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**Character Evidence, Other Acts Evidence and  
Evidence of Habit or Routine Practice**  
**Provisions of the Wisconsin Rules of Evidence**

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**Character Evidence, Other Acts Evidence and  
Evidence of Habit or Routine Practice**  
**Provisions of the Wisconsin Rules of Evidence**

**I. Separate Concepts**

Character refers to a *personality trait*.

Habit involves habitual, repetitive, virtually automatic *behavior*.

Evidence of "other acts" relates to *specific* prior or subsequent *conduct*.

These are three separate and distinct types of circumstantial evidence. In ruling on the admissibility of evidence, the trial judge must separate the concepts and apply the law for whichever type of evidence is proffered.

**II. Character Evidence**

**A. Evidence of character to prove action consistent with character trait.**

1. **Definition.** Character evidence is evidence showing the general propensity of a person to conduct life in a particular way. The term "character" relates to a person's disposition, such as peacefulness, volatility, honesty or sobriety. This is distinguished from "habit" (discussed later in this outline), which is more explicit. A "habit" is specific conduct a person does regularly and repeatedly – almost without thinking.
2. **Purpose.** Attorneys may seek to present evidence of a person's character as circumstantial evidence to suggest that the person acted in accordance with such character on a particular occasion. For example, "my client certainly had the green light because she is a *cautious driver* and would never have entered the intersection were the light red".
3. **Admissibility: Not!** Rule 904.04(1) explicitly prohibits the use of character evidence "for the purpose of proving action in conformity therewith on a particular occasion". Such circumstantial evidence may be powerful and persuasive, but it is absolutely inadmissible. *Unless, of course, one of the exceptions applies.*



[Wisconsin Rules of Evidence Actual Text:](#)

**Rule 904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.**

**(1) Character evidence generally.** Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, except:

• • • •

4. **Exceptions to the general rule of Inadmissibility.** There are two exceptions to the rule against admissibility of character to prove action consistent with the character or trait (although the rule enumerates these two as three).
- a. **Character is raised by the accused.** In a criminal case, the accused may put a pertinent trait of his or her own character or the character of a victim into evidence. Once this is done, the prosecution may also offer character evidence. Such character evidence must be presented in accordance with Rule 904.05 (discussed in the next section of this outline).

[Wisconsin Rules of Evidence Actual Text:](#)

**Rule 904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.**

**(1) Character evidence generally.** Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, **except:**

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

(b) Character of victim. Except as provided in s. 972.11 (2), 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; . . .

- b. **Veracity of a witness.** The character of a particular witness for truthfulness is admissible. However, evidence of a propensity to tell the truth is allowed only after the character of that witness for truthfulness has been attacked. The presentation of character evidence must be done in accordance with Rule 904.05 (discussed in the next section of this outline).

[Wisconsin Rules of Evidence Actual Text:](#)

**Rule 904.04 Character evidence not admissible to prove conduct; exceptions; other crimes.**

**(1) Character evidence generally.** Evidence of a person's character or a trait of the person's character is not admissible for the purpose of proving that the person acted in conformity therewith on a particular occasion, **except:**

(c) *Character of witness.* Evidence of the character of a witness, as provided in ss. 906.07, 906.08 and 906.09.

To establish character for veracity, Rule 904.04(1) directs us to three rules in the Wisconsin Rules of Evidence.

Rule 906.07 says: ". . . credibility of a witness may be attacked by any party, including the party calling the witness."

Rule 906.08 directly refers to the use of character evidence to challenge the veracity (truth telling tendency) of a witness. Rule 906.09 is the rule allows evidence of prior conviction of a crime to attack the credibility of a witness, after consideration by the judge.

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**906.08 Evidence of character and conduct of witness.**

**(1) Opinion and reputation evidence of character.** Except as provided in s. 972.11 (2), the credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion, but subject to the following limitations:

(a) The evidence may refer only to character for truthfulness or untruthfulness.

(b) Except with respect to an accused who testifies in his or her own behalf, 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. Character as an issue in the case.**

The prior discussion (section II A of this outline) has focused on the character of a person as circumstantial evidence to suggest the person acted consistent with the character on a particular occasion. In some cases, however, the character of a person may be a direct issue in litigation.

If character is an element of the claim at trial the determination of "character" by the trier of fact directly affects (or even determines) the outcome of the trial. In such cases type evidence of character is usually direct, not circumstantial evidence. This evidence is perfectly admissible, and Rule 904.04(1) is not invoked. Examples of this type of litigation are:

- a. Defamation (truth of the alleged defamatory statement)
- b. Negligent entrustment
- c. Punitive Damages
- d. Custody (fitness)
- e. Regulatory licensing (good moral character)
- f. Guardianship (suitability of proposed guardian)

**III. Methods of Proving Character**

- A. **The problem.** Character evidence to show how a person probably acted on a particular occasion consumes time and diverts attention from the heart of the case. Additionally, character evidence is ambiguous and not particularly reliable. On the other hand, such evidence can be powerful if used effectively in a trial. The code of

evidence drafters balanced the significance of this tool against its consumption of time on peripheral issues and the likelihood of unreliable testimony.

B. **General Rule.**

When character evidence is admissible to show action in conformity therewith under Rule 904.04(1) the proponent may use only generalities - no specifics will be allowed.

1. **Reputation.** Testimony as to what others think is the character of the person may be adduced. The character witness must establish she or he knows what several people or the community at large think of the person whose character is being discussed.
2. **Opinion.** Testimony as to what the character witness herself or himself thinks may be adduced. Opinion testimony is more clear and direct -- perhaps more reliable -- than testimony as to what the character witness says *others* think. Prior to the adoption of the Federal Rules of Evidence, reputation evidence was preferred over testimony as to the character witness' own opinion. This preference has now disappeared.

[Wisconsin Rules of Evidence Actual Text:](#)

**904.05 Methods of proving character.**

**(1) 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.

**(2) 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 the person's conduct.

C. **Specific instances of conduct.**

Except with respect to a criminal defendant who adduces evidence of the character of a complainant, the proponent of character evidence may *not* provide specifics. The character witness may testify as to sufficient knowledge upon which to base a determination as to reputation, but not state in particular why he or she has come to that conclusion!

The opposing party may ask about specific events, but is bound by the answer of the character witness. The inquiry stops after the character witness testifies as to reputation on direct examination and is subject to cross-examination as to specific instances of conduct. This is troubling to many trial lawyers because the truth is not pursued and may, in fact, be suppressed.

One reason the inquiry must stop is that otherwise it might never end. Among the lofty goals of the Rules of Evidence set forth in Wisconsin Rules of Evidence 102 is the "elimination of unjustifiable expense and delay" in litigation. To allow proof and counter-proof regarding matters of character would consume

substantial resources to achieve marginal results in the pursuit of truth and justice.

D. **Character in issue.**

As stated above, character may be a key issue in the lawsuit. Rule 904.05(b) explicitly allows evidence of specific instances of conduct to prove or disprove character in civil cases as “an element of a claim or defense.”

IV. **“Other Acts” Evidence**

Rules 904.04(a) and 904.05 allow the use of character evidence for limited purposes and only in a particular manner. Rule 904.04(2) reiterates this and distinguishes character evidence from evidence of a different sort.



- A. **“Other acts” to show character.** Not allowed! Consistent with Rules 904.04(a) and 904.05, no party may adduce evidence of prior or subsequent acts to show a person’s character in order to suggest that the person acted in conformity with such character on a particular occasion.
- B. **“Other acts” for other purposes.** If specific conduct is proven for a relevant purpose other than to show character, it is admissible – subject, of course, to a “904.03” analysis. Non-exclusive examples of permissible uses of “other acts” evidence (listed in 904.04(b)) are to show:  
motive, opportunity or intent;  
preparation, plan or knowledge;  
identity, or absence of mistake or accident.
- C. **Advance Notice.** In a criminal case, the prosecution must give advance notice of the general nature of the intended evidence, and must affirmatively show that the probative value of the evidence outweighs the potential for prejudice.

[Wisconsin Rules of Evidence Actual Text:](#)

**Rule 904.04. Character evidence not admissible to prove conduct; exceptions; other crimes**

. . .

**(2) Other crimes, wrongs, or acts.**

(a) Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(b) In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person was convicted of a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

**The judge’s role.** The judge must determine if the proffered evidence is relevant to establish the proper purpose other than to character to show action in conformity therewith. An impartial analysis must be made to determine if the

evidence reasonably and rationally shows motive, opportunity, intent or any other valid “non-character” purpose. Advocates often assert a proper purpose to present this persuasive evidence as a pretext to attack or enhance a person’s character to suggest similar behavior on the day in question. The judge should verbalize her or his analysis on the record outside the presence of the jury. This calls for careful exercise of discretion. Usually, the reasoned decision of the trial judge will be upheld on appeal.

## V. Habit of a Person & Routine Practice of an Organization

- A. **Habit of a person.** As previously stated, the “character” or a trait of character of a person generally may not be used to show conformity therewith on a particular occasion. However “habit” is different from “character”. Evidence of the habit of a person is admissible under Rule 904.06.



There is no precise definition of “habit” set forth in this rule. Generally “habit” is specific behavior that is so regular and routine as to be predictable. From the point of view of the person possessing the habit, the behavior is virtually automatic -- performed without much thinking.

- B. **Routine practice of an organization.** Like habit, if the routine practice of a business, agency or other organization is regular and predictable, it is admissible to show conformity therewith on a particular occasion.
- C. **Method of Proof.** Habit of a person and routine practice of an organization may be proved by opinion or reputation evidence and also by specific instances of conduct.

[Wisconsin Rules of Evidence Actual Text:](#)

### Rule 904.06. Habit; Routine Practice

**(1) Admissibility.** Except as provided in s. 972.11 (2), 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.

**(2) Method of proof.** Habit or routine practice may be proved by testimony in the form of an opinion or by specific instances of conduct sufficient in number to warrant a finding that the habit existed or that the practice was routine.