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- Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
- (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 a criminal case, 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 the alleged victim was the first aggressor;
 - (3) Character of witness - Evidence of the character of a witness, as provided in [rules 607, 608, and 609](#).
- (b) 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.
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- FRE 404(a)(1), (2) Evidence of character not admissible for purpose of proving action in conformity with character except:
 - In a criminal case only, evidence of a *pertinent* character trait is admissible:
 - Of the criminal defendant, but only if offered by: (i) the defendant; or (ii) the prosecution to rebut same.
 - Of the victim (subject to FRE 412), but only if offered by: (i) the defendant; or (ii) the prosecution to rebut same.
 - Of the criminal defendant as to a particular character trait the defendant has introduced as to the victim.
 - In a criminal homicide case only, evidence of the character trait of peacefulness of the victim, *but only* if offered by the prosecution to rebut a defense claim that the victim was the aggressor.
 - Can go into character of witnesses (whether parties or not), for impeachment purposes, but only as provided in FRE 607, 608, 609 (to be addressed later in class.)

3 4 5  **Specific Acts Evidence FRE 404(b)**

- Evidence of other crimes, wrongs, or acts not generally admissible, but may be offered to show:
 - Motive

- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of mistake or accident,
- In a criminal case, this evidence must be disclosed pre-trial (if requested by defendant), absent good cause shown.

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- Notes on 404(b)
- How much similarity is required?
 - Requires 403 balancing.
- Can gov't prove other crimes of which def. has already been acquitted?
 - Yes. Because only requires sufficient proof that would support a verdict.
- Is this fair?
 - Yes because only determines admissibility of evid., not standards for conviction.

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- Rule 405. Methods of Proving Character
- (a) Reputation or opinion.
 - In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.
- (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.
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- Prob. 5-A. Don and Vince get in fight in bar, Don charged with assault. Prosecution wants to call Coach Jones in its case-in-chief to testify that Don is an "aggressive" man, who is "prone to violence." Don's lawyer wants to call Pastor in defense case-in-chief to testify that Don is "peacably disposed" and "non-violent."
- Is testimony by Coach Jones and Pastor relevant?
 - Yes
- Does Coach Jones' testimony meet any of the exceptions of 404(a)?
 - No, because offered by prosecution.
- Does Pastor's testimony meet any exceptions of 404(a)?
 - Yes, because first offered by defense.
- Once defense calls Pastor, can prosecution then offer Coach Jones' testimony?
 - Yes.

- Why the distinction?
- If Don's lawyer offered testimony that Vince threw the first punch, can prosecutor then offer evidence that Vince is a passive person?
 - No, can only do so in a homicide case. FRE 404(a)(2).
 - However, rule in Texas allows same in a civil case as well, if civil case involves assaultive conduct in which defendant claims self-defense. TRE 404(a)(2).
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- If admitted, should the jury be instructed as to how it should weigh evidence of a defendant's "good" character? See Fifth Circuit Pattern Jury Instruction 1.09:
- Where a defendant has offered evidence of good general reputation for truth and veracity, or honesty and integrity, or as a law-abiding citizen, you should consider such evidence along with all the other evidence in the case.

Evidence of a defendant's reputation, inconsistent with those traits of character ordinarily involved in the commission of the crime charged, may give rise to a reasonable doubt, since you may think it improbable that a person of good character in respect to those traits would commit such a crime.

You will always bear in mind, however, that the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

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- Prob. 5-B. Same bar fight. This time, defendant Don's lawyer wants to offer testimony by a witness that the victim, Vince, is "belligerent" and "aggressive."
- Is this witness testimony of victim's character relevant to charges against Don?
 - Yes
- Does the testimony meet any of the exceptions of 404(a)(2)?
 - Yes, evidence of pertinent character of victim offered by criminal defendant (and not subject to rape shield rule 412).

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- Prob. 5-C. Same bar fight. If Coach Jones, Pastor, and witness are allowed to testify to character of Don and Vince, how could they do so?
 - By opinion, based on personal knowledge; or
 - By reputation gained from speaking with others in the community, depending on time period.
- Can the lawyer who called the witness then inquire into specific instances that would support the opinion or reputation?
 - No. Specifically prohibited by 405(a).
- Can the opponent then use specific instances that contradict the character trait in cross-examining the witness?
 - Yes. See 405(a).

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- Can character evidence be admitted in a civil case to prove conduct in conformity with character?
 - No, specifically eliminated in 2006 by rule amendment in FRE.
 - In Texas:

- only if the party offering the evidence is accused of conduct “involving moral turpitude.” TRE 404(a)(1)(B). Then, can be offered by that party, or by opponent to rebut same; or

- Evidence of character of victim for violence or assaultive conduct when offered on the issue of self-defense by the party accused of the assaultive conduct, or evidence of peaceable character to rebut same.

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- Prob. 5-E. Greta charged with shoplifting. As proof of her guilt on this occasion, security guard wants to testify that: (a) he had seen prior tapes from store showing Greta shoplifting; (b) Greta has a reputation as a known shoplifter; and (c) Greta has 4 prior shoplifting convictions. Is the testimony admissible?

- No. Fall squarely within FRE 404(a), and do not meet any exceptions of 404(a)(1), (2).

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- What of FRE 405(b), which allows evidence of character or a trait of character, by specific instances of prior conduct, when such character or trait is an “essential element of a charge, claim, or defense.” In what instances is character an “essential element” of a criminal charge?

- Is the rule the same in civil cases?

- No, specific instances for defamation, negligent entrustment, child custody, and damages in wrongful death case.

- Can a negligent entrustment defendant stipulate to liability if driver found negligent and avoid evidence of prior driving record at trial?

- Probably. But plead gross negligence to get around. Also, defense might move for bifurcated trial.

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- Prob. 5-F. Set up drug sale by girlfriend. Defendant walks away from sale, suspicious. Arrested with small amount of cocaine. Defense is that he had no intent to sell the cocaine, only to cheat the buyer. Does evidence of prior cocaine sales by defendant now come into evidence?

- Yes, clearly admissible under 404(b).

- What if defendant claims entrapment?

- Same answer.

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- Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

- (a) Evidence generally inadmissible.

- The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

- (1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

- (2) Evidence offered to prove any alleged victim's sexual predisposition.

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- Rule 412. Sex Offense Cases; Relevance of Alleged Victim's Past Sexual Behavior or Alleged Sexual Predisposition

- (b) Exceptions.
 - (1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:
 - (A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;
 - (B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and
 - (C) evidence the exclusion of which would violate the constitutional rights of the defendant.
 - (2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.
- (c) Procedure to determine admissibility.
 - (1) A party intending to offer evidence under subdivision (b) must --
 - (A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and
 - (B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.
 - (2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

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- Rape shield laws. Historical context, evid. of prior sexual involvement admissible on theory of probable consent on occasion in issue.
- FRE 412(a) Cannot admit evid. victim engaged in other sexual behavior, or to prove victim's sexual predisposition. Exceptions:
 - In criminal case, can offer evid of specific instances of sexual behavior by victim to show someone other than the accused source of semen, injury, or other physical evid.
 - Evid of specific instances of prior voluntary sexual contact with def to support claim of consent; and
 - Instances in which exclusion would violate constitutional rights of def.

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- Rule 413. Evidence of Similar Crimes in Sexual Assault Cases
 - (a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.
 - (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule [415](#), "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code;
 - (2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;
 - (3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;
 - (4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or
 - (5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

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- Rule 414. Evidence of Similar Crimes in Child Molestation Cases
- (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
- (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
- (d) For purposes of this rule and Rule [415](#), "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
 - (1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;
 - (2) any conduct proscribed by chapter 110 of title 18, United States Code;
 - (3) contact between any part of the defendant's body or an object and the genitals or anus of a child;
 - (4) contact between the genitals or anus of the defendant and any part of the body of a child;
 - (5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or
 - (6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

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- Rule 415. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation
- (a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule [413](#) and Rule [414](#) of these rules.
- (b) A party who intends to offer evidence under this Rule shall disclose the evidence to the

party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

- (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

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- FRE 413-415. In civil or criminal sexual case, or child molestation case, evid. of def's prior similar sexual offenses are admissible for any purpose.
 - Prior similar sexual misconduct defined very broadly
 - Trumps Rule 404(b)
 - Strong presumption of admissibility
 - Still subject to balancing under Rule 403 (majority but not unanimous rule)

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FRE 406 Habit; Routine Practice

- A. Can be habit of a person or an organization
- B. Defined as regular response to particular circumstances
- C. Can be used to prove action in conformity with habit
- D. Dispenses with need for eyewitness
- E. Adequacy of sampling and uniformity of results are keys to determining whether it is habit or character evidence

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- FRE 407 Subsequent Remedial Measures
 - SRM not admissible to show negligence, product defect, or need for warning
 - However, this rule does not require exclusion if offered for another purpose, such as showing ownership, control, or feasibility of precautionary measures, *if controverted*, or for impeachment purposes.

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- *Caterpillar Tractor Co. v. Boyett*. Corpus Christi Ct. App. 1984. 674 S.W.2d 782. Caterpillar equipment brake failure case. Def. does not contest feasibility of suggested design change. Pl's expert takes a SRM design of Caterpillar, redacts Caterpillar insignia, and offers it as expert's safer alternative design. Def. objects pursuant to Rule 407. Court holds admissible, without discussing Rule 407 applicability.
- Can pl's expert do this? Maybe. Within court's discretion to exclude because it makes it impossible for defendant to effectively rebut and therefore destroys SRM rule.

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- In court experiments. Propensity-type evidence, but closely akin to character and habit evidence.
- *Norfolk & Western Ry. v. Henderson* Va. 1922. Train runs over little girl on track. Def. contends could not recognize child until too late to stop. Pl. does out-of-court experiment, having witnesses walk up the track to see how far away they can recognize the object was a child. Testify on clear day could recognize child at 1100 feet, and on cloudy day at 900 feet. Trial court admits, pl. wins. Affirmed.
 - Circumstances must have "substantial similarities." Problem here because testers knew child was there. "Where's Waldo"?
 - Is necessity of evidence a factor in determining admissibility?
 - How could jury judge by listening to train witnesses? What else would they say than that they could not recognize timely?

- What about proving how light it was? What do “foot candles of illumination” mean to a lay witness? How can you film a light level?
- Would a limiting instruction be appropriate? Yes probably.

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- *Howard v. Faberge, Inc.* Hou. App. 1984. 769 S.W.2d 644. Howard suffers burns due to splash on Brut poured on hands and chest. According to Howard, it ignited when he accidentally dropped a match into his waistband. Faberge contends the substance is not flammable once it evaporates, and it evaporates almost immediately.
- Faberge witness does several experiments in court, showing lack of flammability of product. In closing argument, defense counsel pulls out a bottle of something, pours it on his arm, and lights a match, saying: “God, if I am wrong, burn me.” Goes on. Jury finds for Faberge.
 - Reversed. Really decided on basis of improper argument.
 - However, inability to demonstrate similarities of in-court experiment would have made this particular demonstration excludable anyway. Illustrates importance of giving opponent opportunity to challenge dissimilarity between facts and experiment.

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- FRE 408. Settlement negotiations, or statements made in connection with same, not admissible.
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 - However, cannot exclude otherwise admissible evid. solely by using it during settlement negotiations.
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- Texas Mediation statute. Sec. 154.073, Texas Civil Practices & Remedies Code. Confidentiality of Communications in Dispute Resolution Procedures.
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 - (a) Except as provided by Subsections (c) and (d), a communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is confidential, is not subject to disclosure, and may not be used as evidence against the participant in any judicial or administrative proceeding.
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 - * * *
 -
 - (c) An oral communication or written material used in or made a part of an alternative dispute resolution procedure is admissible or discoverable if it is admissible or discoverable independent of the procedure.

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- *Ramada Dev. v. Rauch* 5th Cir. 1981 Ramada builds a motel for Rauch, who rejects it due to alleged defects. Ramada sues Rauch. Ramada hires engineer, to help with negotiation, who prepares the “Goldsmith Report,” that outlines problems. Trial court excludes and Ramada wins. Rauch appeals on exclusion of Goldsmith Report.
 - Affirmed. Ruling was based on uncontested evid. that report was prepared solely to facilitate settlement negotiations.
 - What if other purpose for offer? *E.g.*, pl. has his expert give a video interview, used at the mediation only, and objects to production on basis of Rule 408. What result?
 - Admissible under other rules as expert’s prior statements, expert’s file, *etc.* Cannot immunize from discovery solely by introducing at mediation.

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- Using fact of settlement to show bias of witness.
 - Inadmissible usually.
 - However, if witness is getting something back, "Mary Carter," admissible. If agreement requires "cooperation," admissible.

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- FRE 410 Pleas of guilty that were withdrawn, or nolo contendere pleas, not admissible.
- FRE 411 Liability insurance inadmissible, but admissible if offered for another purpose, such as proof of agency, ownership, or control, *or bias or prejudice of witness*.

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- FRE 409 Payment of medical or similar expenses not admissible to show liability.
- FRE 106 "Rule of Optional Completeness" Def. improperly suggests to jury that he is uninsured and will have to pay personally. Does plaintiff now get to introduce evid. of existence of liab. ins.?
 - Yes. Also known as "opening the door."

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- Prob. 5-D. Irwin's question to Gram about Don's beating his wife was proper. However special and peculiar wife beating might be, it amounts to violence inconsistent with a disposition toward peaceability.
- Questions to Gram about Don being fired for embezzlement or convicted of tax evasion are improper. The prosecturo can argue that they test how well Gram knows Don, but they are so damaging that courts usually restrict them to the subject area of the direct.
- The question about being arrested for brawling after a football game is proper because it relates to defendant's peaceability.