

alternative ways for

OPENING THE DOOR

**TO EVIDENCE OF “OTHER CONDUCT”
THAT WOULD OTHERWISE NOT BE ADMITTED**

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enhance public safety.”

**IN DEVELOPING YOUR CASE,
AS PLAINTIFF OR DEFENDANT,
IT IS IMPORTANT TO APPRECIATE
THE VARIOUS ALTERNATIVE WAYS
FOR OPENING THE DOOR TO
“OTHER CONDUCT” EVIDENCE TO
PROVE RELEVANT FACTS AT ISSUE.
BELOW IS A SYNOPSIS OF
STRATEGIC METHODS AND
INSIGHTS FOR PROFFERING
EVIDENCE OF CHARACTER FOR
A NON-PROPENSITY PURPOSE,
HABIT, SUBSEQUENT REMEDIAL
MEASURES AND PRIOR
OCCURRENCES/FAILURES.**

**A. BARRING CHARACTER EVIDENCE TO AVOID
UNDUE PREJUDICE**

The law of evidence bars the use of character evidence to draw conclusions on culpability presumed on a party's character traits. The two main reasons for exclusion are: (1) the propensity inference may lead to the wrong conclusion and (2) the evidence carries a significant risk of unfair prejudice.

The exclusionary rules for character evidence seek to “undo” what we do in everyday life. Human experience in everyday life teaches that reasonable inferences can be made from one's character traits to a person's likely conduct. For example, a belief that a person is dishonest, careless or hot-headed often causes one to presume that the person acted in a way consistent with one of those characteristics on a particular occasion.

CONTINUED

1. Opening The Door To Character Evidence: Non-Propensity Purposes

There are exceptions that open the door to character evidence. Federal Rule of Evidence 404(b) allows evidence of a person's past acts, crimes or wrongs to be used for any relevant, non-propensity purpose to show:

- Motive
- Opportunity
- Intent
- Preparation
- Plan
- Knowledge
- Identity
- Absence of Mistake/Accident

A court will determine whether a party's assertion of a non-character purpose for introducing relevant evidence about past acts is legitimate or just a ploy to bring unfavorable information to the jury's attention. Even if the evidence is prejudicial, Rule 404(b) allows "other conduct" evidence to go to the jury for a relevant, non-propensity purpose so long as the probative value of the evidence outweighs any unfair prejudice, under Rule 403. The teaching point is that the use of evidence of past conduct should be appreciated as a significant way to boost the merits of your civil case. Some case law examples:

In *Turley v. State Farm Mut. Auto. Ins. Co.*, 944 F.2d 669 (10th Cir. 1991), the co-insured owner/lessor of an allegedly stolen automobile sued the insurer for denying coverage for damages resulting from the theft. The trial court denied evidence of a prior conspiracy by the co-insureds to fake a "slip and fall." The lower court's ruling was overturned on the basis that the evidence should have been allowed under F.R.E. 404(b) to prove the co-insured's intent to defraud the insurer. The appellate court found that the case had all the signs of an insurance fraud and, therefore, evidence of a prior insurance fraud was relevant to prove "intent" and "absence of mistake" or "accident."

In *Glados, Inc. v. Reliance Ins. Co.*, 888 F.2d 1309 (11th Cir. 1987), a restaurant owner sued its insurer to collect on a fire insurance policy. The owner attempted to rebut an arson defense through evidence that the prior owner had a motive to commit arson because the prior owner, who had retained an interest in the restaurant as an insured party, also had an insured interest in two other restaurants that were similarly set afire. The court found that this evidence was relevant and admissible to show that the third party had a "motive" to set the fire.

2. Using Character Evidence When Character Is "In Issue"

Character "in issue" is another example where evidence of character is relevant and may be used without running into the propensity exclusion. Defamation and negligent entrustment cases fit into this category of cases. In a defamation case, for example, the issue may be whether defendant's statement calling plaintiff a thief was actually true. In such a situa-

tion, both parties may legitimately introduce evidence on that point without implicating the propensity inference. As such, evidence that plaintiff had a prior theft conviction for theft may be used to show that plaintiff is, in fact, a thief. Negligent hiring cases may also put character "in issue," where the governing law makes it negligent to hire a violent person to work as a security guard or similar position.

B. ANOTHER WAY TO OPEN THE DOOR TO USE PAST CONDUCT: HABIT EVIDENCE

Habit evidence of past conduct can be used as proof that someone acted in a certain manner on a particular occasion. Habit evidence is relevant to how a person acted on a particular occasion that does not directly involve a person's general character. Once past conduct is shown to be virtually automatic and repeated as "a habit," it can be used to show that a person acted in a way consistent with past behavior. The justification is that the problems with ordinary character evidence do not exist with habit evidence. For example, there is little ambiguity about proof that someone always fastens his or her seatbelt when he or she enters a car. On the other hand, there is significant ambiguity about a trait such as cautiousness or dishonesty. While habit evidence and character evidence are both ways to describe how a person acts, the difference lies in the way that the former can be easily described and compared to a particular disputed issue.

C. THE DOOR WIDENS: SUBSEQUENT REMEDIAL MEASURES

Subsequent remedial measures (repairs, changes in design, new warnings) generally may not be introduced as an admission of negligence. Public policy encourages corrective or remedial actions be taken to enhance public safety. A post-occurrence change is insufficiently probative of prior negligence, because later carefulness does not necessarily imply prior neglect.

Like Rule 404(b), such measures can be admissible for other purposes, i.e., proof of feasibility, ownerships, control or knowledge of a safer design, if controverted. But if the remedial measure is used to establish an undisputed point, i.e., where the defendant manufacturer admits that another design was feasible, then the subsequent remedial measure may not be admissible because the issue is undisputed.

D. FURTHER OPENING THE DOOR: PRIOR OCCURRENCES/FAILURES

Evidence of a party's prior conduct is irrelevant on the question of that party's conduct on the occasion in issue. However, evidence of prior occurrences may be admissible to establish notice of defect or dangerous condition, existence of defect or dangerous condition, causation, motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. The prior accidents must be "substantially similar" to the accident in question, but need not be identical. Likewise, an absence of prior accidents or incidents is admissible when the same product was used under conditions sub-

stantially similar to those in which the plaintiff used the product. Accordingly, your counsel should investigate other occurrences/failures by way of formal and informal discovery in order to be in a position to assert your case merits at key fact witness and expert depositions, and at the dispositive motion and trial stages.

E. PRACTICAL STRATEGIES

In view of the high probative value of “other conduct” evidence - whether character evidence for non-propensity purpose, habit evidence, subsequent remedial measures or other prior occurrences/failures - it is prudent for the entire litigation team (counsel, client representatives, adjusters and investigators) to consider a wide discovery net so that you can establish the necessary evidentiary foundations for use in dispositive motions and at trial. As such, there is great value in recognizing the potential existence of highly relevant documents and evidence from other claims/lawsuits, industry and government agency databases/sources and news searches. Once the appropriate permissible evidentiary hook is determined, there is the big opportunity for your litigation team to boost the strength of the case by using “other conduct” evidence that would otherwise not be admitted.

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