



- Lee Burgess: Welcome back to the Law School Toolbox podcast. Today, we are doing another in our “Listen and Learn” series – this one, on character evidence. Your Law School Toolbox hosts are Alison Monahan and Lee Burgess, that’s me. We’re here to demystify the law school and early legal career experience, so you’ll be the best law student and lawyer you can be. We’re the co-creators of the [Law School Toolbox](#), the [Bar Exam Toolbox](#), and the career-related website [CareerDicta](#). Alison also runs [The Girl’s Guide to Law School](#). If you enjoy the show, please leave a review or rating on your favorite listening app. And if you have any questions, don’t hesitate to reach out to us. You can reach us via the [contact form](#) on LawSchoolToolBox.com, and we’d love to hear from you. And with that, let’s get started.
- Lee Burgess: Today we’re talking about character evidence under the Federal Rules of Evidence. This is an area of law that understandably confuses a lot of students. Part of this is because, like hearsay, the character evidence rule starts out in the negative, and then opens up a universe of exceptions. Rule 404 tells us that character evidence is inadmissible to show propensity, meaning that it cannot come in to show that a person acted in conformity with a certain trait.
- Lee Burgess: And yet, there are times when character evidence may come in for non-propensity purposes, or in limited situations, as circumstantial evidence of propensity. When it does come in, it has limitations in terms of who, what, when, why, and how it’s being offered. Answering a Character Evidence question correctly requires deep attention to the facts. But we’ll get to the facts in a moment. First, let’s start by laying out some rules, and then going through a checklist of questions you want to ask when you’re analyzing character evidence.
- Lee Burgess: The first thing you want to do with any Evidence question generally is note whether you are looking at a civil or criminal case, because this has the potential to change how the rules apply. This is significantly true with character evidence, which operates very differently in civil and criminal courts.
- Lee Burgess: Let’s start with civil. In civil matters, character evidence is inadmissible, unless character is at issue in the case. Examples of cases where character is at issue would be defamation or child custody cases. The exception to this is civil cases concerning sexual violence, in which case evidence of prior acts of sexual violence are permitted. Going back to the general rule though, when character is at issue in the case, then character evidence may come in as opinion, reputation, and specific acts, whether on direct or cross. That’s a major difference from criminal cases, which is where we’ll spend most of our time today.



- Lee Burgess: For criminal cases, character evidence is inadmissible to show that the defendant had propensity to commit the crime at issue. That includes evidence that the defendant had committed a similar act or crime in the past. However, this evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. You always want to make note of not just what is being offered, but what it is being offered to show.
- Lee Burgess: Here are some important notes about when evidence may come in, and in what form. Let's start with character evidence of the defendant in a criminal case. The prosecutor may not be the first to offer character evidence against a defendant. The defendant must first open the door by offering character evidence about themselves. Here are the exceptions to the order of operations:
- Lee Burgess: One: The prosecutor may be the first to offer character evidence as to prior acts of sexual assault or child molestation when that is the charge the defendant is facing.
Two: When the defendant has offered evidence as to the victim's character, the prosecutor may be the first to offer character evidence against the defendant, but it must be for the same trait that the defendant was using against the victim.
- Lee Burgess: Once the defendant does bring in character evidence to prove or disprove something about their own conduct, the prosecutor may rebut with evidence as to a pertinent character trait.
- Lee Burgess: Now, what about character evidence brought against the victim? Same rule – the defendant must open the door by bringing in character evidence about the victim. The prosecutor may not initiate this. The exception is that if a defendant in a homicide case is alleging self-defense, the prosecutor may bring in evidence of the victim's character for peacefulness ahead of time. Otherwise, the prosecutor may only use character evidence as a rebuttal to the defendant's use of character evidence, and the character evidence the prosecutor brings in for rebuttal must be of the same character trait that the defendant used against the victim. For example, if the defendant is putting the victim's dishonest character at issue, the prosecutor may rebut with evidence as to the defendant's dishonest character.
- Lee Burgess: So, that generally covers who may bring in what against whom and when. But next, let's talk about what the evidence looks like. Whether the character evidence is being brought in against the defendant, or the victim, remember the following: On direct examination, character evidence may only be presented as opinion evidence or reputation evidence. On cross examination, character evidence may come in as opinion, reputation, or through specific acts, but no



extrinsic evidence is permitted. That means that it only comes in through the testimony of the witness, not through evidence of the act at issue.

Lee Burgess: Here's where students get confused, because even if extrinsic evidence can't come in for use as character evidence, it may be allowed to come in for impeachment purposes. We won't get into impeachment today, but this relationship between character evidence and impeachment is something you want to hold on to as you're learning more about character evidence.

Lee Burgess: Here's one last exception to keep in mind before we get to our steps for analysis. Remember that Rape Shield laws come with their own nuances. In criminal court, reputation and opinion evidence of the victim's sexual history are not permitted. However, specific instances that show prior consensual history between the victim and the defendant, or that raise the possibility of another responsible party, or that would violate the defendant's constitutional rights if excluded, such as exculpatory evidence, are permitted. In civil cases, reputation, opinion, and specific instances are admissible if their probative value substantially outweighs unfair prejudice. Reputation is only permitted if the victim put reputation at issue.

Lee Burgess: Now let's get to our analytical steps before diving into a fact pattern – to simplify it, we can use a "Where, What, Why, Who, When, and How" framework. Step One is "Where": Where is this case being heard? Criminal or Civil Court? Step Two: What sort of evidence is being offered? Is it evidence of a past conviction? Is it a non-criminal wrongful act? Step Three: Why is it coming in? To show propensity? To show motive, plan, or intent? To impeach credibility? Step Four: Who is offering it? The prosecution or the defendant? And against whom? If the prosecution is bringing it in, did the defendant already open the door? Or does it fall into an exception where the prosecution does not need to wait for the defendant to initiate? Step Five: When is it coming in? On direct or on cross? Step Six: How is it being offered? As an opinion? As reputation evidence? As evidence of a specific Instance? Is it being brought in through extrinsic evidence?

Lee Burgess: And as an epilogue, keep in mind that even if you conclude that something is improper character evidence, could it be used for impeachment instead? Or some other purpose?

Lee Burgess: Note that my analysis on paper isn't going to break out into these questions, but these are questions that will help me determine whether or not a piece of character evidence is admissible. Essentially, these questions help get me get through all the things I need to keep in mind when I'm analyzing a piece of character evidence in order to reach the right conclusion.



- Lee Burgess: So, let's test our steps against a fact pattern. This is adapted from the [July 2010 California bar exam](#). It has been adapted for brevity and to narrow down the issues. To keep things universal, we're also going to be applying Federal Rules only, even though the original fact pattern was testing California law. So, here are the facts:
- Lee Burgess: "David and Vic were farmers with adjoining property. They had been fighting for several years about water rights. One day, Vic and his wife Wanda passed a truck driven by David, who made an obscene gesture as they drove by. Vic immediately stopped and yelled that if David wanted a fight, then that was what he was going to get. Both men jumped out of their trucks. After an exchange of blows, David began strangling Vic. Vic collapsed and died. David was charged with manslaughter. At David's trial, the prosecution introduced into evidence a certified copy of a misdemeanor simple assault conviction David had suffered in 2006.
- Lee Burgess: During the defense's case, David claimed that he acted in self-defense. He testified that he knew about two other fights involving Vic. In the first, which took place four years before his death, Vic broke a man's arm with a tire iron. In the other, which occurred two years before his death, Vic threatened a woman with a gun. David testified that he had heard about the first incident before Vic died, but that he had not heard about the second incident until after his trial had commenced.
- Lee Burgess: Assuming that all appropriate objections were timely made, should the Court have admitted:
1. The certified copy of David's 2006 misdemeanor simple assault conviction? Discuss.
 2. David's testimony about the first fight involving Vic breaking another man's arm with a tire iron? Discuss.
 3. David's testimony about the second fight involving Vic threatening a woman with a gun? Discuss."
- Lee Burgess: So, let's start with the copy of David's 2006 misdemeanor assault conviction. First of all, we want to note where we are – criminal court – so there's a lot to pay attention to in terms of the rest of our analysis. Step Two: What is coming in? Evidence of a prior criminal conviction. Step Three: Why is it coming in? Presumably, the prosecutor wants to show that David's assaultive history lays the groundwork for his propensity to have committed this manslaughter. Uh-oh. That's not okay under Rule 404. But are there any exceptions that may apply? There aren't any indications that it's being brought in for a non-propensity purpose. The prior assault doesn't seem to involve Vic, so we can't find a motive in there. And typically, a past crime needs to share extremely similar facts with



the charge at hand in order to be considered a common plan or scheme. None of the other proper purposes are indicated by these facts.

Lee Burgess: Let's keep going though. Step Four: Who is offering it against whom? The prosecutor is offering it against David. Step Five: When? In the prosecutor's case in chief. What does this mean? This means that David has not yet opened the door with character evidence about his character for peacefulness. Now, we know that he'll be alleging self-defense, but that only bears upon the prosecution's ability to initiate evidence about the victim's character, not David's. This is not looking good for the prosecution so far. Last step: How is it being offered? Here's another red flag: This is a copy of a conviction, which makes it extrinsic evidence, which is not a permissible way to bring in character evidence. So, we've got improper purpose, improper timing, improper form. This evidence is not coming in.

Lee Burgess: Next, let's analyze David's testimony about the first fight involving Vic breaking another man's arm with a tire iron. What kind of evidence is this? Evidence of a past violent act by Vic. Why is it coming in? If David were bringing this evidence in to show Vic's propensity for violence, this would not be a permissible use of this evidence. However, David learned of this fight prior to his fight with Vic, meaning that he can use this to support his reasonableness in fearing for his life and acting in self-defense when Vic fought him. This is why it's important to think about the "Why" – it can really make the difference in terms of admissibility or inadmissibility.

Lee Burgess: Who is offering it against whom? David, the defendant, is bringing in the evidence against Vic. No issues there. When? This is David's case in chief, on direct, meaning he should only be testifying in terms of reputation or opinion, not specific instance. And is this a specific instance? Yes, this is a story about a time Vic started a fight. So why does it still come in? Normally, this would not be an appropriate method of bringing in character evidence on direct. But remember, if David is testifying about this fight only to show his reasonableness in fearing Vic, rather than to prove Vic's character for violence, then this testimony could be admissible, because it's no longer being used as character evidence. It's being used to show David's state of mind. The "Why" is key in this case, and opens up possibilities for admission.

Lee Burgess: For the last piece of evidence, we have an important distinction. It sounds a lot like the evidence we just analyzed – it's a specific incident of Vic getting into a fight. What's the key difference here though? David learned of it after he had already killed Vic. Therefore, it would not be coming in to support David's reasonableness as part of his self-defense claim, but rather would just be coming in as evidence of Vic's propensity for violence. Therefore, it will not be admissible.



- Lee Burgess: Before we wrap up, let's try one more quick example. This time, we'll do a civil case, just so you know how to spot and analyze this issue in a different context. This one is from [February 2016](#). We're editing it down to a single example, and we're also going to be applying federal law, as opposed to the California law the question originally called for:
- Lee Burgess: "Mike, Sue, Pam, David, and Ed worked at Ace Manufacturing Company. Pam was fired. A week later, David circulated the following email to all the other employees:
- Lee Burgess: 'I just thought you should know that Pam was fired because she is a thief. Sue caught her stealing money from the petty cash drawer after Pam's affair with Mike ended.'
- Lee Burgess: Pam sued David for defamation. In defense, David called Sue, who testified that she had caught Pam stealing \$300 from the petty cash drawer. Should the court have admitted Sue's testimony? Discuss."
- Lee Burgess: So, I already gave this one away, but where are we? Civil court. Normally, this would mean character evidence is absolutely barred, but we have to add a special question for civil cases – is character at issue here? Yes, because this is a defamation case. That's a green light for character evidence, and in this case, we're dealing with a specific act – stealing money from a cash drawer – which, as I said earlier, is fine to come in when the case is civil. Obviously, this is a much simpler analysis than with a criminal case, but you can expect that there were lots of other curveballs, like hearsay issues, in the rest of this essay.
- Lee Burgess: So, try these approaches out in your character evidence practice next time. If you find that something is inadmissible as character evidence, take the extra step of analyzing whether it comes in as something else, like impeachment evidence. While there are a lot of nuances and exceptions to keep track of here, the more you practice, the more streamlined it will become. And feel free to watch a lot of courtroom dramas. They're not always right on the law, but it helps to see how these disputes over evidence play out in a courtroom so that you can bring that adversarial spirit into your writing.
- Lee Burgess: And with that, we're out of time. If you enjoyed this episode of the Law School Toolbox podcast, please take a second to leave a review and rating on your favorite listening app. We'd really appreciate it. And be sure to subscribe so you don't miss anything. If you have any questions or comments, please don't hesitate to reach out to myself or Alison at lee@lawschooltoolbox.com or alison@lawschooltoolbox.com. Or you can always contact us via our website [contact form](#) at LawSchoolToolBox.com. Thanks for listening, and we'll talk soon!



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