UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALD CHOW and LILY CHOW, Plaintiffs, v. MARK J. ZIMNY and IVYADMIT CONSULTING ASSOCIATES LLC, Defendants.	)	Civil Action No. 1:10-CV-10572-GAO

PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT ABOUT ALLEGEDLY IMPROPER ACADEMIC ASSITANCE RECEIVED BY GEARALD CHOW IN CONNECTION WITH HIS STUDIES AT HARVARD UNIVERSITY'S KENNEDY SCHOOL

The plaintiffs, Gerald Chow and Lily Chow (collectively, the "Chows), hereby move, *in limine,* for an order excluding evidence and argument about allegedly improper academic assistance received by Gerald Chow in connection with his studies at Harvard University's Kennedy School. In the alternative, should the Court determine that such evidence is admissible, the Chows request that the Court enter an order limiting the defendants' use of such evidence to cross-examination of Dr. Chow and prohibiting them from offering the testimony of any other witness or any documents on this issue (even if the documents are offered through Dr. Chow on cross-examination). As grounds therefor, the plaintiffs state as follows:

1. The defendants, Mark J. Zimny and his company IvyAdmit Consulting Associates LLC ("IvyAdmit"), have indicated that they intend to offer evidence in support of their contention, which is vigorously disputed by the Chows, that the tutors engaged by Mr. Zimny and IvyAdmit to help Dr. Chow with his studies at the Harvard Kennedy School in 2007-2008 provided an inappropriate level of assistance to him.

2. Dr. Chow's studies at the Kennedy School are irrelevant to the Chows' claims against Mr. Zimny and IvyAdmit, which concern the financial dealings between the Chows and the defendants in connection with services provided or promised to be provided for the benefit of the Chows' sons.

3. To the extent the defendants contend that the evidence is admissible under Fed. R. Evid. 608(b) to impeach Dr. Chow's character for truthfulness, it is inadmissible for that purpose because it is not probative of Dr. Chow's character for truthfulness or untruthfulness. Further, even if it were, the evidence should be excluded under Fed. R. Evid. 403 because: (i) the evidence is unfairly prejudicial; and (ii) its admission would result in undue delay and significant distraction of the jury from the claims at issue.

4. Even if the Court were to determine that the evidence is probative of Dr. Chow's character for truthfulness or untruthfulness and that it should be admitted, pursuant to Fed. R. Evid. 608(b) all extrinsic evidence on this issue – whether other witness testimony or documents offered by defendants through Dr. Chow or otherwise – must be excluded.

5. The grounds for this Motion are more fully set forth in the Memorandum in Support of Plaintiffs' Motion in Limine to Exclude Evidence and Argument About Allegedly Improper Academic Assistance Received by Gerald Chow in Connection with his Studies at Harvard University's Kennedy School, filed herewith.

WHEREFORE, plaintiffs request that the Court issue an order excluding evidence and argument about allegedly improper academic assistance received by Gerald Chow in connection with his studies at Harvard University's Kennedy School. In the alternative, should the Court determine that such evidence is admissible, the Chows request that the Court enter an order

limiting the defendants' use of such evidence to cross-examination of Dr. Chow and prohibiting them from offering the testimony of any other witness or any documents on this issue (even if the documents are offered through Dr. Chow on cross-examination).

Respectfully submitted,

GERALD CHOW and LILY CHOW

By their attorneys

/s/ Kevin W. Clancy

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Dated: February 5, 2014

CERTIFICATION PURSUANT TO LOCAL RULE 7.1(a)(2)

I, Kevin W. Clancy, counsel for the plaintiffs, hereby certify that on January 8, 2014, I conferred by telephone with counsel for the defendants, Richard Annen, and attempted to resolve or narrow the issues raised by this motion, but was unable to do so.

/s/ Kevin W. Clancy
Kevin W. Clancy

CERTIFICATE OF SERVICE

I, Kevin W. Clancy, hereby certify that the above document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Kevin W. Clancy
Kevin W. Clancy

Dated: February 5, 2014

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

GERALD CHOW and LILY CHOW,

Plaintiffs,

v.

MARK J. ZIMNY and IVYADMIT CONSULTING ASSOCIATES LLC,

Defendants.

Civil Action No. 1:10-CV-10572-GAO

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION IN LIMINE TO EXCLUDE EVIDENCE AND ARGUMENT ABOUT ALLEGEDLY IMPROPER ACADEMIC ASSISTANCE RECEIVED BY GERALD CHOW IN CONNECTION WITH HIS STUDIES AT HARVARD UNIVERSITY'S KENNEDY SCHOOL

The plaintiffs, Gerald Chow and Lily Chow (collectively, the "Chows"), submit this memorandum in support of Plaintiffs' Motion in Limine to Exclude Evidence and Argument About Allegedly Improper Academic Assistance Received by Gerald Chow in Connection With His Studies at Harvard University's Kennedy School. The defendants, Mark J. Zimny and his company IvyAdmit Consulting Associates LLC ("IvyAdmit"), have indicated that they intend to offer evidence in support of their contention, which is vigorously disputed by the Chows, that the tutors engaged by Mr. Zimny and IvyAdmit to help Dr. Chow with his studies at the Harvard Kennedy School in 2007-2008 provided an inappropriate level of assistance to him. The defendants should not be permitted to offer this evidence or make reference to it in their opening statement or otherwise. Dr. Chow's studies at the Kennedy School are irrelevant to the Chows' claims against Mr. Zimny and IvyAdmit, which concern the financial dealings between the

Chows and the defendants in connection with services provided or promised to be provided for the benefit of the Chows' sons.

In addition, to the extent the defendants argue that the evidence is admissible to attack Dr. Chow's character for truthfulness under Fed. R. Evid. 608(b), their argument fails. The allegedly inappropriate assistance provided to Dr. Chow by the IvyAdmit tutors is not probative of his character for truthfulness. Further, even if it were, the evidence should be excluded under Fed. R. Evid. 403 because: (i) the evidence is unfairly prejudicial; and (ii) its admission would result in undue delay and significant distraction of the jury from the claims at issue. Indeed, if the defendants are permitted to offer evidence on this issue, there will be a trial within the trial as the Chows would certainly be entitled to respond with evidence of their own, which includes both voluminous documents and witness testimony which are otherwise not relevant to the Chows' claims.

Finally, if the Court were to determine that the evidence is probative of Dr. Chow's character for truthfulness or untruthfulness and that it should be admitted, the defendants should be permitted to venture into the issue of Dr. Chows' studies at Harvard only by inquiring of him on cross-examination. In accordance with Fed. R. Evid. 608(b), all extrinsic evidence on this issue—whether other witness testimony or documents offered by defendants through Dr. Chow or otherwise—must be excluded.

ARGUMENT

I. THE DEFENDANTS' CONTENTION THAT DR. CHOW RECEIVED AN INAPPROPRIATE LEVEL OF ACADEMIC ASSISTANCE IS IRRELEVANT TO THE CLAIMS AT ISSUE.

The Chows allege that Mr. Zimny and his company IvyAdmit fraudulently obtained well over $2 million from them in connection with educational consulting services for the Chows'

two then-minor sons. Specifically, the Chows seek to recover: (1) $2 million they paid to Zimny/IvyAdmit as a "retainer" in the summer of 2008 which was to be refunded upon conclusion of Zimny's/IvyAdmit's educational consulting services for *the Chows' sons*; and (2) an additional $282,000 the Chows provided to Zimny/IvyAdmit at Mr. Zimny's request for the specific purpose of making development contributions to schools to which the Chows' sons intended to apply for admission, which contributions Mr. Zimny failed to make, converting the money instead to his personal use.

After Zimny/IvyAdmit commenced providing advice to the Chows in selecting appropriate boarding schools for their sons and assisting them with the admission process, Dr. Chow began fall classes at the Harvard Kennedy School in a one-year program in Public Administration. Dr. Chow, an oral surgeon, took a year off from his dentistry practice in order to attend that program. Mr. Zimny offered to find tutors to assist Dr. Chow in his studies and to handle the billing for their services through his regular monthly invoices. He did so throughout the 2007-2008 school year.

The Chows have no claim concerning the tutoring services provided by Mr. Zimny for Dr. Chow or IvyAdmit's charges therefor. The Chows do not seek to recover any of amounts they paid for the tutoring services provided to Dr. Chow, which were unrelated to the charges for services for the Chows' sons, the retainer payment, or the money the Chows provided to Mr. Zimny for donations that he did not make.[1]

[1] Because some of the invoices which may be offered at trial include charges related to the services provided to the Chows' sons together with charges for tutoring assistance provided to Dr. Chow, the invoices will need either to be offered with these entries redacted and/or there will need to be a limiting instruction explaining that the entries for tutoring services provided to Dr. Chow are not relevant to the Chows' claims and should be disregarded. Either way, the Chows have no intention to offer any evidence in their case about the nature and extent of the tutoring services provided to Dr. Chow.

Accordingly, the defendants' allegation that Dr. Chow received inappropriate academic assistance from the IvyAdmit tutors is irrelevant to the claims at issue. The defendants should thus be precluded from offering evidence on this issue and from making reference to it in their opening statement or otherwise.

II. EVIDENCE CONCERNING THE NATURE AND EXTENT OF THE ACADEMIC ASSISTANCE RECEIVED BY DR. CHOW IS INADMISSIBLE FOR THE PURPOSE OF ATTACKING DR. CHOW'S CHARACTER FOR TRUTHFULNESS.

Because it is not relevant to the claims at issue, the only conceivable basis on which defendants could assert that evidence about the academic assistance Dr. Chow received is admissible would be for the purpose of impeaching Dr. Chow. The admissibility of evidence of specific acts which is offered to attack a witness's character for truthfulness and is otherwise irrelevant is governed by Fed. R. Evid. 608(b). Evidence of the academic assistance allegedly received by Dr. Chow does not meet the requirements of Rule 608(b) and is therefore inadmissible for the purpose of impeaching Dr. Chow.

Rule 608(b) provides, in pertinent part, as follows:

> Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:
> (1) the witness; or
> (2) another witness whose character the witness being cross-examined has testified about.

As stated in this Rule, no extrinsic evidence may be offered for the purpose of attacking a witness's character for truthfulness. Thus, the only question to be decided is whether, in their cross-examination of Dr. Chow, the defendants may inquire about his studies at Harvard.[2] They

[2] Under Fed. R. Evid, 806(b)(2), the Court may permit specific instances of a witness's conduct probative of his character for truthfulness to be inquired into in the cross-examination of another witness only if the other witness is

may not. As expressly stated in the Rule, such cross-examination may be permitted by the Court only if the evidence is probative of the witness's character for truthfulness or untruthfulness, which defendants' contention that Dr. Chow received too much help from the IvyAmit tutors is not. Thus, cross-examination on this issue is impermissible.

Further, even if the Court were to conclude that the evidence has some such probative value, any such value is outweighed by the undue prejudice to the Chows. In addition, introduction of the issue of the academic assistance received by Dr. Chow will substantially prolong the trial and distract the jury from the claims at issue. Accordingly, under Fed. R.Evid. 403, evidence on this issue should be excluded.

A. The Allegation that Dr. Chow Received Too Much Assistance with His Academic Work Is Not Probative of his Character for Truthfulness or Untruthfulness.

Under Rule 608(b), specific instances of a witness's conduct may be inquired into only if they are clearly probative of the witness's character for truthfulness or untruthfulness. *E.g.*, *Bonilla v. Yamaha Motors Corp.*, 955 F.2d 150, 154 (1st Cir. 1992). Even morally repugnant and illegal acts, such as rape, robbery and murder, are inadmissible because they do not bear on the witness's propensity to tell the truth. *E.g. United States v. Bunchan*, 580 F.3d 66, 71 (1st Cir. 2009) (and cases cited therein); *United States v. Calderon-Urbina*, 756 F. Supp. 2d 566, 569-70 (S.D.N.Y. 2010) (and cases cited therein). Thus, even if clearly wrongful by some standard, alleged acts that do not involve untruthfulness must be excluded.

Here, defendants apparently contend that the tutors they provided to Dr. Chow wrote his papers, did his reading, and attended classes for him. Dr. Chow (and his tutors, who were deposed by the defendants) deny these allegations and a significant volume of documentary

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one who has testified about the first witness's reputation for truthfulness. Such reputation testimony is permitted under Fed. R. Evid. 806(a). No such witness will be called to testify in this case. Accordingly, the only question is what will be permitted in the cross-examination of Dr. Chow under Rule 806(b)(1).

evidence supports these denials. If, after hearing all of the evidence, the jury were to conclude that the allegations are true, the evidence *might* demonstrate a breach of academic standards, but the breach of such standards is not probative on the likelihood that Dr. Chow would give false testimony. *See U.S. v. Simonelli*, 237 F.3d 19, 24 (1st Cir. 2001) (permitting cross-examination on alleged violations of company gratuity policy was error absent a showing that the act was "an instance of untruthfulness"). Dr. Chow's alleged conduct, even if proved, is entirely unlike the sorts of acts on which cross-examination under Rule 608(b)(2) is permitted, which typically involve false statements made by the witness, such as false statements in applications and the like, the falsity of which are readily established. *See, e.g., United States v. Shinderman*, 515 F.3d 5, 16-17 (1st Cir. 2008) (false statement in application for medical license that applicant had never been arrested); *United States v. Tse*, 375. F.3d 148, 166 (1st Cir. 2004) (false statements in employment application about educational background and dates of prior employment). Here, in contrast, the defendants' allege no false statement made by Dr. Chow and, further, there are numerous factual disputes which would have to be resolved before a jury could even begin to consider whether anything Dr. Chow did implicates his character for truthfulness.

Indeed, the surrounding circumstances demonstrate that Dr. Chow had a good faith belief that the academic help he received was entirely appropriate. Therefore, his use of the tutoring assistance is not evidence that he is untruthful.

Dr. Chow holds degrees in oral and dental surgery from Howard University College of Dentistry. He also completed a two-year part-time residency certificate program in periodontal surgery at the University of Hong Kong and practiced as an oral surgeon in Hong Kong for twenty-eight years. Dr. Chow had a well-established and successful career as an oral surgeon when he inherited a large family fortune in 2000. He had no need to obtain further academic

credentials to further an existing or new career. However, his new wealth gave him the opportunity to explore his love of learning. He sought out further educational opportunities for his personal enrichment only. *If* he received a degree which he had not properly earned *(which he denies)*, no one would have been deceived or misled because he never intended to use a degree to obtain a job or for career advancement. In fact, he returned to his oral surgery practice in Hong Kong upon completion of his studies and has since retired.

Further, the program in which Dr. Chow enrolled at the Kennedy School—a public administration program—was designed for students from developing countries who do not speak or write English as a first language. Professors in the program encouraged the students to get tutoring help, not only because the program is rigorous but more particularly because of the English language hurdles they would face. Editing help on papers was expressly encouraged. Dr. Chow was not interested in simply passing his courses so that he could obtain a degree he did not need. He wanted to gain the best possible understanding of the course material and better hone his ability to present his ideas effectively in English.

Accordingly, when Mr. Zimny offered to provide tutors to him, Dr. Chow sought his help. Believing Mr. Zimny to be the person he pretended to be—a Harvard professor and respected member of the Harvard faculty—Dr. Chow relied on Mr. Zimny's expertise in finding tutors to provide appropriate academic assistance and on the tutors themselves, all of whom had excellent academic credentials (one had a law degree and another was then a student at the Harvard Law School). Thus, Dr. Chow believed that the tutoring help they provided was appropriate. Indeed, Dr. Chow's principal tutors have been deposed and they expressly denied Mr. Zimny's allegations that they attended classes for Dr. Chow, wrote his papers or took his tests for him. They testified to the assistance they provided in transcribing tape recordings made

by Dr. Chow of the classes he attended, correcting or supplementing class notes taken by Dr. Chow, meeting with Dr. Chow to discuss class readings done by both Dr. Chow and the tutor, editing Dr. Chow's first drafts and subsequent drafts of some of his papers and suggesting additional readings or research materials. The tutors explained their conclusions that the assistance they provided was within acceptable bounds.

Under these circumstances, there was no reason for Dr. Chow to believe that he was doing anything inappropriate and he had no such belief. Thus, even if one were to conclude that Dr. Chow was wrong in his belief that the help he received was appropriate, evidence of his conduct would not evince that it is Dr. Chow's character to be untruthful.

B. Evidence Concerning the Nature and Extent of the Academic Assistance Received by Dr. Chow Should be Excluded Under Fed. R. Evid. 403.

Even if the Court were to determine that the evidence concerning the academic assistance received by Dr. Chow would be of some probative value concerning his credibility as a witness, the evidence should nonetheless be excluded. Under Fed. R. Evid. 403, evidence should be excluded if its probative value is outweighed by a danger of unfair prejudice, confusion of the issues, undue delay, or wasting of time. Before admitting evidence under Rule 608(b), the Court must consider its admissibility under Rule 403. *E.g., Simonelli*, 237 F.3d at 23 ("The trial court is required under [Rule 608(b)] to balance the probative value of specific instance evidence against the potential dangers and costs of the evidence as recognized in Rules 403 and 611."). Even assuming the evidence concerning the academic assistance received by Dr. Chow were probative of his character for truthfulness or untruthfulness, any such probative value is far outweighed by the unfair prejudice and extensive delay and distraction that would result if the court were to permit this topic to become an issue at trial.

1. Any Probative Value of the Evidence is Outweighed by the Danger of Unfair Prejudice.

If the evidence of tutorial assistance received by Dr. Chow were admitted, the jury ***should*** properly consider it only on the question of whether Dr. Chow is an untruthful person. However, even if the jury were to conclude that the evidence does ***not*** bear on Dr. Chow's credibility, there is a very substantial danger that it would nonetheless bias the jury against the Chows. For example, the jury might conclude that, even though Dr. Chow did nothing untruthful, it was wrongful of him to use extensive tutorial help because they may conclude either that this level of help must violate academic rules or simply that it gave him an advantage not available to other, less affluent, students. Jury bias against Dr. Chow for these reasons—rather than reasons concerning his credibility—constitute unfair prejudice.

The danger of jury bias against the Chows from this evidence for reasons unrelated to credibility is particularly acute because there is already a danger in this case of jury bias against the Chows who are wealthy foreigners. The Chows may face jury resentment based on their wealth or a perception that their children have taken slots in U.S. schools that might otherwise have been available to American citizens. Allowing the defendants to offer evidence about the services provided to Dr. Chow simply offers defendants a vehicle by which they can enhance any such jury bias based on the Chows' wealth. Of course, bias based on the Chows' ability to pay for expensive tutoring services for Dr. Chow is "unfair prejudice" since the Chow's wealth is not a proper basis for a decision by the jury in this case. See Fed. R. Evid. 403, 1992 Advisory Committee Notes ("'Unfair prejudice' in this context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one."). Where the evidence of the tutoring services provided to Dr. Chow has at most a very tenuous connection

to his credibility as a witness, the danger of unfair prejudice far outweighs any probative value this evidence might have.

2. The Admission of Evidence Concerning the Tutoring Services Provided to Dr. Chow Will Prolong the Trial and Distract the Jury With a Hotly Contested, Yet Entirely Collateral, Matter.

Whether or not Dr. Chow engaged in any academic misconduct through his use of tutors provided by Mr. Zimny is a hotly contested issue. If forced to litigate this issue in the context of this case, Dr. Chow will offer documentary evidence and witnesses to prove, *inter alia*, that: he, not his tutors, attended his classes; he read virtually all of the assigned readings; he did his assignments; he wrote the first drafts of his papers and many subsequent drafts, with editing assistance from his tutors; and he took his exams. He received significant help from his tutors in understanding the material, by having them do some of the same readings he did so that he could engage in substantive discussions regarding the ideas presented. He had summaries prepared of some of the readings to use as a study guide, like Cliff-notes. Dr. Chow worked very hard at Harvard. Except for vacations, he lived alone at the Charles Hotel, working long hours every day throughout the school year, to squeeze as much learning as he could from his opportunity to attend the Kennedy School. His tutors enriched that learning experience.

If it becomes necessary to resolve the issue of academic misconduct as part of this trial, the evidence will be voluminous. All told, more than 4000 pages of documents on this issue alone have been produced and it has been a subject in multiple depositions. The evidence at trial would include: multiple drafts of papers exchanged between Dr. Chow and his tutors to demonstrate that the tutors were editing, not writing, his papers; books and other class reading materials with notes and underlining made by Dr. Chow during the course of his studies; Dr.

Chow's handwritten class notes; and tape recordings of classes Dr. Chow attended. The evidence would also include the testimony of Dr. Chows' tutors.

Permitting a trial on Mr. Zimny's allegations of academic misconduct within the trial on Mr. Zimny's breach of his contractual commitment to the Chows and his fraudulent conduct would significantly prolong the trial. It would be a significant distraction for the jury, which would then have to assess and weigh a large amount of evidence to determine whether or not the scope and nature of the tutoring assistance he received constituted academic misconduct, which is not relevant to the claims at issue in this case. Any probative value the evidence might have on the issue of Dr. Chow's character for truthfulness or untruthfulness would be far outweighed by the delay and confusion that would result from Mr. Zimny's effort to make Dr. Chow the defendant in this action.

III. IF THE COURT WERE TO DETERMINE THAT DEFENDANTS SHOULD BE PERMITTED TO OFFER EVIDENCE CONCERNING THE ACADEMIC ASSISTANCE PROVIDED TO DR. CHOW, THAT EVIDENCE SHOULD BE LIMITED TO CROSS-EXAMINATION OF DR. CHOW; THEY SHOULD NOT BE PERMITTED TO OFFER DOCUMENTARY OR OTHER EVIDENCE.

As noted above, and as expressly stated in Rule 608(b), extrinsic evidence of specific acts offered only to impeach a witness's character for truthfulness is inadmissible. If probative on that issue and otherwise admissible, the court may only allow the matter to be inquired into on cross-examination. Because extrinsic evidence is inadmissible, the most that may be permitted during cross-examination is for questions to be put to the witness. The answers must be accepted by the examiner who may not seek to impeach those answers by any extrinsic evidence.

> [Rule 608(b)] is essential to enable the effective administration of trials, where the testimony and presentation of evidence must at some point come to an end. Thus, this circuit has in the past been careful to be faithful to the import of the rule. . . . As the Fourth Circuit has stated, "'the interrogator is bound by [the witness'] answers and may not contradict him....' Although the cross-examiner may

> continue to press the [witness] for an admission, he cannot call other witnesses to prove the misconduct after [the witness'] denial."

United States v. Tejada, 886 F.2d 483, 488 (1st Cir. 1989) (internal citations omitted). Accord, *United States v. Beauchamp*, 986 F.2d 1, 3-4 (1st Cir. 1993) ("It is well established that a party may not present extrinsic evidence to impeach a witness by contradiction on a collateral matter. . . . the examiner 'must take [the] answer,' i.e., the examiner may not disprove it by extrinsic evidence.") (internal citations and footnotes omitted).

The prohibition on the use of extrinsic evidence under Rule 608(b) extends even to documents used in cross-examination of the witness whom the examiner seeks to impeach. For example, in *Deary v. City of Gloucester*, 9 F.3d 191 (1st Cir. 1993), a § 1983 case in which the plaintiffs claimed that they were assaulted by the defendant police officers, the witness whose credibility was challenged was Officer Maki, the police officer who was closest to one of the plaintiffs at the time of the alleged assault. After Maki testified, on cross-examination of another officer, Reardon, plaintiff's counsel asked if Maki had been disciplined for filing a false overtime report.[3] Reardon denied knowledge of such an incident. Plaintiff's counsel then recalled Maki to the stand (he had testified earlier) and asked him about the incident. He admitted the incident and documents about it were allowed into evidence.

On appeal, the defendants argued that the testimony Maki gave when he was recalled as well as the documents offered through him should have been excluded as extrinsic evidence. The Court agreed. With respect to the testimony, the Court explained that Maki could have been cross-examined under Rule 608(b) about the disciplinary action taken against him when he first

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[3] It was permissible for Reardon, rather than Maki himself, to be asked this question under Rule 608(b)(2) because the supervisor had testified to Maki's reputation for truthfulness under Rule 608(a). *See Deary v. City of Gloucester*, 9.F3d 191, 196 (1st Cir. 1993). Here, no one other than Dr. Chow could be asked questions about the tutoring services he received. See footnote 1 above.

testified since his submission of a false overtime report was probative of his character for truthfulness. However, the plaintiff chose to ask Reardon about it. As the Court stated:

> . . .although a witness can be questioned about particular events [under Rule 608], once the witness has denied or admitted knowledge of the occurrence on cross-examination, the examiner must accept the answer given by the witness. The purpose of the ban on extrinsic evidence is to avoid holding mini-trials on irrelevant or collateral matters . . . . Officer Reardon stated on cross-examination that he had no knowledge of the disciplinary action involving Officer Maki. Questioning about the event should have been stopped at that juncture.

Id. at 197 (internal citations and quotations omitted).

With respect to the documents concerning the disciplinary action against Maki, the court explained that they would have been inadmissible as extrinsic evidence, ***even if they had been offered through Maki when he first testified***, rather than when he was recalled to the stand.

> The documents regarding the disciplinary event provided further extrinsic evidence of the suspension. As such, they would not even have been admissible during Maki's original testimony, and should not have been allowed during rebuttal.

Id.

Similarly, in *United States v. Tse*, 375 F.3d. 148 (1st Cir. 2004), a drug case, the government relied heavily on the testimony of a cooperating witness, Williams. *In limine*, the District Court (O'Toole, J.) permitted the defense to ask Williams on cross-examination about statements he had made about his educational background and employment history in an employment application he had filled out several years earlier, but denied the defense request to use the application to refresh Williams' recollection should he not recall what he had said in the application. On appeal, the Court ruled that the District Court was within its discretion to forbid the use the use of the employment application to refresh recollection. In its discussion, the Court stated that admission of the employment application to impeach the witness would have violated Rule 608(b).

> Tse's questions about the employment application had no conceivable relevance other than to impeach Williams as untruthful. Using the employment application for this purpose would be a clear violation of Rule 608(b).

Id. at 166. *Accord United States v. Balsam*, 203 F.3d 72, 87 n. 18 (1st Cir. 2000) (recorded statements, even though made by the witness himself, are extrinsic evidence because "extrinsic evidence includes any evidence other than trial testimony"); 28 C.A. Wright & V.J. Gold, FEDERAL PRACTICE & PROCEDURE: EVIDENCE § 6117 (2009 Supp.) at 13 (". . .extrinsic evidence in the form of documents may not be admitted under Rule 608(b) to impeach . . . .") (cited with approval in *United States v. Shinderman*, 515 F.3d 5, 18 (1st Cir. 2008)). To the extent there is any ambiguity about whether the "clear violation of Rule 608(b)" referred to by the *Tse* Court would have been the use of the employment application to refresh recollection or the admission of the employment application into evidence, this was clarified by the Court in *United States v. Shinderman*, 515 F.3d 5, 18 (1st Cir. 2008). Discussing *Tse,* the *Shinderman* court explained that the meaning of the above quoted statement is that "introducing such extrinsic evidence [i.e., the employment application] for the purpose of proving the witness's truthfulness (as opposed to using it merely to refresh the witness's memory) would violate the express prohibition of Rule 608(b)."

CONCLUSION

For the above stated reasons, plaintiffs request that the Court issue an order excluding all argument and evidence concerning the nature and extent of the academic assistance received by Dr. Chow in connection with his studies at the Kennedy School. In the alternative, should the Court determine that such evidence is admissible, the Chows request that such evidence be limited to permit the defendants only to cross-examine Dr. Chow on the issue of the academic assistance he received and not permit them to offer the testimony of any other witness or any

documents on this issue (even if the documents are offered through Dr. Chow on cross-examination).

Respectfully submitted,

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By their attorneys,

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Dated: February 5, 2014

CERTIFICATE OF SERVICE

I, Kevin W. Clancy, hereby certify that the above document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

/s/ Kevin W. Clancy
Kevin W. Clancy

Dated: February 5, 2014