Motions in Limine: Character Problems and Bad Acts

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Character evidence includes a series of wide and varied topics. Evidence can be of both good and bad character although typically most of the focus is on evidence of bad character. Frequently the topic of character is linked with the phrase "bad acts" - which is part of the title for this presentation.

The words "bad acts" or "prior bad acts" are simply short hand phrases that lawyers use to talk about some aspects of character evidence. Those phrases are not words found in the either the Federal Rules of Evidence (FRE), the California Code of Evidence (CEC), or most any other state evidence codes. The phrase "bad acts" usually refer to the following words in the codes: "crimes, wrongs, or acts" in FRE 404(b), "specific instances of conduct" in FRE 405(a) & (b) and FRE 608(b), "sexual misconduct" and "sexual behavior" in FRE 412, "sexual assault" and "child molestation" in FRE 413, 414, and 415, and "convictions of crimes" in FRE 609.

The major reasons to exclude character evidence - and therefore among the best policy arguments to use when you are arguing a motion in limine to exclude character evidence include 1) character evidence’s slight probative value, 2) its prejudicial nature, 3) its tendency to distract the jury from the main question of what actually happened on the particular occasion at issue in the trial, 4) the possibility that a jury might reward a good person and punish a bad person just because of their character, 5) the likelihood of confusing the issues at the trial, and 6) the fact that admitting character evidence might result in an extended collateral inquiry.

Motions in Limine

Motions in limine are pretrial motions. The Latin phrase means "at the threshold."¹ A motion in limine is an anticipatory motion, and a common method for raising evidentiary matters pretrial. It gives the lawyers an opportunity to ensure, or to at least to attempt to ensure, that objectionable and particularly prejudicial information will never be heard by the jurors. Although motions in limine are most often used to exclude evidence, they can also provide an opportunity to obtain a pretrial ruling on the admissibility of certain evidence.²

¹. Christopher B. Mueller & Laird C. Kirkpatrick, Evidence ¶1.6 (2003).

Rules of Evidence

The focus of this paper is on the Federal Rules of Evidence (FRE). The FRE have been used as the model for evidence codes in 42 states, several territories, and the military. The other primary source of evidence law is the California Evidence Code (CEC) which became effective in 1967, a full eight years before the FRE effective date of 1975. The FRE mainly treat character evidence in the 400 and 600 series of the rules; the CEC treats character in the 1100 and 780 series of the rules.

Character as circumstantial evidence

Although character evidence is not normally discussed as circumstantial evidence, it might be best to start by thinking of character evidence as relevancy issues in general and circumstantial evidence issues in particular. In the FRE, the main character evidence provisions are in the 400 series. Character evidence is all about drawing inferences. From certain evidence of character, the trier of fact is usually asked to believe that the person about whom character evidence is introduced must have acted in a certain way, although in a few circumstances evidence of the character of a party is itself an issue in a trial.

Relevancy Rules

The fundamental relevancy rules are rule 401, 402, and 403. Rule 402 tells us that all relevant evidence is admissible (except as excluded by the rules). Rule 401 defines relevant evidence as evidence having "any tendency" to make the existence of any fact that is of consequence to the action more probable or less probable than it would be with the evidence. It is a very low standard, often called "logical relevancy." Under rule 403, relevant evidence can be excluded if its probative value is substantially outweighed by the danger of unfair prejudice or other factors. This is sometime called "legal relevancy."

In theory, all relevancy issues, including character evidence issues, could be answered by application of rules 401-403. However, additional relevancy rules have developed for frequently recurring types of character evidence issues. We are familiar with other types of specialized relevancy rules such as rule 407 which excludes subsequent remedial measures and rule 408 which excludes settlement discussions and statements made during those discussions.

Parties and Witnesses

Typically character evidence is introduced about the plaintiff or the defendant, but character for truthfulness can be an issue for any witness at trial even if they are not a party.

Forms of Character Evidence

Character evidence can be presented in three forms, reputation evidence,
opinion evidence, or evidence of specific instances of conduct. FRE 405 regulates the methods of proving character. Typically, reputation and opinion evidence are treated similarly. They can almost be used interchangeably. Whenever you can use reputation evidence, you can also use opinion evidence, and vice versa - assuming you can lay a proper foundation. However, in many instances, the use of specific instances of conduct is prohibited.

**Rule 404(a)**

Rule 404(a) begins with a general statement that prohibits the use of character, or a trait of character, for the purpose of proving action in conformity therewith on a particular occasion. Sometimes this is called propensity evidence. Basically it means that you cannot prove that "that kind of guy does those kinds of things." For example, in an auto case you cannot offer character evidence in the form of reputation, opinion, or specific acts of conduct that a party is "careful" or "careless" if you are trying to infer that the party drove "carefully" or "carelessly" on a particular occasion - for example, at the time of the accident that is the subject of the law suit. However, the rule does not prevent the use of character to prove something other than action in conformity. For example, the defendant in a wrongful death case might offer evidence of the deceased's poor character in an effort to prove that the damages suffered by the survivors are not so great.

404(a) next presents an exception to the character evidence exclusion which because it uses the words "accused" and "victim," the vast majority of courts only use the rule for criminal cases. Sometime this is called the "Mercy Rule." Although character evidence is generally excluded from all civil and criminal trials by the general rule of Rule 404(a), courts will show the criminal defendant some "mercy" and allow the defendant to start using character evidence in trial by proving the bad character of the victim or the good character of the criminal defendant.

Despite the use of the terms "accused", "victim," and "prosecution" in 404(a), a minority of jurisdictions (including Hawaii) do not limit 404(a) to criminal cases. These jurisdictions allow the use of such evidence in civil cases where, as they say, "the central issue is criminal in nature" - usually meaning the focus of the trial is an assault and self defense, the character trait in issue is assaultive, aggressive, or prone to violent behavior, or the opposite side of that trait such as "peacefulness".

A very important aspect of rule 404(a) is subsection (3) which allows proof of a witness's character under rules 607, 608, and 609 which deal with impeachment. When you get into the 600 series of rules, we are talking about the single character trait of truthfulness (or untruthfulness). A witness's credibility is always at issue. Credibility includes character for truthfulness (proved by reputation, opinion, or specific acts) as well as impeachment by other methods such as prior inconsistent statements and bias. Note that bias is an important method of impeachment, but that there is no FRE on
bias. Bias is one aspect of the common law that did not make it into the FRE. Bias continues to be ruled by the federal common law.

Rule 404(b)

Rule 404(b) is one of the rules associated with the "prior bad acts" language. It allows use of crimes, wrongs, or acts FOR ANY PURPOSE OTHER THAN ACTION IN CONFORMITY. It gives a laundry list of possibilities - "motive, opportunity, intent, reparation, plan knowledge, identity, or absence of mistake or accident" - but the "such as" language in the rule implies that it is not an exclusive list, and therefore use of the "prior bad acts" is not limited to those situations. Such evidence is usually used in criminal cases by the prosecution to prove other uncharged crimes that the defendant allegedly committed, but can be used in civil cases to prove improper motive, notice, a wrongful pattern or practice, and discriminatory or fraudulent intent, and any other situation as long as it is not action in conformity.

The admissibility of other crimes evidence is a question of conditional relevancy under FRE 104(b). The judge need only find that the jury could reasonable conclude by a preponderance of the evidence that a party committed or is responsible for the other bad act. Huddleston v. U.S., 485 U.S. 681 (1988). Even if there was a prior acquittal in a criminal case, the factual evidence of "prior bad act" may still be admissible.

When the judge concludes that the evidence is admissible, the party against whom it is being admitted is entitled to a Rule 105 limiting instruction. And of course, the admission of this evidence is always subject to a Rule 403 balancing to determine "if its probative value is substantially outweighed by the danger of unfair prejudice." There is a set of commonly accepted balancing factors to consider. And, notice to the opposition is required under rule 404(b).

Furthermore, to use 404(b) evidence, the offering party must have a good faith basis for believing that the instances inquired about actually happened, and show that the instances are relevant to the character traits involved at trial. If the witness being crossed, denies that the incidents took place extrinsic evidence of proof of the happening of the incidents is not permissible.

Under Michaelson v. U.S. 335 U.S. 469 (1948), the use of a character witness opens a wide door to cross about prior acts unrelated to the subject of the lawsuit, but that are relevant to testing the character witness' knowledge of person who is being testified about. In other words, the cross goes something like this: "If you are such an expert on the defendant's character for truthfulness, did you know that the defendant has filed a false application" or even "...did you know that the defendant has been accused of cheating on college exam?" Of course these questions are subject to exclusion after a 403 balancing inquiry.
Rule 405

Under rule 405, specific instances of conduct are admissible when character or a trait of character is an essential element of a charge, claim, or defense. This might come to play in negligent entrustment, hiring, or supervision cases or where the defendant is claimed to have been grossly negligent in hiring the person who caused the plaintiff's injury. It is also an element of a defense when a defendant in a defamation case raises a defense of truth. In a wrongful death case, damages for the loss of life makes the character of the decedent relevant as it bears on issues such as likely future earnings and the loss suffered by the claimants in the case. Character of a party is almost always in issue in a child custody case when the issue is who is the better parent. Rule 405 provides that specific instances of conduct can be a topic for cross-examination of a character witness who has testified about reputation and opinion.

Rule 406 - Habit evidence; Routine Practice

Habit evidence, or the routine practice of an organization - which is really like the habits of people who work for businesses - is essentially another form of character evidence. Habit is generally thought to be narrower than character evidence. A lot of habit evidence is not in any way related to "bad acts," e.g., the habit of mailing letters. On the other hand other forms of habit evidence do imply wrongs or moral wrongs, e.g., the habit of having a few drinks before driving home from work. Traditionally we all learned that habits in evidence law are specific actions that are done almost unconsciously, e.g., the habit of stopping (or not stopping) are particular stop signs in a particular place, the habit of wearing a seat belt, the habit of giving informed consent warnings. These are supposedly like Pavlov's dog. You ring the bell; the dog salivates.

Rules 412 and 415 - Sexual Offenses

Rule 412, the Rape Shield Rule, originally designed for criminal rape cases has been extended in the FRE and many states to include civil cases involving sexual conduct where there might be evidence of other sexual behavior or evidence of sexual predisposition. Character issues can come up in work place harassment cases, infecting with sexual diseases cases, and civil rights cases. Depending on the interpretation and jurisdiction, the issues might include not only sexual acts, but also sexual disposition as shown by mode of dress, speech, and life-style. This rule has a special notice provision that requires written notice, including a statement of purpose for which the evidence is offered, and mandates that there be an in camera hearing on the issue. There is also a special balancing test for ruling on the admissibility of such evidence, and the test differs from rule 403.

Rule 415 is a very bold rule and allows for the admission of evidence prior sexual assaults or prior child molestations in civil cases. The rule allows admission of other sexual assault or child molestation incidents to prove a sexual assault or child molestation in the present case. Basically, rule 415 allows proof that "if the person did it
once before, he probably did it this time too."

Impeachment Related to Truthfulness.

Whenever a witness testifies, the credibility of the witness is an issue. Whether you call it credibility, veracity, or just plain truthfulness, what we are talking about is related to the character trait of truthfulness. FRE 611 limits cross-examination to matters covered on direct examination, and matters affecting the credibility of the witness. We know from FRE 607 that any witness can be impeached. Certainly if you call the opposing party as a witness in your case, you might well try to impeach them.

Rule 609 - Impeachment by Evidence of Conviction of Crime

Under FRE 609, you can impeach the credibility of a witness by showing a conviction of a crime. The questionable theory behind the rule is that if witness has been convicted of a crime in the past, they are less worthy of belief when they are testifying in the present case. In any event, it is a great opportunity for invoking an implicit "bad man rule" where the jury may hold it against your opponent (or unfortunately your client) or some other witness, if they have been convicted in the past. Under FRE 609, prior convictions for dishonesty or false statement, whether they were misdemeanors or felonies, are automatically admitted (if the witness testifies), and that evidence of a prior felony may be admitted to impeach. There is typically a motion in limine battle on the admission of the felonies with a variety of well-established factors to consider that make more sense to discuss if this were a program for criminal lawyers. My belief is that judges generally have well developed personal rules of thumb on whether they will allow such evidence or not.

Rule 608 - Evidence of Character and Conduct of Witness

Rule 608 parts (a) and (b) are like separate rules. Subjection (a) allows the use of opinion or reputation of character for truthfulness or untruthfulness but only after the character of the witness has been attacked by opinion or reputation evidence or "otherwise." One way to look at that is to say that "bolstering" is not allowed - meaning that evidence of good character is not admissible unless evidence of bad character for untruthfulness has been introduced through a character witness who says a prior witness has a poor reputation for truthfulness or in the character witness' opinion, the prior witness is not truthful. Of course you do not need a prior "good" character witness to open the witness to attack. A slashing cross, attacking the witness character for truthfulness may be enough to qualify for the "otherwise" language opening up the attack. However, impeaching a witness for bias, contradiction or prior inconsistent statement does not constitute an assault on character and does not allow for the calling of a witness testifying to good character for truthfulness.

Rule 608(b)

Once a witness testifies, the witness' credibility becomes a fact of consequence in issue under rule 401, and an opponent might well attempt to impeach the witness'
credibility. Under FRE 608(b), the witness may, in the discretion of the court, be cross-examined about specific instances of conduct probative of untruthfulness. In other words, the witness on the stand can be asked about "prior bad acts" related to untruthfulness such as lying, cheating, filing false application, and other such acts. Since the witness is on the stand, this is referred to as "intrinsic" impeachment. The major limitation with 608(b) is that it prohibits "extrinsic" impeachment, meaning calling a second witness to present evidence that the witness had committed the conduct related to untruthfulness that he denied on cross. As it is said, the "cross examiner must take the witness' answer" even if the cross examiner has proof that the witness lied under oath. The reason that extrinsic evidence is barred is to prevent trials from being sidetracked on collateral issues and wasting time. However, not all jurisdiction bar extrinsic evidence to impeach. For example, Hawaii's rule 608(b) allows such extrinsic impeachment in the discretion of the court.

So there you have it, a quick overview of character evidence. Although character evidence is generally prohibited (rule 404), character evidence is admissible in the form of habit (rule 406), when it is an essential element of a claim or defense (rule 405), in certain instances related to sexual and molestation claims (rules 412-415), when used to prove any fact of consequence other than conduct in conformity (the classic 404(b) prior bad acts of motive, plan, scheme, etc.), and to impeach, or rehabilitate, the character of a witness who has already testified (rules 607-609).

The FRE related to character evidence are presented below.

**RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES**

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404 (a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of alleged victim. Evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity
therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

**RULE 405. METHODS OF PROVING CHARACTER**

(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.

(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 that person's conduct.

**RULE 406. HABIT; ROUTINE PRACTICE**

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

**RULE 412. SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION**

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions.

(1) ...

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.
(1) A party intending to offer evidence under subdivision (b) must:
   (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
   (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

RULE 415. EVIDENCE OF SIMILAR ACTS IN CIVIL CASES CONCERNING SEXUAL ASSAULT OR CHILD MOLESTATION
   (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.
   (b) ...

RULE 607. WHO MAY IMPEACH
   The credibility of a witness may be attacked by any party, including the party calling the witness.

RULE 608. EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS
   (a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
   (b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness to which character the witness being cross-examined has testified.
   The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters that relate only to character
for truthfulness.

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME
(a) General rule. For the purpose of attacking the credibility of a witness,
(1) evidence that a witness other than an accused has been convicted of a crime
shall be admitted, subject to Rule 403, if the crime was punishable by death or
imprisonment in excess of one year under the law under which the witness was
convicted, and evidence that an accused has been convicted of such a crime shall be
admitted if the court determines that the probative value of admitting this evidence
outweighs its prejudicial effect to the accused; and
(2) evidence that any witness has been convicted of a crime shall be admitted if
it involved dishonesty or false statement, regardless of the punishment.
(b) Time limit....

Good Evidence Sources
Evidence, by Mueller & Kirkpatrick (2d ed. 1999)
Evidence Law: A Student's Guide to the Law of Evidence As Applied in American
Trials, by Roger Park (1998)
Courtroom Evidence, by Goode & Wellborn (1997)
Evidentiary Foundations, by Imwinkelried (6th 2005)