

SUPERIOR COURT OF CALIFORNIA, COUNTY OF

THE PEOPLE OF THE STATE OF	)	Case No.
CALIFORNIA,)	
	)	MOTION TO EXCLUDE
Plaintiff,	)	REBUTTAL EVIDENCE
	)	AGAINST DEFENDANT'S
vs.	)	CHARACTER, WHERE SUCH
	)	TRAITS HAVE NOT BEEN
,	)	RAISED DURING DIRECT
	)	EXAMINATION BY THE DEFENSE
Defendant.)	
	)	Date:
	)	Time:
	)	Dept:

I. ISSUE:

IF THE DEFENSE PROFFERS EVIDENCE OF DEFENDANT'S CHARACTER FOR NON-DEVIANT SEXUAL BEHAVIOR WITH CHILDREN, THE PROSECUTION'S REBUTTAL MAY NOT OPEN UP OTHER TRAITS OF DEFENDANT'S CHARACTER WHICH WERE NOT RAISED ON DIRECT EXAMINATION.

II. LAW

A. THE RULES OF CROSS-EXAMINATION, WHICH PROHIBIT EXCEEDING THE SCOPE OF DIRECT EXAMINATION, DO NOT PERMIT IRRELEVANT CHARACTER ISSUES TO BE OPENED UP.

Permissible Impeachment:

Impeachment is the production of proof that a witness is unworthy of belief, accomplished by successfully attacking the credibility of the witness. Black's Law Dictionary (5th Ed. 1979) 678. A witness can be impeached by cross-examination or extrinsic evidence which discredits him or her. Proper grounds for impeachment include:

- (1) bias (Evidence Code § 780(f));
- (2) prior inconsistent statements (Evidence Code § 780(h));
- (3) defect in perception, memory, or communication

- (Evidence Code § 780(c));
- (4) lack of personal knowledge (Evidence Code § 780(d));
- and
- (5) doubtful honesty (Evidence Code § 780(e),(k)).

B. EVIDENCE OF A PERSON'S CHARACTER TRAIT IS INADMISSIBLE WHEN OFFERED TO PROVE CONDUCT ON A SPECIFIED OCCASION.

Use of Character Evidence for Impeachment:

Several statutes contain exclusionary rules regarding the admissibility of character evidence in general. Evidence Code § 352 excludes character evidence if its probative value is outweighed by its prejudicial effect. (**People vs. Bergschneider** (1989) 211 Cal.App.3d 144, 162.) Evidence Code § 350 excludes irrelevant character evidence, which does not tend in reason to prove or disprove any material fact. (**People vs. Felix** (1993) 14 Cal.App.4th 997, 1004.)

Evidence Code § 1103, which allows and excludes certain character evidence pertaining to a crime victim, is expressly preserved by Proposition 8 as one of a number of specified exceptions to its mandate that all relevant evidence is admissible in a criminal proceeding. Cal. Const. art. I, § 28(d). Evidence Code §1101 was subsequent to the enactment of §28(d) reenacted by the requisite two-thirds vote and therefore remains in effect. (**People v. Ewoldt** (1994) 7 Cal.4th 380, 390-393.)

Rebutting Defendant's Character Evidence:

Evidence Code § 1102(b) permits the introduction of evidence by the prosecution concerning a defendant's character if it is offered in rebuttal, after the defendant offers evidence of his or her character as proof of conduct. (**People vs. Lopez** (2005) 129 Cal.App.4th 1508, 1528.) Because § 1102 does not exclude, but rather permits, introduction of relevant evidence, it appears that it also has survived Proposition 8.

Rules limiting the scope of prosecution rebuttal to defense character evidence abound in the following criminal cases dealing with penalty-phase mitigation testimony. These rules appear to apply just as soundly to guilt-phase cases where the defendant contends that he acted in conformity with good traits of character.

Character Rebuttal Limits:

Once a defendant puts a character trait in issue the prosecution may offer evidence tending to rebut that specific aspect of his personality, but such evidence must be specific and it must relate to the particular incident or character trait which the defendant offers in his own behalf. (**People vs. Rodriguez** (1986) 42 Cal.3d 730, 792 fn. 24; **People vs. Bacigalupo** (1991) 1 Cal.4th 103, 113 [where defendant represented that he was shy and retiring with women, evidence of both his violent and non-violent acts toward women was relevant to rebut his claim that he had a respectful attitude toward females]; **People vs. Ramirez** (1990) 50 Cal.3d 1158, 1191-1194 [error to allow prosecutor to cross-examine defendant's mother about his misconduct throughout his teen years where her direct examination testimony only described adverse

circumstances in his early childhood]; **People vs. McFarland** (2000) 78 Cal.App.4th 489, 495 ["Under section 1102, opinion evidence about a criminal defendant's character may only be offered by the prosecution in rebuttal to similar evidence presented by the defense."].)

Generally, the scope of bad character evidence offered in rebuttal must relate directly to the particular character trait concerning which the defendant has presented evidence. (**In re Ross** (1995) 10 Cal.4th 184, 208.) However, where the defendant does not limit his good character evidence to a singular incident, personality trait, or aspect of his background, then and only then may the prosecution range widely and talk about a specific issue not previously discussed, such as propensity for violence. **People v. Mitcham** (1992) 1 Cal.4th 1027. Where good character evidence is general and broad it warrants rebuttal evidence of the same broad scope. (**In re Ross, supra**, 10 Cal.4th at p. 208.)

Application to the Case at Bar:

When the defendant and/or his/her witnesses testify at trial they will **not** make general representations as to defendant's character. The defense will limit its evidence to the character trait of non-deviant sexual behavior with children. Therefore the prosecution should also be limited in its rebuttal to that single issue of character.

C. THE PROSECUTION CANNOT "OPEN THE DOOR" TO OTHERWISE INADMISSIBLE EVIDENCE BY DISCUSSING TRAITS OF CHARACTER NOT RAISED BY THE DEFENDANT

The defense hereby incorporates by reference a **contemporaneously/previousl**y filed in limine motions entitled "The Prosecution Cannot 'Open the Door' to Otherwise Inadmissible Evidence, and Even 'Open Doors' Have Limits" which describes in additional detail the pertinent rules of evidence concerning the limits and scope of cross-examination and rebuttal.

CONCLUSION:

The defense plans to offer evidence of defendant's character only on the issue of his non-deviant behavior with children. The court should exclude any rebuttal evidence offered by the prosecution which attempts to open up other traits of defendant's character which defendant has not addressed. These traits could conceivably range as far afield as an alleged propensity for violence or substance abuse, to a claimed lack of truth or veracity. Such other character traits would be irrelevant and unduly prejudicial. They would also exceed the proper scope of direct examination and constitute impermissible impeachment.

Dated:

Respectfully submitted,

Attorney for Defendant