept. 1988).
60. *Platousky v. City of New York*, 275 AD2d 699, 713 NYS2d 358 (2nd Dept. 2000).
61. *People v. Batista*, 113 AD2d at 891, 493 NYS2d at 610, *supra*.
62. *People v. Perez*, 44 AD2d 614, 353 NYS2d 818 (3rd Dept. 1974), *revd.*, 36 NY2d 848, 370 NYS2d 914 (1975) (error was harmless).
63. *Gutierrez v. City of New York*, 205 AD2d 425, 613 NYS2d 627 (1st Dept. 1994).
64. *Gorman v. Goldman*, 36 AD2d 767, 321 NYS2d 296 (2nd Dept. 1971).
65. *People v. Bilanchuk*, 280 App. Div. 180, 112 NYS2d 414 (1st Dept. 1952); *Hamby v. Bonventre*, 36 AD2d 648, 318 NYS2d 178 (3rd Dept. 1971).
66. Winter 2004, *Bill of Particulars* at p. 19.
67. *Hyman v. Dworsky*, 239 App. Div. 413, 417-418, 267 NYS 539, 544-545 (3rd Dept. 1933).
68. *See, People v. Alamo*, 23 NY2d at 634-635, 298 NYS2d at 684, *supra*; *People v. Sorge*, 301 NY at 200, 93 NE2d at 638, *supra*.
69. *See, People v. DePasquale*, 54 NY2d 693, 442 NYS2d 973 (1981); *People v. Crawford*, 256 AD2d 141, 143, 683 NYS2d 216, 218 (1st Dept. 1998); Fisch, *supra* n. 13, §457.
70. *See, People v. Alamo*, 23 NY2d at 634-635, 298 NYS2d at 684, *supra* (police reports, another witness's statement, and physical evidence); *People v. Sorge*, 301 NY at 201, 93 NE2d at 639, *supra* (witness's admission); *People v. Montgomery*, 216 AD2d 332, 627 NYS2d 455 (2nd Dept. 1995); *Winant v. Carras*, 208 AD2d at 619, 617 NYS2d at 488, *supra* (letter from witness's employer).
71. *People v. Crawford*, 256 AD2d 141, 143, 683 NYS2d 216, 218 (1st Dept. 1998); *see also People v. Colas*, 206 AD2d 183, 619 NYS2d 702 (1st Dept. 1995) (no proof at all submitted).
72. *People v. Hargrove*, 213 AD2d 492, 624 NYS2d 39 (2nd Dept. 1995).
73. *People v. Hunter*, 88 AD2d 321, 453 NYS2d 212 (2nd Dept. 1982).
74. *See, Dance v. Town of Southampton*, 95 AD2d 442, 467 NYS2d 203 (2nd Dept. 1983); Martin et al., *supra* n. 13, at p. 499.
75. *See, People v. Matthews*, 68 NY2d 118, 506 NYS2d 149 (1986); *People v. Vidal*, 26 NY2d 249, 309 NYS2d 336 (1970); *People v. Schwartzman*, 24 NY2d at 250, 299 NYS2d at 825-826, *supra*.
76. *See, People v. Plaisted*, 2 AD3d 906, 767 NYS2d 518 (3rd Dept. 2003).
77. Martin, et al., *supra* n. 13 at p. 501. *See also People v. Innis*, 83 NY2d 653, 658, 612 NYS2d 360, 362-363 (1994); *People v. Zabrocky*, 26 NY2d 530, 535, 311 NYS2d 892, 895-896 (1970).
78. Barker, et al., *supra* n. 13 at p. 595.
79. *See Badr v. Hogan*, 75 NY2d 629, 555 NYS2d 249, *supra*; *Parsons v. 218 E. Main St. Corp.*, 1 AD3d 420, 766 NYS2d 895 (2nd Dept. 2003); *Ingebretsen v. Manha*, 218 AD2d 784, 631 NYS2d 72 (2nd Dept. 1995).
80. *People v. Jackson*, 165 AD2d 724, 725, 564 NYS2d 259 (1st Dept. 1990). In fact, where the witness denies committing the act, the court may charge that questions are not evidence. *See, People v. Grant*, 210 AD2d 166, 620 NYS2d 358 (1st Dept. 1994).
81. *See, Fisch, supra* n. 13 at p. 297, citing *People v. Malkin*, 250 NY 185, 164 NE 900 (1928); *People v. Bilanchuk*, 180 App. Div. 180, 112 NYS2d 414, *supra*.
82. *See, Badr v. Hogan*, 75 NY2d 629, 555 NYS2d 249, *supra*; *People v. McCormack*, 303 NY 403, 103 NE2d 529 (1952).
83. *See e.g., Carter v. Hewitt*, 617 F.2d 961, 969-970 (3rd Cir. 1980).
84. *People v. DeGarmo*, 179 NY 130, 135, 71 NE 736, 737 (1904).
85. *People v. Pavao*, 59 NY2d at 289, 464 NYS2d at 461, *supra*.
86. *See, Richardson, supra* n. 13.
87. *People v. Sorge*, 301 NY at 201, 93 NE2d at 639, *supra*.
88. *See, e.g., Badr v. Hogan*, 75 NY2d at 634, 555 NYS2d at 251, *supra*; Richardson, *supra* n. 13 at §6-304. *See also People v. Bilanchuk*, 280 App. Div. at 184-185, 112 NYS2d at 418, *supra*.
89. *Ibid.* It has essentially replaced the old common law privilege to refuse to answer on the ground the answer would disgrace the witness. *See, Richardson, Evidence* (10th ed.) §536, at p. 529.
90. *See, People v. Hunter*, 88 AD2d at 322, 453 NYS2d at 214-215, *supra*. *cf., People v. Sorge*, 301 NY at 201, 93 NE2d at 639, *supra*.
91. *cf., Evans v. Wilson*, 133 Misc.2d 1079, 509 NYS2d 296 (Civ. Ct. NY Co. 1986); Barker, et.al., n. 13 at p. 606, n. 3.
92. *See, Winter 2004, Bill of Particulars*, at p. 20.
93. *See, Richardson, supra* n. 89, §536.
94. *See, People v. McGee*, 68 NY2d 328, 332, 508 NYS2d 927, 929 (1986); *People v. Allen*, 50 NY2d 898, 430

BILL OF PARTICULARS

NYS2d 588 (1980), *affg.* 67 AD2d 558, 416 NYS2d 49 (2nd Dept. 1979). *See also* *Kleinmann v. St. Peter's Hosp.*, 298 AD2d at 676-677, 748 NYS2d at 815, *supra*, where the Third Department by its silence on the issue seems to suggest there is no discretion to be exercised by the trial court.

95. *People v. McGee*, 68 NY2d at 332, 508 NYS2d at 929, *supra*. *See also* *People v. Lucius*, 289 AD2d 963, 737 NYS2d 717 (4th Dept. 2001).

96. *People v. Richardson*, 222 NY 103, 111, 118 NE 514, 517 (1928).

97. *See, Gutierrez v. City of New York*, 205 AD2d 425, 613 NYS2d 627, *supra*; *Carr v. U.S. Mattress Corp.*, 166 AD2d 172, 173, 564 NYS2d 67, 68 (1st Dept. 1990).

98. *See, People v. Betts*, 70 NY2d 289, 292, 520 NYS2d 370, 371 (1987); *Barker, et. al.*, *supra*, n. 13 at pp. 598-599; *Martin, et. al.*, *supra* n. 13 at pp. 500-501.

99. *See, Richardson, supra*, n. 89, §525. Compare *People v. Johnston*, 228 NY 332, 340, 127 NE 186, 190 (1920) (no waiver as to matters affecting credibility) with *Connors v. People*, 50 NY 240 (1872) (waiver as to matters affecting credibility).

100. Federal Rule of Evidence 608(b).

101. *See, Winter 2004, Bill of Particulars*, at 20-21.

102. 1A NYPJI3d (2004 ed.) 1:66 and commentary.