

## **11 Rules of Substantive Character Evidence, Similar Acts, and Habit**

*Evidence: The Objection Method*, by Prater, Capra, Saltzburg, and Arguello

### **Rule 1: The Circumstantial Use of Character Evidence is Not Permitted in a Civil Case.**

- A. Serious risks of prejudice, confusion, unfair surprise, and delay
- B. Allowed in Criminal cases under the “mercury rule” which permits a criminal defendant to introduce pertinent character traits of the defendant and the victim because defendant, whose liberty is at stake, may need a counterweight against the government’s resources.

### **Rule 2: When Character is in Issue in a Civil Case, Evidence of the Pertinent Character Trait is Admissible and May Be Proven by Reputation, Opinion, and Specific Instances of Conduct.**

- A. To constitute an essential element of a claim or charge, it must alter the rights and liabilities of the parties under the substantive law, e.g., competency of a driver in an action for negligent entrustment of a motor vehicle to an incompetent driver.

### **Rule 3: In a Criminal Case, the Prosecution May Not Offer Character Evidence Concerning the Defendant in Its Case in Chief.**

- A. Exception if admitted for a proper purpose, e.g., an alias, which although prejudicial, is necessary to lay foundation for intercepted phone conversations.

### **Rule 4: In a Criminal Case, Character Evidence of a Pertinent Trait of the Defendant Is Admissible if Offered by the Defendant, after which the State May Offer Rebuttal Evidence. Proof May be Made Only by Reputation and Opinion (Not Specific Acts).**

- A. “Pertinent” is synonymous with “relevant.”
- B. Good moral character and being law abiding are pertinent traits in criminal actions.
- C. Honesty is a pertinent trait to crimes involving dishonest conduct, but not to other crimes, including drug possession.

### **Rule 5: In a Criminal Case, Character Evidence of a Pertinent Trait of a Victim Is Admissible if First Offered by the Defendant, After Which the State May Offer Rebuttal Evidence as to the Victim as Well as on the Same Trait of the Defendant. Proof may be Made Only by Reputation and Opinion.**

- A. Victim’s Character trait for aggressiveness is relevant in a homicide case if there is a viable self-defense claim.
- B. If the defendant offers evidence of the victim’s pertinent character trait, defendant runs the risk of opening the door to proof of the defendant’s character traits.

**Rule 6: In a Homicide Case, if the Defendant Offers Any Evidence that the Deceased was the First Aggressor, then the Prosecution May Offer Rebuttal Evidence of the Peacefulness of the Victim. Proof May Be Made Only by Reputation and Opinion.**

**Rule 7: In a Criminal Case, when Character Is an Essential Element of a Charge, Claim, or Defense, Proof May Be Made by Reputation, Opinion, and Specific Instances of Conduct.**

A. Rarely used.

**Rule 8: Any Character Witness May Be Cross-Examined Concerning that Witness's Knowledge of Specific Instances of Pertinent Bad Acts Committed by the Person Whose Character that Witness Has Endorsed; the Cross-Examiner Must Have Good Faith Proof That the Acts Occurred.**

A. Procedural safeguards apply:

1. Government must demonstrate a good faith factual basis for the incidents; and
2. Incidents inquired about must be relevant to the character traits at issue.

**Rule 9: Specific Instances of Conduct Are Admissible to Prove Intent, Motive, Plan, Design, or any Purpose Other than Character, Unless the Probative Value of the Evidence as to Its Not-for-character Purpose Is Substantially Outweighed by the Risk of Prejudice, Confusion, and Undue Delay.**

- A. Issue is whether the bad act is probative of intent, knowledge, motive, plan, design, etc.
- B. Prior bad act may be admissible even if defendant was acquitted.
- C. Mere arrest, however, without any showing of the underlying act or circumstances, not admissible.

**Rule 10: Habit – Evidence of Habit Is Admissible to Show that Conduct Conformed to Habit. Rule 406.**

- A. Issue is to distinguish between character and habit.
- B. Courts more liberally admit routine practices of an organization.

**Rule 11: The Rules on Character and Bad Act Evidence Are Applied Differently in Cases Involving Rape or Sexual Abuse – Evidence of the Victim's Prior Sexual Activity Is More Strictly Regulated, while Evidence of the Defendant's Prior Bad Acts is More Permissively Treated. Rule 412.**

- A. Has been held to apply to sexual harassment cases.
- B. Prior false rape accusations may be admissible.