COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION

The District of Columbia Bar

October 24, 1988

Richard B. Hoffman, Esq.
Clerk
D.C. Court of Appeals
500 Indiana Avenue, N.W., 6th Floor
Washington, D.C. 20001

Re: Rogers v. United States, No. 85-1421.

Dear Mr. Hoffman:

In its Order of September 20, 1988, the Court invited briefs amici curiae on whether to adopt the method of proving character or a trait of character set forth in Rule 405(a) of the Federal Rules of Evidence.

In 1984, the Committee on Court Rules of the Section on Courts, Lawyers and the Administration of Justice of the D.C. Bar prepared a report urging adoption of this rule, as well as other Federal Rules of Evidence. The Committee provided the Court copies of the report at that time.

On behalf of the Section and for the convenience of the Court, we enclose the portion of the report pertaining to Rule 405. We request that it be made available to the Court as reflecting the views of the Section on these issues.

Sincerely yours,

Robert N. Weiner
Cornish F. Hitchcock
Co-Chairs

Enclosure

COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE SECTION

Steering Committee:

Cornish F. Hitchcock, Co-Chair
Robert N. Weiner, Co-Chair
Richard B. Hoffman
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The District of Columbia Bar

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DISTRICT OF COLUMBIA COURT OF APPEALS

COMMENTS OF THE SECTION ON COURTS, LAWYERS AND THE ADMINISTRATION OF JUSTICE REGARDING ADOPTION OF RULE 405(a) OF THE FEDERAL RULES OF EVIDENCE IN THE DISTRICT OF COLUMBIA

Cornish F. Hitchcock, Co-chair
Robert N. Weiner, Co-chair
Richard B. Hoffman*
Randell Hunt Norton
Carol E. Bruce
Jeffrey Liss
Arthur B. Spitzer

Steering Committee of the
Section on Courts, Lawyers
and the Administration
of Justice

October 1988

* Did not participate in the preparation of these comments.

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STANDARD DISCLAIMER

"The views expressed herein represent only those of the Section on Courts, Lawyers and the Administration of Justice of the District of Columbia Bar and not those of the District of Columbia Bar or of its Board of Governors."

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RULE 405. Methods of Proving Character

*Alt. A (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.

Alt. B (a) Reputation. 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. On cross-examination, inquiry is allowable into whether the witness has heard of relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of his conduct.

Comment

Subdivision (a): Reputation or opinion. Alternative A is identical to Federal Rule 405 (a), and represents a significant departure from present practice in the District of Columbia. Federal Rule 405 permits proof of character by reputation or opinion evidence. District of Columbia courts, following the traditional rule, have held that character may be proven only by testimony as to the reputation of the person in question for good or bad character traits, and not by the witness' opinion of the person's character or specific incidents of the person's conduct. See, e.g., Obregon v. United States, 423 A.2d 200, 209-10 (D.C. 1980); Hedgeman v. United States, 352 A.2d 926 (D.C. 1976); Lloyd v. United States, 333 A.2d 387 (D.C. 1975).

Federal Rule 405(a) and present District of Columbia law further differ in that while both permit inquiry into relevant specific instances of conduct on cross-examination, District of Columbia courts have held that the only permissible inquiry is "have you

heard" of such incidents, as opposed to "do you know" of such incidents. See, e.g., Morris v. United States, ___ A.2d ___, No. 82-63 (D.C. November 3, 1983);[1] Lloyd v. United States, supra; Coleman v. United States, 137 U.S. App. D.C. 48, 420 F.2d 616 (1969); Stewart v. United States, 70 U.S. App. D.C. 101, 104 F.2d 234 (1939). Alternative B reflects current District of Columbia law.

The departures from the traditional rule embodied in Federal Rule 405 were deliberate. The Advisory Committee felt that "the persistence of reputation evidence is due to its largely being opinion in disguise." The Advisory Committee also felt that since, according to the great majority of cases, a witness may on cross-examination be asked whether he or she has heard of particular instances of conduct pertinent to the trait in question, the witness should also be able to testify to what he or she knows. See Notes of Advisory Committee on Proposed Federal Rules of Evidence, Rule 405. Chief Judge Newman recently expressed similar views in his dissenting opinion in Morris v. United States, supra. For the foregoing reasons, adoption of Alternative A is recommended.

Subdivision (b): Specific instances of conduct. The most prevalent use of character evidence is to attempt to establish, by inference, that a person acted in conformity with his or her character on a particular occasion. These situations are covered by Federal Rules 404 and 405(a).

There are other situations, however, in both civil and criminal contexts, in which a person's character is more directly in issue. Examples of such instances are the competency of a driver in an action for negligent entrustment of a motor vehicle to an incompetent driver, and the character of the decedent in a wrongful death case as it pertains to the issue of damages. See Weinstein's Evidence ¶ 404[02].

Federal Rule 405(b) provides that in the latter instances, where character "is an essential element

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[1] As the Court noted in Morris v. United States, supra, the trial court enjoys broad discretion to limit or exclude cross-examination concerning a character witness' awareness of a criminal defendant's past arrests and convictions where their prejudicial impact outweighs their probative value.

of a charge, claim or defense," proof of character may also be made by specific instances of conduct.

The present state of District of Columbia law concerning the subject matter of Rule 405(b) is not entirely clear. While the cases cited under subdivision (a) express a broad proscription against proof of character by specific acts, they do not necessarily conflict with Rule 405(b) in that none of them involved circumstances in which character was directly at issue.

Certain criminal cases involving claims of self-defense may be read as being consistent with Rule 405(b). See Johns v. United States, 434 A.2d 463 (D.C. 1981) (in homicide case involving claim of self defense, defendant may present evidence of decedent's violent character, and such evidence may be testimony about specific acts); Griffin v. United States, 87 U.S. App. D.C. 172, 183 F.2d 990 (1950) (evidence of uncommunicated threat admissible in case involving claim of self defense). But cf. McBride v. United States, 441 A.2d 644 (D.C. 1982) (evidence of victim's uncommunicated threat against defendant goes to the issue of the victim's specific intent towards the defendant, not general propensity to violence); United States v. Akers, 374 A.2d 874 (D.C. 1977) (rule of admissibility of specific acts to show violent character of victim where self defense is in issue is limited to homicide cases, where exception to rule against propensity evidence is made in recognition of the decedent's absence from the trial).

Significantly, Federal Rule 405(b) reflects the rule at common law as well as the rule followed by most jurisdictions. See McCormick, Evidence § 187 (2d Ed. 1972); 1 J. Wigmore, Evidence § 202 (3d Ed. 1940).

Based on the foregoing, District of Columbia law does not appear to be inconsistent with Federal Rule 405(b), and adoption of Federal Rule 405(b) is recommended.

Minority Statement

The minority does not concur with the recommendation that subpart (b) of the rule should be adopted. Although it is not entirely clear whether District of Columbia case law would permit evidence of specific instances of conduct where a person's character is an essential element of the case, the minority would argue that such evidence would not be

permitted. Clearly, the case law has embraced the general principle that evidence of specific conduct as affirmative evidence of character is not admissible. Hedgeman v. United States, supra. One of the reasons for retaining this general prohibition against evidence of specific instances of conduct is to avoid separate trials on collateral issues (e.g., did the witness actually engage in the conduct alleged?). Neither this Committee's comment nor the Notes of the Advisory Committee on the Proposed Federal Rules gives any argument in favor of the change which rebuts this judicial interest in limiting the evidence at trial to those matters actually in issue. Thus, while the provision in subpart (a) of the rule allowing opinion as well as reputation testimony of charcter may be a rational improvement over the present practice, proposed subpart (b) does not have the same rational basis to support it. Subpart (b) is at best unnecessary and at worst it opens a Pandora's Box of collateral issues. It should not be adopted in the District of Columbia.