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29 October 2004

Peter G. McCabe, Secretary  
Committee on Rules of Practice  
and Procedure  
Administrative Office of the  
United States Courts  
Washington, DC 20544


RE: Proposed Changes to Federal Rule of Evidence 404(a)

Dear Mr. McCabe:

I enclose my comments on the proposed amendment of Rule 404(a) to do away with character evidence in civil cases in United States Courts, save when character is "an essential element of a claim or defense." (R. 405(b)) In my opinion, the proposed changes will do more harm than good to the Federal Rules of Evidence. Further, if the changes are picked up thoughtlessly by any of the states currently following the Uniform Rules of Evidence, the state that does so is liable to have unintentionally created a rule that bars character evidence in civil actions where character evidence is routinely admitted, e.g., child custody cases.

My comments are in the form of an executive summary of my article on civil character evidence. I enclose a copy of the draft of the article for whatever use you may make of it.

Sincerely,

  
Thomas J. Reed  
Prof. of Law

TJR:tjr  
Encl:

**EXECUTIVE SUMMARY**  
**EVIDENCE OF VICE & VIRTUE**  
**ADMISSIBILITY OF CHARACTER EVIDENCE IN CIVIL ACTIONS**

**I. INTRODUCTION**

The U.S. Supreme Court's Rules Advisory Committee intends to amend Rule 404(a) to exclude admissibility of character evidence in all civil cases in all U.S. courts.<sup>1</sup> In the writer's opinion, doing away with character evidence in civil cases would do irreparable harm to the U.S. system of evidence. This essay re-examines the literary, philosophical, and scientific basis that shows that character trait evidence is relevant and reliable. It also examines the common law foundation for admitting character evidence in civil cases and the adverse affect that Rules 404, 405 and 406 have had in extending the common law rationale for admitting character trait evidence.

Federal case law on admissibility of character trait evidence in civil actions since 1975 is confusing, contradictory and not intelligible to ordinary mortals. The confusion begins with a set of rules about character trait evidence that are an exercise in cognitive dissonance. Rule 404(a)(1) makes evidence that an individual has a relevant character trait inadmissible to prove that the individual acted consistently with that character trait. The rule does permit the accused in a criminal prosecution to prove that the accused is a person of good character who should be acquitted. Rule 404(a)(2) allows the accused charged with a violent crime to prove that the victim possessed the character trait of violence to show the accused acted in self defense. The Government may rebut defense character trait evidence offered under Rules 404(a)(1) and (2)

with its own contradictory character trait evidence. The same rule permits an on the credibility of any witness by proof of bad character trait for truthfulness. Rule 404(a) contains no exception for admissibility of character trait evidence in civil cases.<sup>2</sup>

Rule 404(b) allows proof of similar acts evidence in civil and criminal cases to prove an intermediate issue such as motive intent, knowledge etc. The rule ignores the obvious fact that of similar acts evidence may also prove a bad character trait.<sup>3</sup> Rule 405(b) provides for admission of character trait evidence in civil and criminal cases when "it is an essential element of a claim or defense."<sup>4</sup> Rule 405(b) contradicts Rule 404(a)'s limitation on character trait evidence. Rule 406 admits evidence of a habit to prove that an actor acted in conformity with that habit.<sup>5</sup> Neither "habit" nor "character" are defined anywhere in the rules. Conceivably, evidence of specific acts that prove someone possesses a relevant character would be inadmissible under Rule 404(a) and under Rule 404(b) but admissible under Rule 405(b) if "essential to a claim or defense." Rule 404(a) and 405(a) have co-existed in cognitive dissonance since 1975. The same evidence of a character trait may be admitted as evidence of a "habit" under Rule 406, as if a bright line could be drawn between the possession of a "habit" and a "character trait."

Part Two examines the use of character traits and character in literature, philosophy and psychology. Fiction writers depend upon character traits to develop the story and the predictability of the protagonists' behavior within the story. They recognize character as a moral dimension of human personality and use the implied principle that human beings behave in predictable ways in accordance with long-standing moral predispositions in order to write

believable stories.<sup>6</sup>

Philosophers make use of character to explain how human beings develop vices and virtues. Character development by acquiring virtuous habits and getting rid of vicious habits has been the backbone of moral philosophy since Aristotle.<sup>7</sup> In turn, psychologists have developed empirically-based theories of personality development that support the reality of character traits and the predictability of human behavior based on knowledge of character traits. If literature, philosophy and science recognize the existence of and measurability of human character traits as predictors of future behavior, then there is a solid basis for permitting character trait evidence in the courts.<sup>8</sup>

Part Three reviews the common law basis for admitting character trait evidence in civil trials. The common law dealt with character trait evidence by examining its relevance, the method by which character traits were proved, and by balancing probative value against prejudice, confusion and waste of time. The courts allowed proof of a character trait by reputation in civil cases when a character trait was relevant to the matter to be decided. The courts also permitted proof of a character trait by specific instances of conduct under the "similar acts" doctrine to establish intermediate issues such as notice, knowledge or a plan or design. Character trait evidence was also admitted as habit and routine business practice evidence. Although the courts tried to make a distinction between habit and character trait evidence, they never established a bright line test for habit evidence.<sup>9</sup>

Part Four describes the development of Rules 404 through 406 before and after ratification by Congress in 1975. The 1942 Model Code of Evidence included the direct ancestors of Rules 404 through 406. The drafters of the 1942 Model Code were influenced by Prof. Julius Stone's two character evidence articles in the Harvard Law Review. The drafters gave little thought to character trait evidence in civil cases, concentrating on admissibility of such evidence in criminal prosecutions.<sup>10</sup>

Rules 404 through 406 provoked little comment or discussion by the Rules Advisory Committee and the Congressional legislative history on these rules is very sparse. Congress did put a smidgeon of legislative history in the record relating to the use of uncharged misconduct evidence in criminal cases. No one thought that Rules 404 through 406 would as troublesome as they proved to be since adoption. The addition of the three sex offender evidence rules in 1992-93 helped to confuse the situation by making a special exception to Rule 404(a) for evidence of sexual misconduct in civil cases.

Part Five is a review of Federal character trait case law since 1975. The character trait of honesty may or may not be admissible in fraud litigation to disprove a claim of fraud. The circuits are split on this. A civil RICO plaintiff may be able to prove "a pattern of racketeering activities" by proof of specific bad acts that show that pattern and incidentally show that the defendants had bad character traits. Character trait evidence relating to either the defendants or to the plaintiff in police and corrections officer brutality cases may or may not be admissible depending upon the circuit in which the plaintiff happens to bring suit. Character trait evidence in Civil Rights Act

cases involving race, age or sex discrimination and in sexual harassment litigation is not clearly admissible, despite the plaintiff's requirement to prove a pattern of prohibited conduct by defendant.<sup>11</sup>

The scholarly community is attracted to a handful of diversity of citizenship cases in which the courts have allowed specific instances of bad conduct character trait evidence to be admitted in civil cases under Rule 405(b). The diversity cases are accompanied by one or two civil rights cases that admitted character trait evidence to establish probable cause for extreme police behavior. The commentators conclude that evidence of a party's good or bad moral character trait should be excluded in civil actions, based on perceived misuse of character trait evidence. The diversity cases are not fairly representative of the kind of civil cases tried in Federal courts, and provoke discussion that misses the mark.<sup>12</sup>

Rules 405(b) and (404(b) are the primary sources of admission of character trait evidence in current Federal practice. Rule 405 ostensibly describes how to prove character trait evidence deemed admissible under Rule 404. However, Rule 405(b) apparently authorizes proof of a character trait by specific instances of similar conduct despite Rule 404(a). Rule 404(b) permits proof of intermediate issues by proof of specific instances of conduct even though those incidents also prove a character trait. Neither rule really faces up to the problem.<sup>13</sup>

Part Five is the author's recommendations. The Federal Rules should be re-written to separate character evidence in civil cases from character evidence in criminal cases. The

overdrafting necessary to make a "one-size fits all cases" evidence rule for civil and criminal trials leads to confusion. The rationale for using character trait evidence in criminal prosecutions is historically different from the rationale for the same evidence in civil trials.

### **PROPOSED AMENDED RULES 404(a)**

#### **Rule 404. Character Evidence Definitions**

(a) "Character" means the predisposition of a person to act or refuse to act under similar external conditions. Character is proved by proof of a character trait. "Character" includes habitual acts or omissions of a person.

(b) "Habit" is evidence of a character trait based on proof of unreflective repetitive acts or omissions of a person.<sup>14</sup>

\* \* \* \* \*

#### **Rule 406. Character Evidence in Civil Cases**

##### **(a) In General.**

(1) The pleadings, pretrial order, and any other pertinent motions or orders of the court govern the relevance of any character trait of any party or any other relevant person in a civil action;

(2) If a character trait is relevant to an issue under subsection (1), any party may offer evidence to prove or to disprove the character trait in its case in chief;

(3) Any party may rebut character evidence offered in another party's case in chief in its rebuttal case;

(4) Any party may prove some intermediate issue such as motive, guilty knowledge, intent, absence of mistake or accident, plan or design, or identity of the perpetrator in its case in chief by means of act of uncharged misconduct, although admission of uncharged misconduct may also lead to the inference that the relevant person was a person of bad moral character.

(5) Any party may impeach any witness by proof of that the witness has a character trait of dishonesty as provided for in Rules 607, 608 and 609.

##### **(b) Method of proof.**

When character evidence is admissible under subsection (a) it may be proved by opinion evidence from a lay person who has personal knowledge of the relevant person's behavior, by reputation, by expert opinion evidence or by proof of sufficient specific instances of conduct to establish the trait.

##### **(c) Admissibility subject to Rule 403**

This rule is subject to the balancing of probative value against prejudice to the opposition, waste of time and confusion of the issues specified in rule 403.

### **NOTES**

1. Proposed Revised Rule 404(a) would read as follows:

**(a) Character evidence generally.**— Evidence of a person's character or a trait of character is not

admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

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

**(2) Character of alleged victim.**— In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that alleged victim was the first aggressor. Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, PRELIMINARY DRAFT OF PROPOSED AMENDMENTS TO THE FEDERAL RULES OF BANKRUPTCY, CIVIL, AND CRIMINAL PROCEDURE, AND THE FEDERAL RULES OF EVIDENCE 180-81 (2004)

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

(1) Character of Accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same.

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

(3) Character of witness. Evidence of a pertinent trait of character of a witness is admissible as provided in Rules 607, 608 and 609. Fed. R. Evid. 404(a) (2003)

3. Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the



accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial. Fed. R. Evid. 404(b) (2003)

4. (b) Specific Instances of Conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim or defense, proof may also be made of specific instances of that person's conduct. Fed. R. Evid. 405(b) (2003)

5. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not, and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice. Fed. R. Evid. 406 (2003).

6. See text at notes 13 to 18.

7. See text at notes 19 to 33.

8. See text at notes 34 to 109.

9. See text at notes 109 to 137.

10. See text at notes 138 to 178.

11. See text at notes 139 to 230.

12. See text at notes 231 to 243.

13. See text after note 243.

14. Civil character evidence must be separated from criminal character evidence, where constitutional issues and a heavy burden of proof assignment may require different treatment. A suggested new Rule 405 for Character Evidence in Criminal Cases may look something like the following:

**Rule 405. Character Evidence in Criminal Cases**

**(a) In General.**

(1) The prosecution may not prove a relevant character trait of the defendant or any other person in its case in chief;

(2) The defendant may elect to prove the character of the defendant or any other person in its case

in chief, and

- (3) The prosecution may rebut defense character evidence in its rebuttal case.
- (4) The prosecution may prove some intermediate issue such as motive, guilty knowledge, intent, absence of mistake or accident, plan or design, or identity of the perpetrator in its case in chief by means of act of uncharged misconduct, although admission of uncharged misconduct may also lead to the inference that the relevant person was a person of bad moral character.
- (5) The prosecution or the defendant may impeach any witness by proof of that the witness has a character trait of dishonesty as provided for in Rules 607, 608 and 609.
- (6) The party against whom character evidence is offered under subsections (1) through (4) may offer character evidence in rebuttal.

**(b) Method of proof.**

When character evidence is admissible under subsection (a) it may be proved by opinion evidence from a lay person who has personal knowledge of the relevant person's behavior, by reputation, by expert opinion or by proof of sufficient specific instances of conduct to establish the trait

**(c) Admissibility subject to Rule 403**

This rule is subject to the balancing of probative value against prejudice to the opposition, waste of time and confusion of the issues specified in rule 403.