

Character Evidence: Ain't Nothing Special

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pub.testguru.com/character-evidence.pdf

Federal Rules of Evidence discussed in this document: 404, 405, 406, 412, 413, 414, 415, 608, 609, and 806.

Now comes the very confusing “character evidence” thing. I’m going to make it bloody easy for you, but you’ll have to be somewhat patient. Let’s start with a heaping helping of shock and awe. (If you have a heart condition, you might wish to stop reading at this point.)

Are you sitting down? Ahem... There’s nothing special about character evidence!

There certainly is such a thing as “character evidence” — i.e., evidence that someone *is* a certain way. What I mean to make clear, though, is that character evidence *per se* is not subject to any special treatment under the law. At the risk of becoming annoyingly repetitive, let me speak even more explicitly: The fact that you’re seeking to prove that someone *is* a certain way does not trigger any special rules of evidence law — i.e., you’re not limited to opinion/reputation; it doesn’t matter whether the bad thing the guy did was criminal; it doesn’t matter whether he was convicted; it doesn’t matter whether he was released from prison more than 10 years ago; it doesn’t matter whether it’s being offered in a civil or criminal case; you can offer whatever extrinsic evidence you want of particular instances of conduct (“This one time, at band camp...”). In short, character evidence is just like “knee evidence” or “coffee cup evidence” or “limping pirate evidence,” etc. There’s nothing special about it.

Of course, some writers on evidence law are likely to take issue with what I’ve just said. Their books will have the term “Character Evidence” in big, bold type (often preceded by an intimidating and important-looking Roman numeral), signifying the start of a new topic. The books will then assail you with highly complicated rules for how you may (and may not) prove character. These books will, finally, present what they refer to as “exceptions” to the character evidence rules — things

like “MIMIC” (motive, intent, lack of mistake, identity, common plan) or “where character is in issue” or whatever. If I may be blunt: this is crap!

What this whole “character evidence” thing is really about is propensity arguments.

If we’re making a propensity argument, then we find ourselves in a special domain of evidence law, which has specific and peculiar rules. But note: if we’re using character for any other — i.e., non-propensity — purpose, then there are no special rules that limit how we can prove character. (Read that last sentence again.)

What does “propensity argument” mean?

A propensity argument is an argument that uses a person’s character in order to show conduct in conformity therewith. It is an argument of the following form: Mr. Magoo *is* a certain way; therefore, Mr. Magoo *acted* that way at the time in question. Or, to rephrase it in slightly different terms: Mr. Magoo has such-and-such character; therefore, Mr. Magoo acted such-and-suchly at the time in question.

So...

If you’re making a propensity argument, then you must navigate the rules I’ll describe throughout the rest of this document.

However — and this is where many students (not to mention lawyers) get into trouble — if you’re using character to do anything other than make a propensity argument, exit this document right now! Do not pass “Go”! Do not collect \$200! Go away! Scram! None of the analysis that follows is applicable to your situation.

A Red Herring :: What about the widely discussed “exception” for cases where character is in issue?

This is a meaningless notion! Who gives a damn what kind of case we happen to be litigating! The question is simply what are we trying to accomplish with the character? If the character is being offered to show conduct in conformity therewith, then we're making a propensity argument. Otherwise, we're not — *scram!* (This mistaken notion presumably arises from an overbroad reading of FRE 405(b).)

Consider defamation actions, a *purported* illustration of the cases-where-character-is-in-issue shibboleth: A plaintiff in a defamation case seeks to prove the defendant's character for being a spreader of nasty rumors, so that the jury might infer that defendant actually did spread the nasty rumor that plaintiff tortures animals. This is clearly a propensity argument — and it doesn't matter one bit that it arises in a defamation case — because the character is being offered to show conduct in conformity therewith. In contrast, suppose defendant were seeking to prove that plaintiff has a long-standing reputation in the community as a torturer of animals. This would not be a propensity argument, because it's not being offered to show that plaintiff has actually tortured animals, but rather to show that the plaintiff's reputation for doing so was crap even before defendant opened his mouth — i.e., plaintiff had a pre-existing injury.

Consider another *purported* illustration: A plaintiff in a **negligent entrustment** action seeks to prove the defendant's character for being careless in the hiring of truck drivers, so that the jury might infer that defendant actually did fail to use reasonable care in the hiring of the particular driver who crashed into plaintiff. This is clearly a propensity argument — and it doesn't matter one bit that it arises in a negligent entrustment case — because the character is being offered to show conduct in conformity therewith. In contrast, suppose plaintiff were seeking to prove driver's character for careless driving at the time defendant hired him. This would not be a propensity argument, because it's not being offered to show that the driver drove poorly, but rather to show that defendant was a moron for handing said driver the keys to the gravel hauler. Cool?

Another Red Herring :: What about MIMIC?

Another meaningless notion! If you're grappling with the so-called MIMIC “exceptions,” you might want to check out your servant's thoughts at <http://pub.testguru.com/so-called-mimic-exceptions.pdf>. That document will encourage you to see MIMIC as nothing more than particular situations in which the proffered evidence has a powerful non-propensity usefulness. The key term there is “non-propensity.” Is it any wonder that the propensity rules don't apply? Come on people! These aren't “exceptions” to the rules. They are situations in which the rules simply would not apply. *Scram!* (This MIMIC fetish presumably arises from (mis)reading FRE 404(b)'s “[i]t may, however, be admissible for other purposes, such as proof of motive, opportunity, intent...” language as enumerating an exhaustive list of discrete other purposes, rather than as merely providing some examples of same.)

A Different Kettle of Fish :: Note that habit evidence is an altogether different beast.

Not meaningless, just different. We're not offering evidence that Bob always wears his seatbelt in order to prove that Bob is a careful guy (or even that Bob's *the kind of guy who wears his seatbelt*), from which the jury might infer conduct in conformity therewith. No! Rather, we're just trying to prove that the discrete, specific, recurring ritual of buckling up is something that Bob does every damn time he gets into a car — that is, habitually — and, therefore, the jury should conclude that he probably did it this time too. If you're making a habit argument, exit this document — i.e., *scram!* (See FRE 406.)

The moral of these fish tales...

If the argument you're making is actually, really, truly a propensity argument, then proceed with this document.

Otherwise, get the hell out of here! Seriously. No disrespect intended (I'm just trying to protect you from your own befuddlement).

You're still here?

So you're actually offering evidence of somebody's character in order to prove that he acted in conformity with that character at the time in question. Is your evidence going to be admitted? In answering this question, **your analysis should track the following roadmap** (and don't freak, as my wacky terminology will be fully explained *infra*):

Step (1) Are we even permitted to make a propensity argument here?

(a) "Indoor" propensity arguments are allowed in any case (civil or criminal) against any witness.

(b) "Outdoor" propensity arguments are never allowed in a civil case. Nor are they allowed in a criminal case unless the defendant "opens the door."

If (and only if) the answer to Step (1) is "yes," then...

Step (2) By what means are we permitted to prove the character?

- Opinion evidence
 - Reputation evidence
 - Ain't no more ways*
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Step (1) Are we even permitted to make a propensity argument here?

In answering this question, it is useful to distinguish two categories of propensity argument and then provide separate answers for each category. Note that the terms "indoor" and "outdoor," as described below, are my own idiosyncratic coinage. Although they provide an excellent way to get your head around the material, you'd be well advised to avoid writing them on any exam — for your grader probably won't know what the hell you're talking about (unless your grader happens to be one of my former students).

(a) "Indoor" propensity arguments FRE 608(a)

I use the term "indoor" to refer to the inner-goings-on of this trial. Indoor propensity arguments seek to prove the conduct of a witness on the stand *in this trial* based on his character for being a liar (or a truth teller). **There are only two indoor propensity arguments in the universe** (and, actually, they are just the flip sides of a single coin).

The impeaching indoor propensity argument: "Witness W, who testified on the stand in this trial, has a bad reputation for honesty/veracity/truthfulness; therefore, the finder-of-fact shouldn't believe his testimony."

The bolstering indoor propensity argument: "No, no, no! Witness W, who testified on the stand in this trial, has a good reputation for honesty/veracity/truthfulness; therefore, the finder-of-fact should believe his testimony."

Answer for (a): Yes! "Indoor" propensity arguments are permitted against any witness in any case (civil or criminal). And, once a witness's character for honesty has been attacked, it's only fair to permit the bolstering counter-argument.

Note: Everything we learn concerning "indoor" propensity arguments also applies to attacking the character for veracity of a hearsay declarant (and of *certain* party-opponent admission makers). (See FRE 806.)

Note: Some bar exam preparation materials have suggested that there's a meaningful difference between "veracity" and "honesty" (or was it "truthfulness"?), and that different rules apply to each. Rubbish! All of these terms mean the same thing — to wit, are you honest or are you a freakin' liar. Simple.

(b) “Outdoor” propensity arguments FRE 404(a)

I use the term “outdoor” to refer to conduct that is extrinsic to this trial — i.e., anything other than the conduct of a witness while testifying on the stand in this trial. Observe that, **if we’re dealing with any propensity argument that doesn’t fall within the “indoor” domain (as defined above), then — ipso facto — it’s an outdoor propensity argument.** There are as many outdoor propensity arguments as you might care to imagine. Here are a few examples:

- “Elvis has a bad character for violence; therefore, Elvis committed the aggravated assault.”
- “Fred has a bad character for exercising care while driving; therefore, Fred acted negligently when he crashed into the plaintiff.”
- “George has a good character for exercising care while driving; therefore, George didn’t act negligently when he crashed into the plaintiff.”
- “Hagar has a bad character for veracity/honesty/truthfulness; therefore, Hagar lied to those senior citizens at the nursing home about his having legal title to a certain bridge over the East River.” This propensity argument is now being offered against Hagar in his prosecution for fraud. You see how the conduct (Hagar’s lie) is external to this trial; it’s behavior out in the world. The fact that the conduct happens to relate to honesty/dishonesty doesn’t change this fact.
- “Izzy has a bad character for veracity/honesty/truthfulness; therefore, Izzy lied on the stand [in that other trial].” This propensity argument is now being offered against Izzy in his prosecution for perjury. You see, *that other trial* is extrinsic to *this current trial*. From the perspective of this trial, Izzy’s conduct in that other trial is essentially conduct out in the world — that is, “outdoor” — even though the conduct involved lying while testifying on the stand. The “stand” in question was a stand in a different proceeding. Capiche?

Answer for (b): Generally, no! “Outdoor” propensity arguments are *never* allowed in a civil case. Nor are they allowed in a criminal case, *unless* the defendant “opens the door,” which he can do in three ways: (i) by offering his own good, relevant character; (ii) by attacking a relevant character trait of the victim; or (iii) by arguing

self-defense in a homicide case (which operates as an implicit attack on the victim’s character for peacefulness).

The Pause that Refreshes :: How can we make sense of what we’ve seen in Step (1)?

Before proceeding to Step (2) of our analysis, we might wish to pause and consider why the law does what it does here (rather than just blindly attempting to memorize a bunch of seemingly incoherent rules). **I’d say that the organizing principle is one of hostility to propensity arguments:** our legal system is supposed to judge people based on what they’ve actually done, not on who they are. You might be the most gentle, peaceful, non-violent, Gandhi-esque guy since, well, Gandhi; but, if on the Thursday night in question you — most uncharacteristically — pistol-whipped a nun, you’re guilty of aggravated assault. Just because Jeffrey Daumer is a creepy, serial-killer guy doesn’t mean that he committed the particular murder at issue in this particular case. Etc.

“Wait, wait!” you’re saying, **“But why, then, does the law permit propensity arguments to be made at all?** You just said that ‘indoor’ propensity arguments are routinely cool, and ‘outdoor’ propensity arguments are cool when the defendant opens the door. What gives? How hostile can the law possibly be to propensity arguments?” Well, the law is pretty hostile, but not insurmountably so. Some propensity arguments are *tolerated* (and you should think of it that way).

Indoor propensity arguments are tolerated because they are not substantive evidence, but rather they just turn down — or, in the bolstering case, up — the volume on some testimony that’s already in the record. No one will be found guilty (or not guilty) or liable (or not liable) due to the substantive force of any indoor propensity argument, for such arguments have no substantive force whatsoever. Obviously, I don’t mean to suggest that impeaching a witness can’t be extremely important, even outcome determinative. But its importance, its effect, is *indirect*. The fact that my alibi witness is shown to be a liar doesn’t substantively lead to my being convicted (even though, if the jury were to believe his testimony, they’d conclude that I was fishing in upstate Minnesota at the time the bank was being robbed in Los Angeles). Does this make sense?

As to letting the criminal defendant open the door, the law recognizes that the criminal defendant has his back against the wall — he's facing prison (and the prospect of getting raped on a weekly basis for the next several years) or execution. We're willing to sacrifice the purity of our analysis in the interest of **the competing virtue of mercy**. If the criminal defendant believes that his best shot at an acquittal is to play the "character card," we'd be bastards not to let him do so. This explains door openers (i) and (ii).

As to door opener (iii), however, you'll note that it does the criminal defendant no good whatsoever. He would be happy enough to introduce evidence of self-defense ("Bob came at me with a knife, so I just reacted...") without thereby opening the door for the prosecutor to bring in evidence of Bob's peaceful nature. Our tolerating propensity arguments in this situation cannot therefore be explained as an act of mercy toward the defendant. **But it can be explained as giving the dead guy his say.** After all, the victim in a homicide case is, by definition, dead and so cannot offer an alternative version of the events. (Just sitting here, I can think of at least a few other places in our legal system where this rationale seems to crop up: In the hearsay exception for statement made under belief of impending death, notice that the exception does not apply in non-homicide prosecutions; therefore, although we'd prefer not to let in hearsay in a criminal case, where the defendant is charged with (categorically) making it impossible for declarant to come into court and testify, we'll allow his dying words to come in on his behalf. (This is somehow reminiscent of the joke about the guy charged with murdering his parents who pleads for leniency on the grounds that he's an orphan.) Another obvious example of the law's concern for a decedent's inability to offer an alternative version of events is found in dead man's statutes. Can you think of any others? Do you even want to try? I thought not.)

As long as we're taking a break from our analysis, let's talk about SEX!

Achtung! Please note that **everything we've said (or will say) about outdoor propensity arguments has no applicability in sex-related proceedings** — e.g., rape, child molestation, sexual harassment, etc. The FRE has a set of unique rules for those types of cases, which turn all of our instincts about propensity arguments on their head (**see FRE 412–415**). The FRE apparently subscribes to the notion that sex stuff is different, that in this context you basically are quite likely to act out your characterological inclinations. Remember Bill Clinton's "perjury trap," with the questions about a certain White House intern? Why were such questions even remotely allowed in a case concerning allegations of harassment of a different woman that occurred back in Arkansas years before? The policy can be summarized as follows: once a skank, always a skank. (I wonder if the Supreme Court still thinks it was a good idea to allow civil suits against a sitting president?) We see the same cultural consensus in the fairly ubiquitous sex-offender registries: we're afraid that that child molester will strike again, based on the fact that he struck before. Perhaps we should also have murderer registries — wouldn't you want to know whether the guy who moves in next door strangled a few of his neighbors some years back? What about an armed robber registry? No. Only sex. Sex is somehow different. Whatever.

And now, let's resume our analysis ...❖

Step (2) By what means are we permitted to prove character? FRE 405(a), FRE 608(a)

The answer to this question is extremely simple. **There are only two permissible ways to prove character (within the context of a propensity argument!):**

- **opinion evidence** The witness offers his own opinion as to the dude's character — e.g., “Fred's been a close, personal friend of mine for 20 years, and in my opinion he's a freakin' liar” (great friend, huh?).
- **reputation evidence** The witness testifies to the dude's reputation in the community — e.g., “I don't know Gus personally. But I've lived in the neighborhood for 12 years, and everybody says that Gus is extremely sadistic.”

Ain't no more ways!* But see FRE 609, discussed *infra*.

Maybe you're saying, “But I thought you could inquire into specific instances of conduct on cross examination?” (See FRE 405(a) and FRE 608(b).) Well, yes, you can. But in doing so you're not (really) proving character; rather, you're (ostensibly) merely testing the witness's knowledge/judgment. Of course, the jury will get to hear your question — and, although they should consider it only as it bears on the witness's credibility, they may (impermissibly, though rather predictably) consider it as substantive evidence of the dude's character.

Consider the following example: Defendant, charged with murder, calls his favorite professor from back in law school as a character witness. The professor testifies that “I've known Herman here for going on 10 years now. I was sort of a mentor to him back in the day, and we've stayed very close over the years. That is to say, I know him quite well. And, in my opinion, he's a gentle, peaceful guy.” On cross, the prosecutor can ask (assuming that there's some plausible basis for the question — the law won't let him drop utterly fictional bombs within earshot of the jury): “But Professor! Surely, you must have heard about the incident in which the defendant pistol-whipped the Managing Editor of the Law Review during an argument over Blue Book form?” Aha, a specific instance of conduct! The question is proper. Theoretically, the question is not seeking to prove that defendant is violent, or even that he administered said pistol-whipping. Rather, it's seeking to test the witness's expertise as to defendant's character.

If the witness testifies that he hadn't heard about the incident, then perhaps the jury will conclude that the witness doesn't really know much about extremely salient episodes from the defendant's life. Therefore, the jury may decide not to give the witness's testimony much weight.

Suppose, though, that the witness testifies that he had heard about the incident but that he regards it as anomalous, and insists that “on balance, looking at the totality of the circumstances, my opinion remains that Herman is peaceful — I mean, come on, it was an isolated pistol-whipping, a youthful indiscretion.” In that case, the jury might well conclude that this professor's judgment (as opposed to his knowledge of the facts) is crap, and that therefore his opinion ain't worth much.

Here's the kicker, though: **Whatever this witness says in response to the question is the end of the inquiry.** The pistol-whipping cannot be proved by any “extrinsic evidence” — that is, any means other than posing the question to this witness on cross. If you don't like the witness's answer, you can repeat the question (and even preface it with something like “I remind you, sir, of the penalties for perjury in this jurisdiction...”). But no matter what this witness says in reply, that's the end of it. Drop it. What if the prosecutor has a video tape of the pistol-whipping? What if the video even shows this witness egging Herman on to “hit him again”? Doesn't matter. Not in this case. By all means, if the statute of limitations hasn't run, prosecute Herman (and the professor as well, as an accomplice) for the pistol-whipping. But *this case* is a prosecution of Herman for a murder totally unrelated to that event.

You might ask why the law nips the pistol-whipping inquiry in the bud. I mean, damn, the prosecutor's got a freakin' video of the beating! Recall that the law isn't too fond of propensity arguments to begin with — we merely *tolerate* them. In that spirit, we certainly don't want to have an entire mini-trial on the peripheral question of whether Herman pistol-whipped a guy back in law school. Think about it: We'd need witnesses, authentication of the video tape, maybe the Managing Editor's hospital records, etc. Maybe Herman would bring in receipts to prove that on the day of the alleged pistol-whipping, he was out in L.A. interviewing with a law firm. The prosecution might call a documents expert to try and show that these receipts are fakes. Etc. Etc. Etc. We're

now into next week. And for what? To establish Herman's general propensity for violence, so that the jury might infer that he committed the murder at issue in this case? Please.

And it would even get worse: That documents expert, being a witness, would be an appropriate target for an indoor propensity attack. Herman's lawyer might call that expert's (visibly pregnant) former girlfriend to testify that "he said that he'd had a vasectomy, which wound up not being exactly the truth!" Of course, this girlfriend is herself a witness, and so the prosecutor might call the manager of the Burger King where the girlfriend worked 8 years ago to testify that "she lied about having experience as a fry cook." Oy! We're litigating sideways.

***Well, there is *one* other way...**

See FRE 609, which you should think of as nothing more than an exception to the by-opinion-and-reputation-evidence-only rule. Please note that this "exception" applies only in the indoor-propensity context, *not* in the outdoor-propensity context. And note, too, that FRE 609 doesn't apply at all if we're seeking to prove the conviction for any purpose other than an indoor-propensity slam on the witness. FRE 609 is nicely broken down here [<http://pub.testguru.com/fre-609.pdf>].