

Evidence:

Propensity Character Evidence (Rule 404)

Colin Miller



Evidence: Propensity Character Evidence

Colin Miller

The John Marshall Law School

CALI eLangdell Press 2013

About the Author

Professor Miller teaches Evidence, Criminal Procedure, Criminal Law, and Civil Procedure. He is the creator and Blog Editor of EvidenceProf Blog of the Law Professor Blogs Network. He is the Editor of Illinois Criminal Procedure and drafted a 100 page report comparing the Federal Rules of Evidence to Illinois evidentiary principles, which was used in the creation of the first Illinois Rules of Evidence.

Professor Miller received his B.A. degree with distinction from the University of Virginia and his J.D. (Order of the Coif) from the William & Mary Law School.

Notices



This work by Colin Miller is licensed and published by CALI eLangdell Press under a Creative Commons Attribution- ShareAlike 3.0 Unported License. CALI and CALI eLangdell Press reserve under copyright all rights not expressly granted by this Creative Commons license. CALI and CALI eLangdell Press do not assert copyright in US Government works or other public domain material included herein. Permissions beyond the scope of this license may be available through feedback@cali.org.

In brief, the terms of that license are that you may copy, distribute, and display this work, or make derivative works, so long as

- you give CALI eLangdell Press and the author credit;
- you do not use this work for commercial purposes; and
- you distribute any works derived from this one under the same licensing terms as this.

Suggested attribution format for original work:

Colin Miller, Evidence: Propensity Character Evidence, Published by CALI eLangdell Press. Available under a Creative Commons BY-SA 3.0 License.

CALI® and eLangdell® are United States federally registered trademarks owned by the Center for Computer-Assisted Legal Instruction. The cover art design is a copyrighted work of CALI, all rights reserved. The CALI graphical logo is a trademark and may not be used without permission.

Should you create derivative works based on the text of this book or other Creative Commons materials therein, you may not use this book's cover art and the aforementioned logos, or any derivative thereof, to imply endorsement or otherwise without written permission from CALI.

This material does not contain nor is intended to be legal advice. Users seeking legal advice should consult with a licensed attorney in their jurisdiction. The editors have endeavored to provide complete and accurate information in this book. However, CALI does not warrant that the information provided is complete and accurate. CALI disclaims all liability to any person for any loss caused by errors or omissions in this collection of information.

About CALI eLangdell Press

The Center for Computer-Assisted Legal Instruction (CALI®) is: a nonprofit organization with over 200 member US law schools, an innovative force pushing legal education toward change for the better. There are benefits to CALI membership for your school, firm, or organization. eLangdell® is our electronic press with a mission to publish more open books for legal education.

How do we define "open?"

- Compatibility with devices like smartphones, tablets, and e-readers; as well as print.
- The right for educators to remix the materials through more lenient copyright policies.
- The ability for educators and students to adopt the materials for free.

Find available and upcoming eLangdell titles at elangdell.cali.org. Show support for CALI by following us on Facebook and Twitter, and by telling your friends and colleagues where you received your free book.

Table of Contents

About the Author	iii
Notices.....	ii
About CALI eLangdell Press.....	1
Propensity Character Evidence	3
I. A Definition of Propensity Character Evidence	3
II. Common Law Origins of the Propensity Character Evidence Proscription	3
A. England	3
B. United States.....	4
III. Federal Rules of Evidence	7
A. Federal Rule of Evidence 404(a)(1).....	7
B. Federal Rule of Evidence 404(a)(2) – The Mercy Rule	9
1. Rule 404(a)(2): Injecting Propensity Character Evidence Into a Criminal Trial	9
2. Rule 405(a) Methods of Proving Character Under the Mercy Rule.....	14
C. Federal Rule of Evidence 405(b) – Character “In Issue”	23
IV. Character Evidence Motions	28

Propensity Character Evidence

I. A Definition of Propensity Character Evidence

Propensity character evidence is the use of evidence of a person's character or trait of character to prove that he has a propensity to act in a specific manner and thus that he likely acted in conformity with that propensity at the time of an alleged pre-trial wrong. For instance, evidence that a defendant charged with a crime of violence had a reputation for being violent would be propensity character evidence. This is because it would be used to prove his propensity for acting violently and his likely conformity with that propensity at the time of the crime charged.

Alternatively, propensity character evidence can be defined more simply as evidence whose probative value depends upon the aphorism, "[o]nce a criminal, always a criminal," such as evidence that a person on trial for robbery had committed robberies before ("Once a robber, always a robber."). See *Alegata v. Commonwealth*, 231 N.E.2d 201, 209 (Mass. 1967) ("The concept of 'once a criminal always a criminal' is abhorrent to our law.").

II. Common Law Origins of the Propensity Character Evidence Proscription

A. England

In England, before the 17th Century, courts admitted almost any type of evidence, with the only limitation being rules deeming certain categories of individuals "incompetent" to testify. All other forms of evidence were admissible under the inquisitorial system, which had reigned in England since the Norman Conquest and which found an evidentiary code unnecessary. Under the inquisitorial system, "it was not considered irregular to call witnesses to prove a prisoner's bad character in order to raise a presumption of his guilt." John H. Langbein, *The Origins of Adversary Criminal Trial* 190-91 (2003).

This open door policy with regard to propensity character evidence could be explained by the inquisitorial system's assumption that the accused committed a crime and the concomitant requirement that he affirmatively prove his innocence. One of the most conspicuous consumers of propensity character evidence, and ultimately the harbinger of its death, was The Court of Star Chamber. Established in 1487, the Star Chamber was an expeditious way for the Tudors and Stuarts to exorcise political and religious dissenters of the monarchy while masquerading as a court conducting treason trials. The Star Chamber was the Crown's "organ of terror, renown[ed] among the citizenry for its arbitrary and cruel decisions," and one of its most capricious practices was the deluge of character evidence it admitted, resulting in defendants being punished for their sordid character rather than their culpable conduct. Cheryl Swack, *Safeguarding Artistic Creation and the Cultural Heritage: A Comparison of Droit Moral Between France and the United States*, 22 Colum.-VLA J.L. & Arts 361, 381 n.135 (1998).

The Star Chamber engendered widespread animosity in the citizenry in the years preceding the English Civil War, eventually prompting the revolutionary Long Parliament to abolish it in 1641. At the close of the English Civil War, the Restoration, and the Glorious Revolution, the same dissidents who were subjected to the monarchy's organ of terror had wrested control of the Parliament, but still felt the sting of the Star Chamber. In an effort to prevent the ills of the past from infecting the future, these new power wielders passed the Treason Act of 1695, which contained a provision proscribing prosecutors from proving at trial any overt acts by the defendant which were not charged in the indictment, thus precluding the admission of propensity character evidence. While this prohibition on propensity character evidence was initially limited to treason trials, it soon permeated all criminal trials, with courts and commentators recognizing that the use of such evidence violated the right to due process of law guaranteed by the Magna Carta.

B. United States

Eventually, the English ban on propensity character evidence carried across the pond, with American courts in both civil and criminal

cases adopting a similar exclusionary rule in the middle of the 19th Century based upon the Treason Act and similar English law. Indeed, in holding in 1892 that a trial court erred in admitting evidence indicating that two defendants on trial for murder had previously committed robberies, the United States Supreme Court in *Boyd v. United States*, 142 U.S. 450, 458 (2009), forcefully stated that:

Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death....However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offence charged.

While this quotation accurately describes the common law judicial proscription on the introduction of propensity character evidence, there were three circumstances in which courts allowed parties to prove the character of a party or witness.¹ First, in rape and sexual assault cases, courts allowed defendants to present evidence of the alleged victim's character for promiscuity as evidence that she consented to the sexual act at issue. This practice was ended with the eventual adoption of rape shield laws, which are the topic of the **Rape Shield Chapter** of this casebook.

Second, under the so-called “mercy rule,” a criminal defendant could inject the issue of character into his trial and present pertinent propensity evidence concerning his good character and/or the alleged

¹ Courts also allowed parties to present character evidence, not to prove character, but to prove other purposes, such as motive, intent, and knowledge. This common law practice was eventually codified in Federal Rule of Evidence 404(b) and state counterparts and will not be addressed in this chapter.

victim's bad character. Accordingly, a defendant charged with assault could have witnesses testify that he was a peaceable person, and, if he were claiming self-defense, he could call witnesses to testify that the alleged victim was a violent person. Only at that point could the prosecution call witnesses to testify that the defendant was violent and/or that the alleged victim was peaceable. But if the defendant did not want propensity character evidence to pervade his trial, all he needed to do was refrain from presenting his own character witnesses, and the state would be precluded from presenting its own. Thus, Pandora's Box was firmly in the criminal defendant's hands.

Third, in either civil or criminal cases where courts determined that character was "in issue," they also allowed for the admission of character evidence, not for propensity and conformity purposes, but because character itself was an (essential) element of a charge, claim, or defense. To wit, under the common law tort of seduction, a man could be sued for having persuaded a chaste woman to have sexual intercourse with him based upon a promise of marriage. Thus, an element of a defense in such a case was that the alleged victim was not in fact chaste, permitting the presentation of evidence that she had a lascivious character or had engaged in prior acts of sexual intercourse.

This type of case provides a nice illustration of why character evidence in such cases did not require a propensity/conformity analysis. In a seduction case, the defendant would not be using evidence of the alleged victim's lascivious character and past acts of sexual intercourse to prove that she had a propensity to engage in sexual acts and that she likely acted in conformity with this propensity at the time of the alleged seduction; indeed, his defense might be that no sexual act occurred between the victim and himself. Instead, the defendant would be using the evidence to prove that the alleged victim was not chaste and thus could not be a victim of seduction. See Colin Miller, *Killed on the Fourth of July: July 4th Murder Case Helps Explain Federal Rule of Evidence 404(b)*, EvidenceProf Blog, July 4, 2008,

<http://lawprofessors.typepad.com/evidenceprof/2008/07/killed-on-the-f.html>.

III. Federal Rules of Evidence

A. Federal Rule of Evidence 404(a)(1)

Federal Rule of Evidence 404(a)(1) currently provides that

Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

Rule 404(a)(1) thus continues the common law proscription on the introduction of propensity character evidence in both civil and criminal cases. As noted in the Advisory Committee's Note to Rule 404, Rule 404(a)(1) deems inadmissible "evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft."

There are generally three types of propensity character evidence that are not admissible under Rule 404(a)(1): (1) reputation, (2) opinion, and (3) specific act evidence. So, for instance, a witness could not testify in an assault case that he had been the defendant's neighbor for 5 years and that the defendant had a reputation in the neighborhood for being violent. *See, e.g., State v. McBride*, 618 S.E.2d 754, 757 (N.C. App. 2005) (finding that testimony that a defendant charged with possession of cocaine and related crimes had a reputation for being a dealer of drugs such as cocaine was improperly admitted). Similarly, a witness could not testify in a child abuse case that he had known the victim for 5 years and that, in his opinion, the victim was a violent person. *See, e.g., State v. Leber*, 246 P.3d 163 (Utah.App. 2010) (finding that the trial court erred in a child abuse case by allowing the defendant's ex-wife to testify "that it was her opinion that he is violent with children"). Finally, the prosecution could not present evidence that a defendant charged with a crime of violence had previously committed acts of violence and/or had prior convictions for crimes of violence. *See, e.g., United States v. Ferguson*, 425 Fed.Appx. 649 (9th Cir. 2011).

There are three main reasons why the rules continue to deem propensity character evidence inadmissible:

First, there is a concern that a jury will convict a defendant as a means of punishment for past deeds or merely because the jury views the defendant as undesirable....Second, there is a “possibility that a jury will overvalue the character evidence in assessing the guilt for the crime charged.”... Third, it is unfair to require a defendant to defend not only against the crime charged, but moreover, to disprove the prior acts or explain his or her personality. *Kaufman v. People*, 202 P.3d 542, 552 (Colo. 2009).

Hypothetical 1: Francine Johnson and the Leadership Council For Metropolitan Open Communities bring an action against Robert and Rosemary Pistilli, alleging a violation of the Fair Housing Act, 42 USC § 3604. The plaintiffs allege that Johnson, an African-American woman, left several messages for the Pistillis, seeking to view available apartments owned by the Pistillis, and that they failed to return her phone calls because of her race. In response, the Pistillis seek to call two witnesses who would testify that the Pistillis have a good reputation in the African-American community for the “manner in which they treat people of color.” Should these witnesses be allowed to testify? *See Johnson v. Pistilli*, 1996 WL 587554 (N.D.Ill. 1996).

Hypothetical 2: John and Michelle Sandalis are convicted of tax fraud and tax evasion based upon failure to report revenue from their business, Dalis Painting. After they are convicted, they appeal, claiming, inter alia, that the district court erred by allowing the following exchange:

Prosecutor: “Have you formed an opinion regarding John [Sandalis]’s character for honesty?”

Witness: “I don’t think he’s a very truthful person.”

Was this testimony properly admitted? *See United States v. Sandalis*, 39 Fed.Appx. 798 (4th Cir. 2002).

Hypothetical 3: Christopher Branch is charged with first-degree murder. Branch was under the influence of drugs and alcohol when he struck the victim with his truck, projecting him several feet. Two witnesses testified that Branch did not slow down as he approached the victim and purposefully swerved to hit him. At trial, the prosecution also presented evidence that Branch was previously convicted of a robbery that he committed under the influence of drugs and alcohol, and that he refused to undergo the ordered treatment. According to the prosecution, “Defendant was an individual that simply did not care to try to address his drug and alcohol problem, a problem that the evidence established contributed to the death of [Victim].” Was this evidence related to the prior conviction properly admitted? *See State v. Branch*, 241 P.3d 602 (N.M. 2010).

B. Federal Rule of Evidence 404(a)(2) – The Mercy Rule

1. Rule 404(a)(2): Injecting Propensity Character Evidence Into a Criminal Trial

Federal Rule of Evidence 404(a)(2) provides that

The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant’s pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim’s pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant’s same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

The Federal Rules of Evidence thus continue to apply the common law mercy rule. The Advisory Committee noted that it was maintaining the “mercy rule” in criminal cases because it was “so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.”²

Initially, the Rule did not make clear whether this mercy rule applied only in true criminal cases or also in quasi-criminal cases, *i.e.*, civil proceedings where a judgment rendered against the party necessitates a finding that the party committed a particular act that was also punishable under criminal law (*e.g.*, a wrongful death action). In 2006, however, the Rule was amended to make clear that the mercy rule only applies in criminal cases and “that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait.” According to the Advisory Committee, “[t]he circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay.” The mercy rule is in place “because the accused, whose liberty is at stake, may need ‘a counterweight against the strong investigative and prosecutorial resources of the government.’” Conversely, the Advisory Committee found that these “concerns do not apply to parties in civil cases.”

² Some states have exceptions to their character evidence rules, pursuant to which prosecutors in domestic violence cases can present evidence of prior acts of domestic violence by a defendant before the defendant injects the issue of character into trial. See, e.g., Colin Miller, A Matter Of Character: Alaska Case Reveals State's Domestic Violence Character Evidence *Exception*, EvidenceProf Blog, May 30, 2011;

<http://lawprofessors.typepad.com/evidenceprof/2011/05/alaska-404b4-jackson-v-statenot-reported-in-p3d-2011-wl-2084075alaska-app2011.html>.

Under Federal Rule of Evidence 404(a)(2), then, the defendant in a criminal trial can present no propensity character evidence and maintain Rule 404(a)(1)'s proscription on the prosecution presenting any propensity character evidence against him.

On the other hand, under Rule 404(a)(2)(A), the defendant can present evidence of his good character for a pertinent character trait, which then opens the door for the prosecution to present evidence of his bad character for that same character trait. Thus, for instance, in *Bell v. State*, 725 So.2d 836 (Miss. 1998), a capital murder case, the defendant was allowed to have character witnesses testify that he was not violent and that he would not hurt anyone who did not first "do something to him." In turn, this opened the door for the prosecution to have members of the police force testify that the defendant's reputation in the community for violence was bad.

Moreover, under Rule 404(a)(2)(B), subject to the Rape Shield Rule contained in Federal Rule of Evidence 412, the defendant can present evidence of the alleged victim's bad character for a pertinent character trait, which then opens the door for two types of character evidence.³ First, under Rule 404(a)(2)(B)(i), after the defendant attacks the alleged victim's character for a pertinent trait, the prosecution can present evidence of the alleged victim's good character for that same character trait. For instance, in *State v. Jennings*, 430 S.E.2d 188 (N.C. 1993), a defendant charged with the first-degree murder of her 80 year-old husband was allowed to present opinion testimony that her husband was mentally confused and demented, which in turn allowed the prosecution to present evidence of the husband's competence.

³ Some states do not allow defendants to attack the character of alleged victims. See, .e.g, Colin Miller, *Character of the Matter: Michigan Case Reveals Different Character Rules for Crime Victims*, EvidenceProf Blog, February 23, 2012;

<http://lawprofessors.typepad.com/evidenceprof/2012/02/federal-rule-of-evidence-404a2bprovides-that-subject-to-the-limitations-in-rule-412-a-defendant-may-offer-evidence-of.html>.

Second, under Rule 404(a)(2)(B)(ii), after the defendant attacks the alleged victim's character for a pertinent trait, the prosecution can also present evidence of the defendant's bad character for that same character trait. For example, in *People v. Fuiava*, 269 P.3d 568 (Cal. 2012), a defendant charged with first-degree murder of a peace officer was allowed to present evidence that the officer had a reputation and character for engaging in violence, which in turn allowed the prosecution to present evidence of the defendant's bad character for violence. See Colin Miller, *Rubber & Glue: Supreme Court of California Finds No Problem With Crossover Character Evidence Rule*, EvidenceProf Blog, May 29, 2012;

<http://lawprofessors.typepad.com/evidenceprof/2012/05/federal-rule-of-evidence-404a2bprovides-that-in-a-criminal-action-bsubject-to-the-limitations-inrule-412-a-defendan.html>.

What is currently Rule 404(a)(2)(B)(ii) was added to the mercy rule by amendment in 2000, with the Advisory Committee noting that “[t]he amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused.” According to the Advisory Committee, “the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.” To date, at least 14 other states/territories “have since adopted the same or a similar rule.” *Fuiava*, 269 P.3d at 629.

In most cases, then, Pandora's Box remains firmly in the criminal defendant's hands. If the defendant wants to keep propensity character evidence out of his trial, he merely needs to refrain from presenting any propensity character evidence. And, if he wants to inject the issue of character into trial, he may do so, but he opens the door to the prosecution responding in kind.

As the language of Rule 404(a)(2)(C) makes clear, however, there is one situation in which the prosecution can present propensity character evidence before the defendant injects the issue of character into trial: If the defendant in a homicide case claims self-defense and presents evidence that the alleged victim was the first aggressor, the

prosecution can present evidence of the alleged victim's character for peacefulness.

In other words, even if a defendant in a homicide case merely presents evidence that the alleged victim was the first aggressor in the case at hand and does not present evidence that the alleged victim generally had a character for being violent and/or aggressive, the prosecution can present evidence concerning the alleged victim's general peacefulness. As an example, in *United States v. Weise*, 89 F.3d 502 (8th Cir. 1996), the defendant was charged with second-degree murder after fatally stabbing the victim in the chest with an eight-inch butcher knife. The defendant claimed that the victim was the first aggressor, but presented no evidence that the victim was generally a violent or aggressive person. After the defendant was convicted, the Eighth Circuit found no error with testimony by the victim's brother and others concerning the victim's peaceful character pursuant to what is now Rule 404(a)(2)(C).

It is important to note, though, that Rule 404(a)(2)(C) only applies when a defendant "coupl[es] self-defense with evidence of first aggression by the victim in a homicide case...." *State v. Austin*, 686 N.E.2d 324, 327 (Ohio App. 7 Dist. 1996). If a homicide defendant claims self-defense based upon the theory that he was the first aggressor but that his right to self-defense was revived because, *inter alia*, the victim escalated the fight to the deadly level, Rule 404(a)(2)(C) would not apply. See Colin Miller, *Be Aggressive: Why Does Rule 404(a)(2)(C) Only Apply In First Aggressor Cases & Not Other Self-Defense Cases?*, EvidenceProf Blog, June 11, 2012;

<http://lawprofessors.typepad.com/evidenceprof/2012/06/im-currently-working-on-an-article-on-federal-rule-of-evidence-404a2c-which-states-that-despite-the-general-ban-on-the.html>.

Nor would the Rule apply in a case in which a homicide defendant claims self-defense based upon the victim's past acts of violence against him but does not claim that the victim was the first aggressor in the incident leading to his death. See *State v. Copenny*, 888 S.W.2d 450, 455 (Tenn.Cr.App. 1993).

Of course, even when the criminal defendant and/or the prosecution can present character evidence under Rule 404(a)(2)(A)-(C), that evidence must relate to a character trait that is pertinent to an issue at trial. In a murder trial, a defendant claiming self-defense could present evidence about the victim's reputation for violence, but could **not** present evidence about the victim's reputation for dishonesty. Conversely, if the defendant were charged with defrauding the victim, he could present evidence about the victim's reputation for dishonesty, but could **not** present evidence about the victim's reputation for violence. For example, in *Wilkinson v. State*, 979 A.2d 1111 (Del.Supr. 2009), the Supreme Court of Delaware found that a trial court did not err in precluding the defendant from presenting character evidence that he was "hardworking" in his prosecution for two counts of rape in the first degree. Moreover, only evidence of specific character traits is admissible; evidence of a witness' "good character," "bad character" or "never being in trouble before" is inadmissible. *See id.*

2. Rule 405(a) Methods of Proving Character Under the Mercy Rule

Moreover, even when the criminal defendant and/or the prosecution can present evidence under Rule 404(a)(2)(A)-(C), they are constrained by Federal Rule of Evidence 405(a), which provides that

When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

Thus, pursuant to Rule 405(a), when the prosecution or defense calls a character witness, on *direct* examination, the character witness can

only offer (1) opinion or (2) reputation⁴ testimony. So, for instance, a defendant in an assault trial could call a neighbor to testify, “I’ve been the defendant’s neighbor for 5 years, and in my opinion he’s non-violent,” or “I’ve been the defendant’s neighbor for 5 years, and he has a reputation in the neighborhood for being non-violent.” In turn, the prosecution could then call a different neighbor to testify, “I’ve been the defendant’s neighbor for 5 years, and in my opinion he’s violent,” or “I’ve been the defendant’s neighbor for 5 years, and he has a reputation in the neighborhood for being violent.” But, on direct examination, the defense character witness could *not* testify concerning specific instances of non-violence by the defendant (*e.g.*, “He turned the other cheek when a neighbor punched him.”). *See, e.g., Biagas v. State*, 177 S.W.3d 161 (Tex.App.-Houston [1 Dist. 2005]) (finding that the trial court erred by allowing a defense character witness to testify that the defendant charged with theft never stole from him at work). And, on direct examination, the prosecution character witness could *not* testify concerning specific instances of violence by the defendant (*e.g.*, “He punched someone at the neighborhood barbeque.”). *See, e.g., United States v. Reese*, 568 F.2d 1246 (6th Cir. 1977) (finding that the district court erred by allowing the prosecution to call witnesses to testify that they committed prior burglaries at the behest of the defendant after the defendant called four witnesses to testify to his good reputation for truthfulness).

As Rule 405(a), notes, however, on *cross-examination* of a character witness, the court may allow a party to inquire into specific instances of conduct. Typically, this inquiry involves the party asking the character witness questions that begin with “Did you know...,” “Have you heard...,” or “Were you aware...” *See, e.g., Harrison v. State*, 241 S.W.3d 23, 25 (Tex.Crim.App. 2007). For example, if the defendant in a murder case calls a character witness to testify that he

⁴ While reputation is technically hearsay because it is the aggregation of the statements of several individuals offered to prove that truth of the matter asserted (*e.g.*, that the victim was violent), they are admissible under Federal Rule of Evidence 803(21), which provides an exception to the rule against hearsay for “[a] reputation among a person’s associates or in the community concerning the person’s character.”

believed the defendant to be a peaceful person, on cross-examination, the prosecution could ask that witness, “Did you know that the defendant committed an aggravated assault on September 19, 1991?” or “Did you know that defendant had assaulted his girlfriend...?” See *Allison v. State*, 1994 WL 699076 (Tex.App.-Hous [14 Dist. 1994]). Similarly, if the prosecution in a capital murder case called a character witness to testify that he believed the victim had a peaceful character, defense counsel could ask that witness on cross-examination whether she had heard about incidents in which the victim had acted aggressively. See *Mack v. State*, 928 S.W.2d 219 (Tex.App.-Austin 1996).

In either of the above cases, the purpose for asking the question is not to prove that the defendant or the alleged victim had a propensity to act violently and thus likely acted in conformity with that propensity at the time of the crime charged. Instead, with the regard to the specific instance in question,

If the witness has not heard of it, then an implication is created that he is not sufficiently qualified to attest to the defendant's reputation in the community. If the witness has heard about the specific act, and still testifies to the defendant's good reputation in the community, then an implication is created that the community itself is suspect, or that the witness is lying about the good reputation. *United States v. Kinsella*, 545 F.Supp.2d 158, 162 (D. Me. 2008).

Because such questions are directed toward probing the character witness' testimonial qualifications rather than proving the character of the defendant or the victim, the party cannot prove the specific instance through extrinsic evidence. In other words, the party asking the question is “stuck with whatever the witness responds.” *United States v. Merz*, 50 M.J. 850, 852 (N.M.Ct.Crim.App. 1999). So, for instance, in *Merz*, a defendant court-martialed for wrongful use of marijuana called a Chief as a character witness to testify that the defendant was “very honest” and that one of his “greatest qualities...is his honesty.” *Id.* The government then asked the Chief,

“Are you aware that, upon entrance into the military, he failed to disclose his involvement in a burglary, upon enlistment?” *Id.* When the Chief responded, “No, sir,” the government was left with that answer and could not use extrinsic evidence such as the defendant’s enlistment papers to prove the failure to disclose the burglary. *Id.*

Because questions regarding specific instances of conduct are admissible for one purpose, but inadmissible for another, they are “often accompanied by a limiting instruction.” Kinsella, 545 F.Supp.2d at 162. The essence of such a limiting instruction is that the jury can consider the question and answer as evidence going only to the extent of the witness’ knowledge of the defendant/victim and the weight to be given to his opinion of his character. *See Reel v. State*, 702 S.W.2d 809, 810 (Ark. 1986).

There are two limitations on cross-examination regarding specific instances of conduct under Rule 405(a): First, the party asking the question(s) must have a good faith factual basis to believe that the defendant or victim committed the instances of conduct. Second, the incidents must be relevant to the character traits of the defendant or victim that are testified to by the character witness. *United States v. Dillard*, 2009 WL 4034812 (5th Cir. 2009). For instance, in *Moore v. State*, 143 S.W.3d 305 (Tex.App.-Waco 2004), a defendant charged with retaliation against a public servant presented evidence of his good character, which then opened the door for the prosecution to have character witnesses testify that the public servant had a good reputation for honesty. In addressing the defendant’s appeal after his conviction, the Court of Appeals of Texas, Waco, found that the trial court properly allowed the defendant to ask these character witnesses about the public servant’s prior theft convictions, and properly did **not** allow him to ask them about the public servant’s DUI conviction because it was not relevant to his truthful character. *See id.*

A defendant can, however, present evidence of specific instances of violence by the alleged victim if he is claiming self-defense and not using the prior acts to prove the alleged victim’s propensity to act violently and likely conformity with that propensity at the time of the crime charged. If the defendant can present evidence that he was aware of the alleged victim’s prior acts of violence, he can admit

evidence of them, not to prove propensity/conformity, but for the purpose of showing his reasonable apprehension of immediate danger. Some courts refer to this use as “communicated character” because the defendant is aware of the victim’s violent tendencies and perceives a danger posed by the victim, regardless of whether the danger is real or not. *See, e.g., State v. Laferriere*, 945 A.2d 1235 (Me. 2008).

Hypothetical 4: Henry Hyunchoon Pak is charged with assault and emergency call interference. Before trial, defense counsel informed the judge that he planned to call Pak’s brother to testify that he believed Pak to be a nonviolent person. In response, the following exchange took place:

THE COURT: Character witnesses are usually not admissible in criminal cases. I don't know [what] the purpose of character witnesses would be; his character is not in dispute, is it? Do you [the prosecutor] intend to offer evidence as to his character?

THE PROSECUTOR: I have no character evidence, Judge.

THE COURT: So-

DEFENSE COUNSEL: That's fine then.

THE COURT: Those witnesses are not appropriate, all right? Step off and we'll get the jury up here....

Did the court act properly? *See State v. Pak*, 787 N.W.2d 623 (Minn.App. 2010); Colin Miller, *He’s Not Heavy, He’s My Brother: Court of Appeals of Minnesota Concludes Jurors Would Have Ignored Brother’s Character Testimony In Mercy Rule Appeal*, August 26, 2010;

<http://lawprofessors.typepad.com/evidenceprof/2010/08/mercy-rule--state-v-pak----nw2d-----2010-wl-3304693minnapp2010.html>.

Hypothetical 5: Christopher Seigfried is charged with first-degree murder based upon the death of Clarence Overhulser. Overhulser died after Seigfried swung a homemade cast iron sword, striking Overhulser on the side of the head with the handle part, cutting four

inches deep into the brain. Seigfried claims that he was acting in self-defense after Overhulser became upset about a game of pool they had played, threatened to kill him, and tackled him. In his defense, Seigfried seeks to have several witnesses testify about their unpleasant and violent prior experiences with Overhulser. Should this testimony be admitted? See Colin Miller, *The Character of the Matter, Take 2: Iowa Judge Precludes Specific Act Character Evidence in Murder Trial*, July 8, 2009; <http://lawprofessors.typepad.com/evidenceprof/2009/07/character-evidencehttpwwwthehawkeyecomstory-murder-analysis-070409.html>.

Hypothetical 6: Ralph Emeron Taken Alive II was charged with violating 18 U.S.C. § 111, which makes it unlawful to assault, resist, or impede a federal officer engaged in his official duties. BIA Officer Yellow alleged that Taken Alive engaged in such behavior when Yellow lawfully arrested him after a bar brawl. Taken Alive, however, contended that he resisted arrest only after Yellow slammed the door of his patrol car on his head and started hitting him with some unknown object. According to Taken Alive, this caused him to pull Yellow's jacket over his head and run toward his father's house. In support of his account of the arrest, Taken Alive sought to have two witnesses testify that Yellow had a reputation in the community for being "overly aggressive, quarrelsome, and violent." The district court precluded these witnesses from rendering this testimony. Did the district court act properly? See *United States v. Emeron Taken Alive*, 262 F.3d 711 (8th Cir. 2001). What if the defendant also wanted to present evidence of complaints regarding the officer's violent acts? See Colin Miller, *Character Of The Matter: 8th Circuit Case Reveals Rule 405(a) Limitation On Rule 404(a)(2) Evidence*, EvidenceProf Blog, July 19, 2011;

<http://lawprofessors.typepad.com/evidenceprof/2011/07/404a2-us-v-drapeau-f3d-2011-wl-2652317ca8-sd2011.html>.

Hypothetical 7: Samuel and Marilyn Manfredi are charged with tax evasion and related crimes, and Samuel is charged with filing false tax returns on behalf of his business, Aquarian & Associates. Before trial, the prosecution files a motion *in limine* seeking to preclude the

defendants from calling character witnesses to offer opinion testimony concerning the defendants' "honesty, truthfulness, integrity, and generosity." Should the court grant the motion *in limine*? See *United States v. Manfredi*, 2009 WL 3762966 (W.D.Pa. 2009).

Hypothetical 8: Albert Allen is charged with first-degree murder based upon the stabbing death of Devron Labat. Labat, Julie Yourell, and others had come to Allen's apartment to see Michelle Acquino, whom had had intimate relations with both Allen and Labat. Allen told Labat that Acquino was not there, and, in response, Labat threatened to kill Allen, and Yourell encouraged Labat to "smoke" Allen. Allen closed the door and called 911, but then told the dispatcher that he would handle the situation himself. Allen retrieved a knife, left his apartment, discovered Labat, and started chasing him. Labat eventually stopped running and turned to face Allen, who stabbed Labat to death. At trial, Allen claimed that he was acting in self-defense and presented no character evidence concerning Labat. The prosecution presented evidence that Allen had previously been convicted of assault and had previously assaulted Acquino with a machete. Was this evidence properly admitted? See *Allen v. State*, 945 P.2d 1233 (Alaska App. 1997). What if the prosecution wanted to have Labat's co-worker testify that Labat had a reputation in the workplace for being peaceable?

Hypothetical 9: Carl Miller was at the Aristocrat Club when he started talking to some young women. Terry Burleson, a bail bondsman and member of a motorcycle club called "The Humping People," walked up to Miller, said the women were with him, cursed at Miller, and invited him to go around the corner to "talk." That talk ended with Miller stabbing Burleson in the chest and head 3 or 4 times. Miller "leaned" into Burleson as he stabbed him, pushing the blade in almost three inches, piercing Burleson's aorta, vena, cava, and heart, causing his death. Burleson was unarmed and had a blood alcohol concentration of .14. Before the altercation, Miller had never before met Burleson and knew nothing about him. At trial, the court precludes Miller from presenting evidence of Burleson's prior conviction for misdemeanor assault. Did the court act properly? See *Ex Parte Miller*, 330 S.W.3d 610 (Tex.Crim.App. 2009); Colin Miller,

The Character of the Matter: Texas Opinion Reveals Limits in Character Evidence Criminal Defendants Can Present, EvidenceProf Blog, November 10, 2009;

<http://lawprofessors.typepad.com/evidenceprof/2009/11/404a2-txex-partemiller----sw3d-----2009-wl-3446468texcrimapp2009.html>.

Hypothetical 10: William L. Scholl, a superior court judge, is charged with filing false tax returns and structuring currency transactions in violation of 31 U.S.C. § 5324. According to the prosecution, Scholl engaged in several practices to hide his gambling winnings from the IRS such as making sub-\$10,000 deposits into a personal credit line that was his main account for gambling. At trial, Scholl calls Judge Lacagnina, a character witness who testified that Scholl's "integrity is beyond question." Thereafter, on cross-examination, the prosecutor asked Judge Lacagnina, "And in giving your testimony here today, had you heard that Judge Scholl, while serving as a judge, had accepted a \$10,000 loan from a defense attorney who was appearing before him at the time and had not disclosed to opposing counsel?" Defense counsel objects. Should the court sustain the objection? *See United States v. Scholl*, 166 F.3d 964 (9th Cir. 1999). If the objection is overruled, and the judge answers, "No," can the prosecution prove the loan through financial documents?

Hypothetical 11: Larry B. Daniels is charged with deliberate homicide after he kills his adult son, Buddy. At trial, the prosecution calls Daniels' 13 year-old son, Hagen, as a witness for the prosecution. After Hagen testified on direct, defense counsel cross-examined him, eliciting from Hagen that Buddy had a reputation for being a fighter. Thereafter, defense counsel sought to interrogate Hagen about specific instances of fighting by Hagen. The prosecution objected. Should the court allow the question? *See State v. Daniels*, 265 P.3d 623 (Mont. 2011); Colin Miller, *Crossed Up: Supreme Court Of Montana Finds Trial Court Properly Circumscribed Character Inquiry*, January 7, 2012;

<http://lawprofessors.typepad.com/evidenceprof/2012/01/like-its-federal-counterpartmontana-rule-of-evidence-405aprovides-that-in-all-cases-in-which-evidence-of-character-or-a.html>.

Hypothetical 12: Edmundo Blanco is charged with second-degree murder. The prosecution evidence showed that a prostitute purchased some cocaine from Blanco. When the prostitute learned that what she had been given by Blanco was not in fact cocaine, she tried to get her money back and enlisted the help of the victim, her protector or enforcer. The prostitute and the victim became involved in an argument with Blanco which escalated to fisticuffs. The prostitute testified that Blanco tried to land a blow on her, but was stopped by the victim, who then proceeded to batter Blanco with his fists. Blanco then returned 15-20 minutes later and shot the victim in the back in revenge. Blanco, however, claims that the shooting was in self-defense and presents evidence of the victim's bad character for violence. The prosecution then sought to adduce evidence to rebut this defense claim by showing that Blanco was also a violent man like his victim. Should the court admit this evidence? *See People v. Blanco*, 13 Cal.Rptr.2d 176 (Cal.App. 1 Dist. 1992).

Hypothetical 13: Duane Bedford performed some construction work for his neighbor, Sam Brown, until a dispute arose between the two men before the job was completed. That dispute escalated when Brown suspected that Bedford smashed his car windows. Brown went to confront Bedford, with that confrontation ending with Bedford shooting Brown three times, causing his death. Bedford subsequently went incognito, leading to a year-long search for him, an appearance on *America's Most Wanted*, and, ultimately, his apprehension.

Charged with first-degree murder, Bedford claimed self-defense and specifically that Brown was the first aggressor who came looking for him "with hardness of heart." In response to this defense, the Commonwealth called Sergeant Sean Butts as a character witness, leading to, *inter alia*, the following exchange:

[THE COMMONWEALTH]: Do you know
[Victim] to be a violent individual?

[SGT. BUTTS]: No.

[THE COMMONWEALTH]: [Why] do you
say "no"?

[SGT. BUTTS]: [Victim] was a very soft-spoken, meek person, very subdued. Never really raised his voice around me or in public. There have been some instances at his employment where he could have gotten upset or violent, but he didn't.

Was this testimony proper? *See Commonwealth v. Bedford*, 2012 WL 1950152 (Pa.Super. 2012); Colin Miller, *Be Aggressive, Take 2: Commonwealth v. Bedford, America's Most Wanted & Why Rule 404(a)(2)(C) Makes No Sense*, EvidenceProf Blog, June 14, 2012;

<http://lawprofessors.typepad.com/evidenceprof/2012/06/federal-rule-of-evidence-404a2cprovides-that-in-a-homicide-case-the-prosecutor-may-offer-evidence-of-the-alleged-vi.html>.

C. Federal Rule of Evidence 405(b) – Character “In Issue”

While Federal Rule of Evidence 405(a) limits parties to using opinion and reputation testimony to prove character on direct examination, Federal Rule of Evidence 405(b) provides that

When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

Rule of Evidence 405(b) thus continues the common law practice of allowing parties to prove character when it is “in issue,” meaning that it is an essential element of a charge, claim, or defense. And, as the language of the Rule makes clear, when character is “in issue,” it can be proven not only through opinion or reputation testimony but also through specific instances of conduct.

Rule 405(b) applies in a small universe of cases. The most typical Rule 405(b) cases involve issues such as defamation, negligent hiring, entrustment or supervision, and entrapment. *See* Colin Miller, *Impeachable Offenses?: Why Civil Parties in Quasi-Criminal Cases Should be Treated Like Criminal Defendants Under the Felony Impeachment Rule*, 36 PEPP. L. REV. 997, 1024 (2009).

In a defamation case, a politician might sue a newspaper for defamation, claiming that it published a false article stating that he was an adulterer. In response, the newspaper could claim the absolute defense of truth. In this case, the politician's character for adultery would be an essential element of the newspaper's truth defense because the newspaper could not prove its defense without proving that the politician was an adulterer. There would be no other way to prove the truth of the story. Accordingly, under Rule 405(b), the newspaper could present evidence of specific instances of adultery by the politician in addition to opinion and reputation testimony. *See, e.g., United States v. Manfredi*, 2009 WL 3762966 at *5 (W.D. Pa. 2009) (noting that Rule 405(b) applies in "a defamation case where the plaintiff's claim is that the defendant's defamatory statements harmed his reputation for good character").

Similarly, assume that an injured bus passenger sued a city for negligent hiring after a city bus driver got into an accident while driving drunk. If the passenger's claim was that the city was negligent in hiring the driver because of his history of DUIs, the driver's character for drunk driving would be an essential element of the passenger's claim. The passenger could not prove the city's negligence without proving the *reason* for that negligence: hiring a driver with a history of DUIs. For the same reason, if customers sued a store for negligent supervision after a security guard allegedly falsely imprisoned them, evidence of prior acts of job-related misconduct by the guard would be admissible to prove *why* the store was negligent in not firing or disciplining the guard. *See, e.g., Panas v. Harakis*, 529 A.2d 976, 989 (N.H. 1987) (finding that under Rule 405(b), customers claiming false imprisonment by a K-Mart guard could present evidence that the guard had previously represented himself as a police officer to a customer to prove negligent supervision).

Finally, if a defendant charged with a crime claims entrapment as a defense, the prosecution's response to this defense could be that the defendant was predisposed to commit the crime charged. The only way that the prosecution could prove this predisposition would be through presenting evidence of the defendant's prior, similar crimes, making evidence of those crimes admissible under Rule 405(b). *See,*

e.g., *United States v. Manzella*, 782 F.2d 533, 546 n.5 (1986). Conversely, despite some possible findings to the contrary, an alleged victim's character for violence is not an essential element of a defendant's self-defense claim. For instance, in *United States v. Gulley*, 526 F.3d 809 (5th Cir. 2008), the defendant was involved in a prison fight that ended after he stabbed the victim 11 times, with one of those stabs piercing the upper lobe of the victim's left lung and the pericardial sac or his aorta, causing his death. The defendant claimed self-defense and sought to present evidence of the alleged victim's prior violent acts pursuant to Rule 405(b). The district court, however, excluded this evidence, a decision that the Fifth Circuit affirmed, finding that the victim's "character was not an essential element of the self-defense in the 'strict sense' because a self defense claim may be proven regardless of whether the victim has a violent or passive character." In other words, the defendant could prove that the alleged victim was the initial aggressor in this case regardless of whether the alleged victim was generally a violent or peaceable person. As noted by the Court of Appeals of Alaska in *Allen v. State*, 945 P.2d 1233, 1240 (Alaska App. 1997),

The jury could adopt [the defendant]'s self-defense theory even if they concluded that [the victim] was not a characteristically violent man; that is, a characteristically peaceful person may yet be an aggressor. Similarly, the jury could acquit [the defendant] under a self-defense theory even if they concluded that [the victim] was characteristically given to violence; the defense of self-defense is available to all, even to characteristically violent people. By the same token, the jury could reject [the defendant]'s claim of self-defense and convict [the defendant] of murder even if they disbelieved the State's evidence of [the defendant]'s violent character and instead concluded that [the defendant] was, by nature, a peaceful man.

Hypothetical 14: Anthony Beckett is charged with intentionally and knowingly causing serious bodily injury to a child fourteen years of age or younger. At trial, Beckett raises an insanity defense. Beckett

seeks to prove his “character of insanity” through witnesses testifying about specific instances in which Beckett reported God talking to him, reported God writing to him in the snow, and reported or believed that a devil was after him. The trial court deems this evidence inadmissible. Did the court act properly? *See Beckett v. State*, 2012 WL 955358 (Tex.App.-Dallas 2012); Colin Miller, *March Madness: Court of Appeals of Texas Implies Insanity Defense Triggers Rule 405(b)*, March 22, 2012;

<http://lawprofessors.typepad.com/evidenceprof/2012/03/similar-to-its-federal-counterpart-texas-rule-of-evidence-405-provides-that-a-reputation-or-opinion-in-all-cases-in-which.html>.

Hypothetical 15: Deonte Reed is charged with conspiracy to interfere with commerce by robbery, conspiracy to possess cocaine with intent to distribute, possession of a firearm in furtherance of a drug trafficking crime, and aiding and abetting. Reed raises an entrapment defense, which, when properly raised, requires the prosecution to prove that the defendant was predisposed to commit the crime or that the defendant was not induced by government agents to commit the crime. In determining predisposition, the court considers five factors: (1) the character or reputation of the defendant, including any prior criminal record, (2) the party who made the initial suggestion, (3) whether profit was a motive, (4) evidence of reluctance by the defendant, and (5) the nature of the government’s inducement. At trial, can the prosecution present evidence of prior robberies committed by Reed? *See United States v. Reed*, 2011 WL 5869494 (9th Cir. 2011); *See* Colin Miller, *Entrapment: 9th Circuit Finds Character An Essential Element Of (Disproving) Entrapment Defense*, EvidenceProf Blog, December 23, 2011;

<http://lawprofessors.typepad.com/evidenceprof/2011/12/405b-us-v-reedslip-copy-2011-wl-5869494ca9-nev2011.html>.

Hypothetical 16: Francisco Mendoza-Prado is charged with conspiracy to possess with intent to distribute cocaine, conspiracy to distribute cocaine, and distribution of cocaine. Mendoza-Prado claims an entrapment defense, which the prosecution seeks to rebut through evidence of Mendoza-Prado’s prior convictions for theft,

extortion, and aiding a prison escape. Should the court deem evidence of these prior convictions admissible? *See United States v. Mendoza-Prado*, 314 F.3d 1099 (9th Cir. 2002).

Hypothetical 17: Harold Fish is completing a solo day-hike in the Coconino National Forest when he sees the victim with three unleashed dogs, two of which start barking and running at him at “full gallop.” In response, Fish drops his hiking stick, grabs his 10 millimeter Kimber semiautomatic handgun, and fires a “warning shot” into the ground. In response, the victim starts running toward Fish, his eyes crossed and looking crazy and enraged. Fish yells at the victim to stop or he would shoot, but the victim keeps running at Fish and “doing this weird punching thing.” When the victim is 5-8 feet away from Fish, Fish shoots him three times in the chest, killing him. Fish is charged with second-degree murder and claims self-defense. He seeks to have a witness testify that the witness previously confronted the victim about his dogs, resulting in the victim becoming irrationally aggressive and threatening, getting a wild look in his eyes, and thrashing the air. Should the court deem this testimony admissible? *See State v. Fish*, 213 P.3d 258 (Ariz.App. Div. 1 2009); Colin Miller, *The Character Of The Matter: Court Of Appeals Of Arizona Finds That Victim’s Violent Character Is Not An Essential Element Of A Self-Defense Claim*, July 7, 2009;

<http://lawprofessors.typepad.com/evidenceprof/2009/07/az-mercy-rulestate-v-fish---p3d-----2009-wl-1872146arizapp-div-12009.html>.

Hypothetical 18: Venus Longmire brings an action against Dr. Leon Howard and the Alabama State University, claiming, *inter alia*, that Dr. Howard attempted to rape her. In response, Dr. Howard files a defamation counterclaim against Longmire, claiming that she “defamed him by accusing him of having attempted to rape her.” In response, Longmire seeks to ask Dr. Howard during trial about other acts of sexual misconduct that Dr. Howard committed while he was employed by Alabama State. How should the court rule? *See Longmire v. Alabama State University*, 151 F.R.D. 414 (M.D.Ala. 1992).

IV. Character Evidence Motions

Some concise examples of motions connected to evidence sought to be admitted or excluded under the character evidence rules can be found at:

- *Dominguez v. Metropolitan Miami Dade County*, 2004 WL 2246537 (S.D.Fla. 2004) (Plaintiff's Answer to Defendant's Motion *in Limine* to Exclude Evidence of Other Acts and Incorporated Memorandum of Law) [Rule 405(b)];
- *Ryley v. The Sparks Law Firm, P.C.*, 2011 WL 4668151 (Ariz.Super. 2011) (Plaintiff's Motion *in Limine* #3 to Preclude Questions or Answers Relating to Character Trait of Honesty Which is Inadmissible in a Civil Case) [Rule 404(a)];
- *John v. Scott*, 2008 WL 7313457 (D.N.M. 2008) (Plaintiffs' Consolidated Response to City Defendants' Motion for Limine No. II....) [Rule 405(a)].