

6. CHARACTER EVIDENCE

A. Introduction

1. Rule 404 makes character evidence inadmissible in most circumstances, but admissible under several exceptions.

2. Definition

a) Character is not defined in Rule 404, so we rely on customary usage.

b) The definition is tricky, because most people associate character with moral qualities. That is part of the definition, but not the whole. Character also includes non-moral characteristics, behavioral tendencies, and patterns of life, which would include things having nothing to do with morality like carefulness, shyness or fondness for cats. While character evidence often concerns a person's moral qualities, it is not limited to moral behavior. Character is a pattern of any kind of behavior, whether it involves an issue of morality or not.

c) The definition is also tricky because you have to distinguish "fixed" behavior from a "tendency" to behave in certain ways. Fixed patterns of behavior are called habits which fall under Rule 406 and are admissible. They will be discussed in the next chapter. Character evidence under rule 404 is evidence of a general tendency to behave in certain ways, which is not usually admissible.

d) The definition includes both the aggregate of a person's qualities (a "good" person) and individual traits such as recklessness or violence.

e) Character is not the same as reputation. "Character" consists of the individual patterns of behavior and characteristics which make up and distinguish one person from another. "Reputation" is the general opinion of people in the community as to a person's character traits, and is therefore evidence of (and a common way to prove) character. Reputation also may be independently relevant, as in a defamation case in which a party sues for damage to reputation.

f) Character is also different from credibility: The character of a person (how they are likely to behave) is rarely in issue; the credibility of a witness (how likely they are to be completely truthful) is always in issue. Evidence that a witness lacks credibility obviously also impugns that person's character, but is independently admissible under the Impeachment Rules -- 607, 608, 609 and 616 -- covered later in the course.

3. Rule 404 makes character evidence inadmissible for the purpose of proving that on a particular occasion the person acted in accordance with that trait, unless it falls within the exceptions we will discuss later.

4. When character evidence is admissible, Rule 405 says that “it may be proved by testimony about the person's reputation or by testimony in the form of an opinion.” It may not be proved through evidence of specific events that illustrate the character trait in action.

Yes: Joshua has an excellent reputation in town as an honest used-car seller.

Yes: In my opinion, Joshua is an honest used-car seller

No: Joshua was honest when he sold me a used car.

B. Character Evidence in Civil Cases

1. General rule. Character evidence is not admissible to prove conduct in civil cases. For example, a defendant cannot offer the testimony of friends (or her own testimony) that she is usually a very careful driver as circumstantial evidence she was probably driving carefully and not negligently on the day of an accident.

2. Character in issue. Character evidence is occasionally admissible if a trait of character has been placed in issue by the pleadings. Lawsuits in which character is a material issue are extremely uncommon. One must be careful not to confuse an allegation of particular unsavory behavior (e.g., acted maliciously on a certain day) with true character (tendency to be malicious on all days and toward all people). Character is a material issue in the following types of cases:

- a) Defamation. Character is in issue in a defamation case when the defamatory statement falsely accuses the plaintiff of having a general flaw, e.g., accusing Hillary Clinton of being a liar. Character is not in issue if the defamatory statement falsely accuses the plaintiff of a specific act, e.g., Hillary lied about Benghazi.
- b) Negligent entrustment. In an action for negligent entrustment, the plaintiff may prove that the defendant entrusted an automobile to an employee who was known to drive carelessly.
- c) Parenting ability. Parents' characters and patterns of behavior toward their children is in issue in cases involving custody, visitation and termination of parental rights.

3. Character of witnesses for truthfulness. All witnesses, including the parties, place their character for truthfulness in issue when they testify. We will get to this when we discuss impeachment.

C. Character Evidence in Criminal Cases

1. General rule. Character evidence is more frequently introduced in criminal cases than in civil. Although the same general presumption against the use of character evidence applies, defendants may offer it and prosecutors may respond in kind in several situations specified in Evid. R. 404(a)(2).

2. Character of the accused. Defendants in criminal cases may offer evidence of their own good character to negate a charge of criminal conduct. They may offer evidence of their general law-abidingness or may prove good character for specific traits relevant to the conduct for which they are accused. Once the defendant has offered evidence of good character (but not before), the state may rebut with evidence of bad character on the same trait. Defendants often raise character inadvertently, by going beyond denying the crime charged and testifying "I would never hurt anyone." This may open the door to evidence about his character for violence. There is a lot of judicial discretion involved on two key issues:

- When is the line crossed between witnesses saying bland nice things about a defendant and placing his character in issue, and
- What is the scope of the prosecutor's rebuttal?

Defense attorneys obviously try to present their clients in a good light -- well dressed, polite, and a responsible citizen who goes to church and has a job and family. Neighbors may testify that he was quiet and never caused trouble. The judge must decide at what point the attorney has placed the defendant's character in issue, whether it matters if the prosecutor objected, and what kinds of bad character evidence will be admissible in rebuttal.

3. Character of victim. The accused may offer evidence of a pertinent trait of character of the victim that is material to the crime. After the accused places the victim's character in issue, the prosecutor may offer rebuttal evidence on that same trait. The state may rebut only as to the victim's character, not the defendant's.

Illustration. In an assault/self-defense case, the defense calls witnesses to testify that the victim had a reputation for violence, carrying guns, and starting fights. The prosecution can rebut with witnesses who say the victim was a peaceful man, but not that the defendant also had a reputation for violence, carrying guns and starting fights.

In a homicide case in which the accused offers appreciable direct evidence that the victim was the first aggressor, the prosecution may in rebuttal prove the victim's good character for peacefulness whether or not the accused offers character evidence.

4. Character of rape victim. Most states have a so-called rape shield law, e.g., Evid. R. 412, which restricts evidence of the character and prior behavior of a rape victim. This matter is discussed in detail in the readings on sexual character.

5. Character of witnesses. All witnesses, including the defendant and victim, place their character for truthfulness (whether they tend to be truthful or untruthful) in issue when they testify. We will get to this when we discuss impeachment.

6. Insanity defense. A plea of insanity places a defendant's entire life in issue, including his character.

7. Entrapment defense. When the defense raises the issue of entrapment, it places his predisposition to commit the crime in issue. Predisposition may be proved by evidence as to his character.

D. Methods of Proving Character

1. General reputation. When character is admissible, Rule 405 says it may be proved by testimony describing the subject's reputation in the community concerning a trait in issue. Traditionally "community" has meant the town or neighborhood in which the subject lives or used to live. The modern trend is to expand the concept of community to include the workplace, institutions and other large groups with whom the person regularly associates. A family unit is not large or diverse enough to be a community. A foundation must be laid to show:

- a) The witness is familiar with the subject's reputation within a community.
- b) The subject is a member of that community.
- c) The subject has a general reputation among an identifiable group of people who have adequate basis to form opinions.
- d) The witness has substantial contact with the community or group.

2. Personal opinion. Rule 405 says character also may be proved by testimony in the form of a personal opinion offered by someone acquainted with the subject. A foundation must be laid that the witness has known the subject over a long enough period of time and under sufficient circumstances that they can form a reasonably reliable opinion as to the trait in issue.

- a) A husband may give an opinion of his wife's general character or a specific trait such as loyalty or honesty that would be apparent from daily domestic life, but probably may not give an opinion about how she would behave at work.
- b) Captain Kirk may give an opinion of his officers' bravery, but probably not an opinion of the bravery of a junior mess steward who works in the kitchen.

The general foundation for an opinion is discussed in the chapter on the opinion rule.

3. Specific instances of conduct. Rule 405 says that character may not be proved by introducing evidence of specific acts that supposedly illustrate a particular trait, unless character is directly in issue. There is one exception -- if a defendant claiming self-defense is trying to prove that he or she had a reasonable and justifiable fear of the victim because of the victim's violent character, the defendant may offer proof of specific acts of violence of which the defendant was personally

aware because it tends to prove the defendant's reasonable belief, not the victim's conduct..

4. Expert witnesses. Behavioral traits may not be proved by expert testimony from a psychologist. This is a recurring issue in child sexual abuse cases, where the child's testimony is bolstered by her therapist, who testifies that the child is not prone to fantasy or exaggeration, is not susceptible to manipulation by her mother, and has a tendency to be truthful.

E. Cross-Examination of Character Witnesses

1. Character witnesses who testify to a person's reputation, or give their personal opinion, concerning a character trait, may be cross-examined about whether they have heard about specific acts that contradict the character trait testified to. If the witness states a personal opinion about the defendant's character, the prosecutor can ask the witness if they are personally aware of the defendant's prior convictions for disorderly conduct, assault and/or resisting law enforcement. If the character witness testifies to reputation, the prosecutor can ask the witness whether he or she has heard about the defendant's prior arrests for crimes of violence whether or not they ended in convictions -- because we are talking about reputation, not fact. However, before the state may raise any specific acts of a defendant on cross-examination, it must disclose the acts it intends to use if the accused gave pretrial notice of intent to call character witnesses.

2. Character witnesses generally may not be asked hypothetical questions on cross-examination. Thus, questions that begin, "Would your opinion of the defendant's character change if ..." are improper. *United States v. Williams*, 738 F.2d 172 (7th Cir. 1984).

F. Bolstering

1. General rule. An attorney may not bolster the credibility of a witness with evidence of their good character for truthfulness and honesty before that witness's credibility has been attacked. The usual rationale for this rule is that every witness is presumed to speak the truth, so it is a waste of time to accredit a witness unless it is clear that the witness's credibility is going to be an issue, which we won't know until the cross-examination.

2. Background evidence permitted. The no-bolstering rule does not prevent an attorney from eliciting relevant background testimony from a witness, even if that background tends to enhance the witness's credibility. General background -- job, marriage, children, church, where one was born and raised -- should always be admissible. The jury is entitled to know who the witness is. In addition, more specific background should be permitted if it has something to do with the case. For example, a police officer may testify to the number of years on the force, a small business operator to the length of time in business, a doctor to the number of similar surgeries performed., even though this may indirectly bolster the person's credibility or character. However, this rule should not be extended to allow testimony about unrelated good deeds.

3. Witnesses in uniform. Police officers and members of the military on active duty may testify in uniform. Doing so is not considered bolstering the witness's character.

4. Child victim-witnesses. In trials involving allegations of child sexual abuse, the credibility of the child is often crucial because he or she may be the only witness. The defendant who denies guilt is likely to claim the child is lying, fantasizing, or has been coached by an angry spouse (one study found that most accusations of child sexual abuse were made by a spouse during divorce and custody disputes). It is common for prosecutors to try to offer character testimony from parents, teachers, police investigators, doctors and counselors that in their opinion the child is trustworthy and has no tendency to exaggerate or fantasize. Such bolstering testimony is not generally allowed, although state laws vary because of the emotional nature of the issue.