

What's Your Theory of Admissibility: Character Evidence, Habit, and Prior Conduct*

<i>Issues</i> ↓	Theories →	Character directly in issue	Character as circumstantial evidence of conduct as witness	Character as circumstantial evidence of conduct in case	Habit as circumstantial evidence of conduct in case	Prior conduct to show non-character purpose
<i>What person may be the subject of the evidence?</i>		Person whose character is directly in issue	Person who gives testimony, including own witness and out-of-court declarant	Defendant or victim in criminal case	Any person	Any person
<i>What aspects of character or conduct may be proved?</i>		Aspects relevant to character trait at issue	Character for truthfulness	Pertinent character trait of defendant or victim	Aspects relevant to issues in case	If for relevant purpose, not for character, not too dissimilar or remote in time, and passes balancing test
<i>What kinds of evidence may be used?</i>		Reputation, opinion, and specific acts	Convictions, reputation, lay opinion and, as permitted on cross, specific acts	Reputation, lay opinion and, on cross, specific acts	Opinion and specific acts	Specific acts, including uncharged conduct, but not fact of arrest or conviction
<i>Is extrinsic evidence permissible in addition to cross-examination?</i>		Yes	Yes, for convictions, reputation, lay opinion; no, for specific acts	Yes, for reputation and lay opinion; no, for specific acts	Yes	Yes
<i>Who can introduce evidence?</i>		Any party	Party may offer character for untruthfulness; opposing party then may offer character for truthfulness	Defendant may offer character of defendant or victim, state then may rebut as to <u>that</u> person	Any party	Any party
<i>Are the rules the same in civil and criminal cases?</i>		Yes	Yes	No, the above applies to criminal cases only	Yes	Yes
<i>Applicable rules</i>		405(a), (b)	607, 608, 609, 806	404(a), 405(a)	406	403, 404(b)

*Character comprises the actual qualities and characteristics of an individual. *Habit* is a regular or uniform response to a specific situation.

Evidence Rules on Character, Non-Character Purposes, and Habit

Rule 403. Exclusion of relevant evidence on grounds of prejudice, confusion, or waste of time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. (1983, c. 701, s. 1.)

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 his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion, except:

- (1) Character of accused. – Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the same;
- (2) Character of victim. – Evidence of a pertinent trait of character of the 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 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 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 that he acted 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, entrapment or accident. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult. (1983, c. 701, s. 1; 1994, Ex. Sess., c. 7, s. 3; 1995, c. 509, s. 7.)

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. Expert testimony on character or a trait of character is not admissible as circumstantial evidence of behavior.

(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 his conduct. (1983, c. 701, s. 1.)

Rule 406. Habit; routine practice.

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. (1983, c. 701, s. 1.)

Rule 607. Who may impeach.

The credibility of a witness may be attacked by any party, including the party calling him. (1983, c. 701, s. 1.)

Rule 608. Evidence of character and conduct of witness.

(a) Opinion and reputation evidence of character. – The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.

(b) Specific instances of conduct. – Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of his privilege against self-incrimination when examined with respect to matters which relate only to credibility. (1983, c. 701, s. 1.)

Rule 609. Impeachment by evidence of conviction of crime.

(a) General rule. – For the purpose of attacking the credibility of a witness, evidence that the witness has been convicted of a felony, or of a Class A1, Class 1, or Class 2 misdemeanor, shall be admitted if elicited from the witness or established by public record during cross-examination or thereafter.

(b) Time limit. – Evidence of a conviction under this rule is not admissible if a period of more than 10 years has elapsed since the date of the conviction or of the release of the witness from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect. However, evidence of a conviction more than 10 years old as calculated herein is not admissible unless the proponent gives to the adverse party sufficient advance written notice of intent to use such evidence to provide the adverse party with a fair opportunity to contest the use of such evidence.

(c) Effect of pardon. – Evidence of a conviction is not admissible under this rule if the conviction has been pardoned.

(d) Juvenile adjudications. – Evidence of juvenile adjudications is generally not admissible under this rule. The court may, however, in a criminal case allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

(e) Pendency of appeal. – The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible. (1983, c. 701, s. 1; 1999-79, s. 1.)

Rule 806. Attacking and supporting credibility of declarant.

When a hearsay statement has been admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with his hearsay statement, is not subject to any requirement that he may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine him on the statement as if under cross-examination. (1983, c. 701, s. 1.)

The following is a draft excerpt from Chapter 11: Evidence of the forthcoming School of Government manual on abuse, neglect, dependency, and termination of parental rights proceedings in North Carolina. The excerpt was written by School of Government faculty member John Rubin.

11.8 Character and Prior Conduct

A. Generally

Character comprises the “actual qualities and characteristics of an individual.” 1 BRANDIS & BROUN § 86, at 252. Thus, a person may have a violent character or a law-abiding character or a truthful one.

There are essentially three types of evidence that show a person’s character: specific acts by the person, lay opinion about the person, and the person’s reputation in the community. The admissibility of these different types of character evidence depends on the theory for which the evidence is offered. The theory of admissibility also controls other rules on character evidence, such as whether a party may elicit character evidence on cross-examination only or may offer extrinsic evidence as well. For a chart identifying the basic theories for offering character and noncharacter evidence and the rules governing the admissibility of such evidence for each theory, see John Rubin, *What’s Your Theory of Admissibility: Character Evidence, Prior Conduct, and Habit* (April 2010), [www. -----](http://www.-----).

The rules on character evidence have rarely been addressed in appellate decisions in juvenile proceedings, perhaps because evidence of a type similar to character evidence is admitted for noncharacter purposes. The discussion below first addresses the different theories of admissibility for character and noncharacter evidence and then discusses the theories of admissibility that apply in juvenile proceedings.

B. Theories of Admissibility of Character Evidence

One theory of admissibility of character evidence is that character is directly in issue. This theory applies in a narrow range of cases, “as in litigation to determine the custody of children when the fitness of one or both parents is in issue, or when the issue is the good moral character of an applicant for admission to the bar.” 1 BRANDIS & BROUN § 86, at 253. When character is directly at issue, specific acts, opinion, and reputation are admissible. *See* N.C. EVID. R. 405(a), (b). The evidence is still subject to general evidence requirements. Thus, the evidence must be relevant to the character issue to be decided—for example, marijuana use in high school may be considered irrelevant to fitness to practice law. *See generally* 1 BRANDIS & BROUN § 99, at 314. The witness also must be qualified to testify to the matter. To testify to specific acts, the witness must have personal knowledge of the acts. To give an opinion about a person’s character, the witness must know the person. To testify to reputation, the witness must know the person’s reputation in the community. Note that reputation testimony is a form

of hearsay (excepted from the hearsay rule by Evidence Rule 803(21)) because the witness is testifying to what others in the community think about the person. *See id.*, § 96. Opinion and reputation testimony also must be about matters of character, not factual information about a person's conduct. *See State v. Collins*, 345 N.C. 170, 173-74 (1996); *State v. Moreno*, 98 N.C. App. 642, 645-46 (1990) ("not using drugs" is character trait akin to "sobriety," but "not dealing in drugs" is evidence of a fact and not a character trait); *see also* JOHN RUBIN, *THE ENTRAPMENT DEFENSE IN NORTH CAROLINA* 70-71 & n.46 (2001) (discussing admissibility of opinion and reputation testimony in that context). Testimony on character is also subject to exclusion under Evidence Rule 403 if its probative value is substantially outweighed by the danger of prejudice, confusion of the issues, or considerations of undue delay or needless presentation of cumulative evidence. *See also* 1 MCCORMICK § 186, at 744 ("pungency and persuasiveness" of character evidence declines as one moves from the specific to the general).

A second theory of admissibility is when character evidence is offered to show a person's conduct on a particular occasion. Ordinarily, character is inadmissible to prove conduct. *See* N.C. EVID. R. 404(a) ("[e]vidence of a person's character or trait of his character is not admissible for the purpose of proving that he acted in conformity therewith on a particular occasion" except as otherwise provided). Narrow exceptions exist, however. In a criminal case the defendant may offer evidence of a pertinent trait of his or her own character or of the victim, and in rebuttal the State may offer evidence of that person's character. *See* N.C. EVID. R. 404(a)(1), (2); *see also State v. Wagoner*, 131 N.C. App. 285, 292-93 (1998) (evidence of defendant's general psychological makeup was found not to be pertinent character trait in prosecution for sexual assault). Proof of character in those instances is limited to lay opinion and reputation testimony, although on cross-examination inquiry is permitted into relevant specific instances of conduct. *See* N.C. EVID. R. 405(a). In either a civil or criminal case, a party also may offer evidence of a habit or routine practice of a person or organization to prove that the person or organization acted in conformity with that habit or practice. *See* N.C. EVID. R. 406.

A third theory of admissibility is when character evidence is offered on a witness's credibility. *See* N.C. EVID. R. 404(a)(3). This theory is also an exception to the general rule that character may not be offered to prove conduct. In this instance, character evidence bears on the witness's conduct on the stand—that is, whether the witness is telling the truth. Under this theory, evidence is limited to the witness's character for truthfulness or untruthfulness. *See* N.C. EVID. R. 405(a), 607, 608, 609.

Last, character evidence may be offered when a party opens the door through the testimony he or she offers. The admissibility of evidence under this theory depends on the circumstances of the case. *See, e.g., State v. Garner*, 330 N.C. 273, 287-90 (1991).

C. Is Character Directly in Issue?

It does not appear that any North Carolina cases have addressed the issue in juvenile cases, but character is likely directly at issue at disposition in either the abuse, neglect, and dependency or termination of parental rights phase of the case. 2 MYERS § 8.02[B], at 667 (so concluding). The

focus of the dispositional phase is the best interest of the child, which necessarily is bound up with a determination of the parent's fitness. *See In re Katharine*, 674 N.E.2d 256, 258 (Mass. App. Ct. 1997).

Myers posits that the character of the parent could also be considered at issue at adjudication because the petitioner is seeking to prove what happened in the past to protect the child in the future and evidence of parental character is relevant in this regard. 2 MYERS § 8.02[B], at 667. The argument is not an exact fit, however, with the issues in juvenile cases.

When the basis of alleged abuse is a discrete incident—for example, that a parent inflicted serious physical injury or committed a criminal act of a sexual nature—the issue to be decided is whether the incident occurred. In that kind of case, the rules prohibit evidence of the parent's character to show that the incident occurred (although evidence of the parent's past conduct may be admissible for a noncharacter purpose under Evidence Rule 404(b), discussed in D., below).

When the allegations involve a broader inquiry into a parent's conduct—for example, when the basis of alleged neglect is that the juvenile has not received proper care or supervision or lives in an environment injurious to the juvenile's welfare—the question is closer. *See In re Mark C.*, 8 Cal. Rptr. 2d 856, 861-62 (1992) (legislature intended to place character at issue “to some extent” when allegation is that caretaker's abuse of one child endangers another child). The North Carolina courts have permitted evidence of a parent's past conduct and behavior in a number of such cases, but they have not specifically analyzed whether the evidence is permissible because the parent's conduct is directly “at issue” or because the conduct is simply relevant evidence of the alleged abuse or neglect. *See supra* Chapter 6 (collecting cases showing evidence that may support finding of abuse or neglect). Whether evidence of prior conduct is permissible or impermissible may ultimately depend on the ground of abuse or neglect alleged.

D. Rule 404(b) and Prior Bad Acts

1. Applicability of rule. Evidence Rule 404(b) prohibits evidence of a person's crimes, wrongs, or acts when offered “to prove the character of a person in order to show that he acted in conformity therewith.” In other words, it prohibits evidence of a person's prior “bad” acts to show that a person had a propensity to commit the current act and therefore committed the act. Rule 404(b) permits evidence of a person's prior acts, however, if offered for a noncharacter purpose—that is, the prior act is offered for a purpose other than the person's propensity to commit the current act. In juvenile cases, Rule 404(b) comes into play primarily when the basis of abuse or neglect is a person's alleged commission of a particular act, such as the infliction of serious injury or commission of a sex act against a child, and the issue is whether a prior act by that person is admissible.

Rule 404(b) may not be the correct vehicle for analyzing prior act evidence when the alleged basis of abuse or neglect necessarily involves a broader inquiry into the parent's conduct. In

such cases, a parent's prior conduct may be admissible without regard to Rule 404(b), either because the prior acts themselves are relevant evidence of abuse or neglect or because the parent's character is directly in issue, as discussed in C., above. See *In re Deantye P.-B.*, 643 N.W.2d 194, 198-99 (Wis. App. 2002) ("other acts" evidence statute in Wisconsin [similar to North Carolina's Rule 404(b)] prevents fact finders from unnecessary exposure to character and propensity evidence in the context of determining whether a party committed an alleged act; that concern is not applicable when a fact finder must determine whether "there is a substantial likelihood" that a parent will not meet the conditions for return of his or her children, which necessarily involves consideration of a parent's relevant character traits and patterns of behavior); *In re Allred*, 122 N.C. App. 561, 563-65 (1996) (defendant argued that Rule 404(b) barred evidence of prior orders finding neglect of mother's other four children; court finds that evidence was relevant and admissible without determining whether evidence needed to satisfy other relevant purpose requirement of Rule 404(b)). If Rule 404(b) does apply, evidence of prior acts would be admissible if offered for a noncharacter purpose relevant to the alleged basis of abuse or neglect. See *In re Teyon D.*, 655 N.W.2d 752, 759-60 (Wis. App. 2002).

2. Basic requirements for admission of prior bad acts under Rule 404(b). Numerous criminal cases have addressed the applicability of Rule 404(b), and certain basic principles have emerged.

- Rule 404(b) is considered a rule of inclusion in North Carolina, allowing evidence of prior acts if offered for a relevant purpose and excluding prior acts if the only probative value of the evidence is to show the defendant's propensity to commit the alleged act. *State v. Coffey*, 326 N.C. 268, 278-79 (1990). This formulation means that the list of possible relevant purposes in Rule 404(b)—motive, identity, knowledge, and the like—is not exhaustive. The proponent may offer prior acts for other purposes as long as the purpose is relevant to an issue to be decided in the case and is not to show the defendant's character.
- The courts have set an outer limit on relevance, excluding prior acts that are too dissimilar or too remote in time in relation to the current act. See, e.g., *State v. Al-Bayyinah*, 356 N.C. 150, 154-55 (2002).
- In prosecutions for sexual offenses, the courts have been "markedly liberal" in finding evidence of prior sex acts to be for a relevant noncharacter purpose. *Coffey*, 326 N.C. at 279 (citations omitted). For a discussion of such cases, see Jeff Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/04 (Aug. 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0904.pdf.
- Prior act evidence may be excluded if its probative value is substantially outweighed by its prejudicial effect under Evidence Rule 403.

3. Form of Proof: Prior Criminal Proceedings. A proponent must show the commission of a prior act by admissible evidence. Thus, the proponent must offer live testimony by a person with personal knowledge of the acts or by hearsay within an exception, such as an

admission by a party-opponent. See 1 EDWARD J. IMWINKELRIED, COURTROOM CRIMINAL EVIDENCE § 903, at 370 (4th ed. 2005). The prior act need not have been the subject of a criminal proceeding. By its terms, Rule 404(b) applies to prior “crimes, wrongs, or acts.” When the prior act has been the subject of criminal proceedings, however, the cases have limited the evidence that may be offered about the proceedings.

A prior act may not be established by an arrest, indictment, or other charge. See 1 BRANDIS & BROUN § 98, at 309 (discussing bar in context of impeachment of witness). Nor may a prior act be shown by the bare fact of conviction. See *id.* § 94, at 272; *State v. Wilkerson*, 356 N.C. 418, *rev’g for reasons stated in dissent*, 148 N.C. App. 310 (2002). In both instances the proponent must prove the acts underlying the charge or conviction through admissible evidence and must show that the acts are relevant to an issue to be decided in the case and not for character.

The existence of a criminal conviction is admissible when the fact of the conviction itself is a ground for a finding of abuse. See G.S. 7B-101(1)d. (commission of violation of specified statutes, such as first-degree rape under G.S. 14-27.2, is abuse); G.S. 7B-1111(a)(1) (juvenile is deemed abused for purposes of termination of parental rights proceeding if court finds juvenile to be abused within meaning of G.S. 7B-101); *Curtis v. Curtis*, 104 N.C. App. 625, 628 (1991) (father’s conviction of first-degree sexual offense against minor child provided basis for finding of abuse).

An arrest or conviction also may be admissible if not offered to show commission of the act but for another purpose, such as why a parent was physically unable to care for a child. See *In re Teyon D*, 655 N.W.2d 752, 759-60 (Wis. App. 2002) (offense and sentences were admissible to show why mother had been unable to take responsibility for children).

For a further discussion of the admissibility of other proceedings, see *supra* § 11.7.

E. Rape Shield Law

Evidence Rule 412 modifies the customary rules on character evidence and evidence offered for a noncharacter purpose, barring evidence of opinion and reputation testimony on character and allowing specific act evidence in limited instances only. By its terms, the rule applies only to criminal cases, but a recent decision held that a trial court may (although apparently is not required to) apply the rule’s restrictions to juvenile cases. *In re K.W.*, 192 N.C. App. 646, 648-49 (2008). For a discussion of North Carolina’s rape shield law, see Jeff Welty, *Special Evidentiary Issues in Sexual Assault Cases: The Rape Shield Law and Evidence of Prior Sexual Misconduct by the Defendant*, ADMINISTRATION OF JUSTICE BULLETIN No. 2009/04 (Aug. 2009), www.sog.unc.edu/pubs/electronicversions/pdfs/aojb0904.pdf.