

CHARACTER EVIDENCE IN CRIMINAL CASES

Rules 404(a), 405, and 608 of the Texas Rules
of Evidence
&
Article 37.07 § 3 of Texas Code of Criminal
Procedure

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Introduction

Character evidence is a general category of evidence that relates to some character trait that is at issue during a criminal trial. Character, as the term is used in our jurisprudence, means the estimate attached to an individual by the community, not the real qualities of the individual as perceived by the witness. In other words, it is not what the individual in question really is, but what he is held to be by the society in which he moves. *Rogers v. State*, 70 S.W.2d 188, 189 (Tex. Crim. App. 1934). The character evidence sought to be admitted must be related to the offense the defendant is charged with. The defendant is permitted to offer relevant character evidence under the Due Process Clause of the Fourteenth Amendment. *Washington v. State*, 388 U.S. 14, 19 (1967). The same argument should be made under Article I, § 19 of the Texas Constitution. If proper constitutional objections are made, a 44.2(a) harm analysis is required under the Texas Rules of Appellate Procedure.

In Texas, character evidence is admissible for or against a criminal defendant, a witness, or a victim/complainant. Rule 404 of the Texas Rules of Evidence governs *when* character evidence is admissible, Rule 405 governs *how* character may be proven, and Rule 608 governs when and how the character and conduct of a witness may be impeached. Rule 803(21) specifically provides for an exception to the hearsay rule for the admission of character evidence. Texas Code of Criminal Procedure Article 37.03 § 3 relates to the punishment phase of a criminal trial and is used to determine when and what type of character evidence is admissible for or against a defendant who has already been found guilty.

While several of the cases cited below are older cases, hopefully, they are still good law and many of their holdings have not been challenged or limited. The list of cases is obviously not

exhaustive, but simply seeks to highlight the important holdings interpreting the Rules of Evidence that relate to character.

The author wishes to acknowledge Mona Shea for her significant contributions to this article. Ms. Shea is a 2001 graduate of Northeastern University School of Law and is currently a briefing attorney for Judge Cheryl Johnson of the Texas Court of Criminal Appeals. Her writing and research skills dominate the majority of this work. Thank you, Mona.

An acknowledgment is also in order for Stephanie L. Stevens, criminal defense attorney from San Antonio, for her article on these same rules, *Evidence in Criminal Cases - Character Evidence*, which was presented at the Texas Criminal Defense Lawyer's Project in South Padre Island on July 16-17, 1998. Much of her research, where still relevant, was incorporated into this article.

Finally, many thanks to Judge Charlie Baird, formerly of the Texas Court of Criminal Appeals, for the liberal use of his article titled *Character Evidence Can Be a Powerful Tool for the Defense*, printed in *Voice for the Defense*, November 2000, Vol. 29, No. 9, pp. 20-23. The author strongly recommends that you obtain a copy of Judge Baird's article for your library. He has recently updated the article and it should be available on TCDLA's web site www.tcdla.com.

Postscript, November 17, 2006. I have updated Randy Leavitt's paper with his permission by shepardizing the case law he used and adding a few cases that have been decided since this was last presented. I have told Randy that I appreciate his willingness to let me use his paper for this retreat. Robert Icenhauer-Ramirez

I. Rule 404(a)

A. 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 action in conformity therewith on a particular occasion, except:
- (1) *Character of accused.* Evidence of a pertinent trait of his character offered:
 - (A) by an accused in a criminal case, or by the prosecution to rebut the same, or
 - (B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;
 - (2) *Character of victim.* In a criminal case and subject to Rule 412¹, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;
 - (3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609².

(Rule 404(b) will be discussed by Mindy McCracken and Buddy Meyer in a separate paper.)

The State is not allowed, in the first instance, to offer evidence of the defendant's bad character because of Rule 404(b) unless it fits one of 404(b)'s exceptions, such as motive, identity, etc. and even then it cannot be offered only to show the defendant acted in conformity with the particular character trait on the occasion in question. *See Rule 404(b)*. The defendant, on the other hand, may offer character evidence for that very purpose - i.e., to show that he did or did not do a particular act. This is precisely what Rule 404(a)(1)(A) allows. Character is a generalized description of a person's disposition, or of the disposition in respect to a general trait, such as honesty, temperance, or peacefulness. *Nolte v. State*, 854 S.W.2d 304, 309 (Tex. App.—1993)

¹ Rule 412 governs evidence of previous sexual conduct in criminal cases.

² Rules 607, 608, and 609 relate to impeaching a witness.

B. Relevant Case Law

1. Character of the *Accused*

- a. The defendant's character trait for being a law-abiding citizen is automatically at issue because of the accusation against him. ***Hammer v. State*, 314 S.W.2d 301,305 (Tex. Crim. App. 1958)**
- b. As stated above, the defendant can introduce evidence of a specific good character trait to show that it is improbable he committed the charged offense. ***See Valdez v. State*, 2 S.W.3d 518, 519 (Tex. App.—Houston [14th Dist.] 1999).**
- c. ***Washington v. State*, 388 US 14, 19, 87 S.Ct. 1920, 1923, 18 C.Ed 2d 1019, 1023 (1967)** holds that evidence of defendant's good character operates as a defense and that it is admissible pursuant to the Due Process Clause of the Fourteenth Amendment. Likewise, Article I § 19 of the Texas Constitution should be urged. Consequently, the error in excluding this evidence is constitutional and would require a harm analysis under Rule 44.2(a) of the Texas Rules of Appellate Procedure.
- d. ***Foley v. State*, 356 S.W.2d 686, 686-87 (1962) (opin. on reh'g.)** (In a DWI related prosecution the defendant is allowed to offer character evidence of his sobriety.)
- e. ***Canto-Deport v. State*, 751 SW2d 698, 700 (Tex. App.—Houston [1st Dist.] 1988, pet ref'd)** (holding trait of "honest and fair dealing" is admissible in fraud case. Same in an embezzlement case, ***Hammar v. State*, 314 S.W.2d 301, 305 (Tex. Crim. App. 1958).**
- f. Honesty is not a character trait of sexual assault, therefore, evidence of dishonesty is inadmissible. ***Wiggins v. State*, 778 S.W.2d 877, 893 (Tex. App.—Dallas, 1989 pet. ref'd)**. The defendant's reputation for honesty should not have been introduced in the first place so it was error for the State to introduce by way of 'have you heard' questions, extraneous crimes of the defendant regarding honesty.
- g. Child sex abuse case - trait of morality and "safe and proper treatment of young children." ***See Thomas v. State*, 669 S.W.2d 420, 423-24 (Tex. App.—Houston [1st Dist.] 1984 pet ref'd)**.
- h. Possession of Marijuana - evidence that defendant was not known to sell or use marijuana should have been admissible when offered pursuant to both the Rules of Evidence and the Due Process and Due Course of law

provisions of the United States and Texas Constitutions. ***Brazelton v. State*, 947 S.W.2d 644, 650 (Tex. App.—Fort Worth 1997 no pet.)** (Evidence that appellant did not use or sell drugs is a pertinent trait and essential element to her defense that the only reason she possessed the marijuana was because she reasonably believed that possession was immediately necessary to avoid imminent harm. (*relying on *Wade v. State*, 803 S.W.2d 806, 808 (Tex. App.—Fort Worth 1991, no pet.)*)). (concluding that trial court erred in excluding evidence of defendant’s non-use of drugs to support defense that drugs were planted.)

- i. Evidence that appellant had a reputation as a parsley salesman was not a pertinent character trait in a delivery of marijuana case. ***Spivey v. State*, 748 S.W.2d 18, 20 (Tex. App.—Houston [1st Dist.]1988)**.
- j. Reputation for truthfulness is not pertinent character evidence in a possession of marijuana case. ***Spector v. State*, 746 S.W.2d 946, 949 (Tex. App.—Austin 1988, pet. ref’d)**.
- k. Evidence of honesty is not a pertinent character trait in a charge of aggravated sexual assault. ***supra, Wiggins at 893***.

Unpublished cases:

- a. Rule 404(a)(1)(A) permits an accused to offer evidence only of his own character, not of someone else's. ***Toluao v. State*, No. 2-04-040-CR, 2005 Tex. App. LEXIS 6751 (Tex. App. –Ft. Worth [2nd Dist.] 2005)**.

2. Rebuttal of the Character of the Accused

- a. Rule 404(a)(1) only allows the prosecution to rebut the pertinent character trait to which the defense witness’s testimony referred. A party may only correct a false impression left by a witness’s testimony by cross-examination of the witness who created the false impression and may not convert another party’s fact or expert witness into a character witness through its own cross-examination. Inquiries into an extraneous act during defendant’s cross-examination is not admissible based on the false impression left by another witness. The state cannot create a false impression on cross-examination in order to open the door to extraneous-act evidence. ***Duren v. State*, No. 06-01-00122-CR, 2002 Tex. App. LEXIS 5889, at * 22-24 (Sixth Dist. Aug. 14, 2002)**.
- b. The State may not convert a defense fact or expert witness into a character witness through its own cross-examination. Although appellant was entitled to proffer evidence of his good character (or propensity) for moral and safe relations with small children or young girls under Rule

404(a)(1)(A), he was required to do so in accordance with the procedures and foundations set out in Rule 405. This he did not do. Because his expert witness (a Child Protective Services Investigator) did not offer true character testimony under Rule 405, the State was not entitled to turn her into a character witness on cross-examination and then ask her questions concerning prior specific instances inconsistent with the particular character trait discussed in her testimony. (HOWEVER, the Court of Criminal Appeals found that because the expert's testimony was relevant only for the inference that appellant was the type of person who did not pose a risk of abuse to children, the State was entitled to rebut that "false impression" with cross-examination questions concerning allegations of similar misconduct toward another child.) ***Wheeler v. State*, 67 S.W.3d 879, 882-883 (885-886)(Tex. Crim. App. 2002).**

- c. An accused puts his character for veracity (as opposed to his moral character) in issue by merely taking the stand, and thus he may be impeached in the same manner as any other witness. ***Hammett v. State*, 713 S.W.2d 102, 105 (Tex. Crim. App. 1986).**
- d. When a party fails to object to inadmissible character evidence, it is precluded from then rebutting that inadmissible evidence with further inadmissible evidence. ***Wiggins v. State*, 778 S.W.2d 877, 893 (Tex. App.—Dallas, 1989 pet. ref'd).**

3. Character of the Victim

The character of the victim or character traits of the complainant are admissible pursuant to Rule 404(a)(2) when the traits are pertinent to an element of the case, claim or defense. This rule is only limited by Rule 412 (previous sexual conduct). Generally, this rule arises in the context of murder prosecutions, but the rule is not necessarily confined to murder cases. It has arisen a few times in other contexts such as evidence tending to show a victim may have fabricated the event.

Typically, however, the issue arises in self-defense cases where the defendant attempts to demonstrate that the victim was the "first aggressor" in the assault. Evidence of specific bad or violent acts of the victim are admissible to explain the victim's conduct. Stated another way, it is relevant to show the decedent's current aggressive conduct. A *caveat* here is that when proffering the testimony, the attorney should articulate why the evidence explains the aggressive conduct of the deceased in a manner other than demonstrating character conformity only. Most importantly, the prior specific acts do not have to involve the defendant and he does not have to demonstrate prior knowledge.

After the enactment of the new Rules of Criminal Evidence - now the Rules of Evidence, the state of the law in this area was hotly contested. The pre-rule law was governed pursuant to the “Dempsey Rule” after *Dempsey v. State*, **266 S.W.2d 875 (Tex. Crim. App. 1954)**. However, the enactment of the new Rules put the “Dempsey Rule” in doubt. A series of cases, particularly *Morgan, Tate and Torres, supra*, hopefully has clearly defined the law for now. Essentially, the same evidence that was admissible under *Dempsey* is still admissible today - just under a different rationale.

- a. In *Torres v. State*, **71 S.W.3d 758 (Tex.Crim.App.2002)**, the Court stated, “Under *Tate v. State*, 981 S.W.2d 189, 193 (Tex.Crim.App.1998), a defendant claiming self-defense may introduce a deceased’s specific acts to show that the deceased was the first aggressor, but the specific acts must be relevant apart from their tendency to show character conformity.” In the *Torres* case the trial court excluded evidence that, two days before the killing, the deceased, Valdez, entered Diane Espinosa’s apartment through a window and threatened her and her children. The appellant was unaware of this prior threat. Nevertheless, because this evidence had relevance apart from character conformity, the Court of Appeals erred in affirming the exclusion of this evidence.” *Id.* at 759. As long as the proffered violent acts explain the outward aggressive conduct of the deceased at the time of the killing, and in a manner other than demonstrating character conformity only, the prior specific acts of violence committed by the deceased may be admitted even though those acts were directed against a third party and not the defendant. *Torres v. State*, **71 S.W.3d 758, 762 (Tex. Crim. App. 2002)**.
- b. The common law rule created by the *Dempsey* line of cases cannot be reconciled with the language of Rules 404(a)(2) and 405(a) because that line of cases specifically stands for the proposition that reputation or specific act evidence is admissible to show a victim’s character. Once Rule 404(b) is applied, however, the problem no longer exists and the evidence of specific past acts may be admissible under the Rules of Evidence to explain the deceased’s conduct by showing the decedent’s motive or intent. *Tate v. State*, **981 S.W.2d 189, 192 (Tex. Crim. App. 1998)**.
- c. Appellant sought to introduce past violent acts of the victim. The trial court excluded the evidence based on Rule 403. Appellant claimed that Rule 403’s balancing test does not apply to the evidence because it was being proffered under Rule 404(a) to support her defensive theory. The Court held: 1) the Texas Rules of Evidence superceded the *Dempsey* line of cases that relied upon common law; 2) while evidence may be admissible under Rule 404, the trial court may nevertheless exclude the same evidence if it determines that the probative value of such evidence is

substantially outweighed by its unfair prejudice. *Mozon v. State*, 991 S.W.2d 841, 846 (Tex. Crim. App. 1999).

- d. A defendant is permitted to introduce evidence of a pertinent character trait of the alleged victim of the offense on trial, but such evidence may only take the form of reputation or opinion testimony as required by Rule 405(a). Questions regarding the victim's past psychiatric treatment or specific incidents of past violent behavior do not qualify. *Martinez v. State*, 17 S.W.3d 677, 687 (Tex. Crim. App. 2000). However, the broad statement made by the Court here seems to render Rule 405(b) meaningless, which allows, in certain situations, character traits to be proven with specific acts of conduct.
- e. The trial court committed reversible error by not allowing appellant to present evidence from several witness which would have shown that the child "victim" was fabricating the entire episode of abuse. *Waddell v. State*, 873 S.W.2d 130, 139 (Tex. App.—Beaumont, 1994 pet. ref'd).

4. Character of the Witness

Rule 404(a)(3) allows for the introduction of character evidence regarding a witness only if the evidence is otherwise admissible pursuant to Rule 607 (impeachment of one's own witness), 608 (truth and veracity) and 609 (impeachment of witness with evidence of a crime). Opinion or reputation evidence related to a witness may be offered only to attack or support the witness' character for truthfulness or untruthfulness as limited by Rule 608(a)(1) .

Any witness can be attacked for being untruthful, but only after that attack has been mounted can evidence of truthful character be admitted. A witness who creates a false impression of law-abiding behavior opens the door to an otherwise irrelevant past criminal history. *Weirich v. State*, No. 03-01-00002-CR, 2002 Tex. App. LEXIS 2390, at *9 (3rd Dist. Apr. 4, 2002). This is discussed in much more detail in Section III - Rule 608.

II. Rule 405

A. Rule 405. Methods of Proving Character

- (a) **Reputation or Opinion.** In all cases in which evidence of character or character trait is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. In a criminal case, to be qualified to testify at the guilt stage of trial concerning the character or character trait of an accused, a witness must have been familiar with the reputation, or with the underlying facts or information upon which the opinion is based, prior to the day of the offense. In all cases where testimony is admitted under this rule, on cross-examination inquiry is allowable into relevant specific instances of conduct.
- (b) **Specific Instances of Conduct.** In cases in which a person's character or character trait is an essential element of a charge, claim or defense, proof may also be made of specific instances of the person's conduct.

B. Opinion vs. Reputation.

There are three basic methods of proving character: (1) reputation of the person in the community; (2) personal opinion testimony of witnesses who know the person; (3) specific instances of conduct of the person from which inferences may be drawn.³ *See*, Wendorf, Schlueter and Barton, Texas Rules of Evidence Manual, 5th Ed., 2001, sec. IV, p. 87.

Opinion testimony of a character trait requires personal knowledge of that character trait. Based upon this personal knowledge, the witness testifies as to what the defendant is, e.g., he is peaceful, law-abiding, sober, honest, etc. Reputation testimony, on the other hand, need not be based on personal knowledge. Instead, testimony of this nature may be based either on (1) discussions between the witness and others about the defendant; or (2) defendant's reputation.

Allowing testimony that is not based on personal knowledge would appear to violate the hearsay rule. *See* Tex. R. Evid. 802. But Rule 803(21) specifically provides for an exception to the hearsay rule for the admission of such testimony.⁴ As the Dallas

³ Specific acts are admissible under Rule 405(b) when the character trait is an essential element of the cause of action or defense to it.

⁴ "The following [is] not excluded by the hearsay rule even though the declarant is available as a witness: ... (21) Reputation as to Character. Reputation of a person's character among associates or in the community."

Court of Appeals stated in *Moore v. State*, 663 S.W.2d 497, 500 (Tex. App.—Dallas 1983):

“Reputation testimony is necessarily based on hearsay, but is admitted as an exception to the hearsay rule. For reputation testimony to be an exception to the hearsay rule it must meet two basic criteria: (1) that there is some necessity for the introduction of testimony; (2) that the testimony has some circumstantial probability of trustworthiness. 5 Wigmore, Evidence § 1580, 1611, & 1612 (Chadbourn rev. 1974); 1A R. Ray, Texas Law at Evidence Civil and Criminal § 1321 (Texas Practice 3d. ed 1980). The trustworthiness of reputation testimony stems from the fact that a person is observed in his day to day activities by other members of his community and that these observations are discussed. Over a period of time there is a synthesis of these observations and discussions which results in a conclusion as to the individual’s reputation. When reputation is based solely on specific acts, this synthesis is lost, as well as its reliability. When reputation testimony is given by police officers who have investigated an individual’s offenses and by victims of an individual act who have spoken only with others who are also victims, it is obvious that the witnesses’ conclusions as to the appellant’s reputation will be slanted against the individual and will not have the trustworthiness implicit in the exception to the hearsay rule. The conclusion of such witnesses as to the reputation may be vastly different from those who have had the day to day contact within the community envisioned in the traditional exception to the hearsay rule for reputation testimony. What is actually occurring with testimony of this type is that a witness takes the specific acts of the individual and then infers what the reputation of the person would be. In this respect, this evidence could easily be fabricated and, thus, loses its reliability. Consequently, if this were an open question, we would likely hold that such testimony was inadmissible.”

C. Relevant Case Law

1. Testimony of the accused’s character may be offered in the form of opinion testimony, provided that the witness was familiar with the reputation or underlying facts or information upon which the opinion is based prior to the day of the offense. *Ibarra v. State*, 11 S.W.3d 189, 197 (Tex. Crim. App. 1999).
2. A reputation witness’s testimony must be based on discussion with others about the defendant, or on hearing others discuss the defendant’s reputation, and not just

on personal knowledge. General reputation testimony is admissible even though it is partially based on discussions concerning the offense for which the defendant is being tried, if it is also based on a discussion of matters other than the instant offense. *Turner v. State*, 805 S.W.2d 423, 429 (Tex. Crim. App. 1991).

3. Character evidence refers to the inherent qualities of a person. Reputation evidence applies to the collective opinion of the community as to those qualities. A character witness is one who testifies to specific character traits of an accused of which he has personal knowledge. A reputation witness, on the other hand, testifies to what he or she has heard through others about the defendant's standing in the community. *Shumaker v. State*, 704 S.W.2d 548, 549 (Tex. App.—Corpus Christi, 1986 pet. ref'd).
4. Police officers, whose knowledge consist only of prior crimes committed by appellant and statements from other police officers and witnesses are, nonetheless, qualified to testify as character witnesses under Rule 405. *Adanandus v. State*, 866 S.W.2d 210, 225-226 (Tex. Crim. App. 1993).
5. Expert testimony is not character evidence. Defense called an expert to testify concerning the psychological profile of sexual abusers. The trial court, citing Rule 405(a), allowed a general description of the relevant characteristics, but held that the expert could not give an opinion as to whether appellant fit the profile. The Court held that the trial court's reliance on 405(a) was misplaced in that the expert's testimony was not character evidence. The expert's testimony should have been admitted pursuant to Rules 702, 703 and 704, however, the error was found to be harmless. *Nolte v. State*, 854 S.W.2d 304, 309 (Tex. App.—Austin, 1993 pet. ref'd).
6. The witness need not be able to name the specific persons who made the comments. *Lopez v. State*, 574 S.W.2d 563, 566 (Tex. Crim. App. 1978) (citing *Jacks v. State*, 317 S.W.2d 731 (Tex. Crim. App. 1958)).
7. While Rule 405 requires only “substantial familiarity” with the reputation of the accused, *Hernandez v. State*, 800 S.W.2d 523, 524-525 (Tex. Crim. App. 1991), a single unproven allegation made by a biased third party, standing alone, will not qualify a witness to testify that he knows the reputation of an accused to be bad. *Wagner v. State*, 687 S.W.2d 303, 315 (Tex. Crim. App. 1985).
8. Questions are typically couched in terms of the defendant's reputation in the community. A person's community is not limited to the locale where the case is tried nor his residence on the date the offense was committed. *Arocha v. State*, 495 S.W.2d 957, 958 (Tex. Crim. App. 1973) (permissible to question character witness about offense committed in Houston although defendant was resident of Austin).

9. *Ayers v. State*, 288 S.W.2d 511 (Tex. Crim. App. 1956) (permissible to question Texas witness about offense in New York).
10. Reputation testimony is clearly admissible at the punishment phase of trial for a capital offense as bearing upon the propensity of the defendant to commit future acts of violence. Reputation testimony may be based upon specific instances of conduct described to the witness by other persons in the community. *Cooks v. State*, 844 S.W.2d 697, 736 (Tex. Crim. App. 1992).
11. Testimony regarding character evidence that may otherwise be admissible under Rule 405 is limited by the relevancy requirements of Rule 401. *Goff v. State*, 931 S.W.2d 537, 552-553 (Tex. Crim. App. 1996).
12. The right of a party to cross-examine a character witness on specific instances of conduct is subject to certain limitations: 1) the incidents must be relevant to the character traits at issue; 2) the alleged bad act must have basis in fact; 3) before the questions are asked, the foundation for inquiring into specific instances of conduct should be laid outside the presence of the jury so that the judge will have an opportunity to rule on the propriety of asking them; and 4) specific instances of conduct should not be proven before the jury using extrinsic proof. *Wilson v. State*, 71 S.W.3d 346, 350-351 (Tex. Crim. App. 2002).
13. Cross-examination of *opinion* witnesses should be in the form of “**did you know**” questions while cross-examination of *reputation* witnesses should be in the form of “**have you heard**” questions. The right to cross-examine a character witness is subject to two limitations: there must be some factual basis for the incidents inquired about; and those incidents must be relevant to character traits at issue in the trial. *Reynolds v. State*, 848 S.W.2d 785, 788 (Tex. App.—Houston [14th Dist.] 1993, pet. ref’d).
14. A witness who testifies to the defendant’s good character may be cross-examined as to relevant specific instances of misconduct by the defendant to test the weight of that witness’s testimony. *Drone v. State*, 906 S.W.2d 608, 616 (Tex. App.—Austin, 1995 pet. ref’d).
15. A prosecutor’s “have you heard” or “did you know” question must have a factual basis, i.e., must be asked in good faith. *See Lancaster v. State*, 754 S.W.2d 493, 496 (Tex. App.—Dallas 1988, pet. ref’d). Furthermore, foundation for inquiry into specific instances of conduct must be laid outside the presence of the jury. *See Lancaster, supra* at 496; *Lopez v. State*, 860 S.W.2d 938, 944 (Tex. App.—San Antonio 1993, no pet.). (The procedure to be followed when admitting reputation testimony is to permit the opposing party to test the qualifications of

the witness outside the presence of the jury before he testifies as to the defendant's reputation.)

16. The character traits inquired about on cross-examination must be relevant to the character traits put into issue by the defendant. An example of this is found in *Kennedy v. State*, 200 S.W.2d 400, 403-07 (Tex. Crim. App. 1947). The prosecutor asked a witness if he had heard of defendant's illicit affair. The defendant's witnesses had only testified as to his reputation for truth and veracity, quietness, peacefulness, being inoffensive and being law-abiding. *See Id.* *See also Baize v. State*, 790 S.W.2d 63, 64 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd) (case reversed because State went into trait for peaceful and law-abiding when defendant had placed into issue his character for truth and veracity only).
17. Limiting instruction - if the witness is questioned with "have you heard" or "did you know" questions, the defendant should request a limiting instruction at the time the testimony is elicited and in the jury charge. *See Tex. R. Evidence 1.05(a); Rankin v. State*, 974 S.W.2d 707, 711-713 (Tex. Crim. App. 1996).
18. Judge Charlie Baird suggested the following charge:

"Certain questions were asked by the State inquiring of character witnesses for the defendant whether they had heard and/or knew about other offenses on the part of the defendant. You are instructed that you may not consider such questions, nor may you consider any answers of such witnesses as to whether they had heard and/or knew of any other offenses, if any such answers were given, as any evidence of guilt in this case, but only for the purpose of testing (if it does) the knowledge of such witnesses as to the defendant's reputation and the weight to be given to their testimony; and you must not consider such questions and answers in regard to any other offenses, if any, for any other purposes whatsoever."
19. Although allowing two assistant district attorneys to testify about the defendant's character might violate disciplinary rules, it is not reversible error unless actual prejudice to the defendant is shown. *House v. State*, 947 S.W.2d 251, 253 (Tex. Crim. App. 1997).
20. The purpose of cross-examining by the use of "have you heard" testimony is not to discredit the person on whose behalf the witness is testifying, but rather, the purpose is to affect the weight of the *testifying* witness's testimony. *Wiggins v. State*, 778 S.W.2d 877, 894 (Tex. App.—Dallas, 1989).
21. Appellant called a long-time friend to testify as to his character. The State's cross-examination included a series of "did you know" questions about Appellant's history of assault. The Court held that Appellant failed to preserve

error because his objection at trial was that “there was no evidence to support the facts asserted by the prosecutor.” This does not preserve a Rule 405 objection. *Wilson v. State*, 71 S.W.3d 346, 349 (Tex. Crim. App. 2002).

D. Specific Instances of Conduct

1. Specific acts are admissible under Rule 405(b) only when the person’s character or character trait is an essential element of a charge, claim or defense. It is hard to imagine when this would occur. Consequently, this author could find no cases where such testimony was approved. Conversely, there are a few cases where specific acts of conduct of a person were excluded.

2. Relevant case law

a. Defendant attempted to elicit testimony through his sister that he had been married, had children and had always had good behavior toward children in an aggravated sexual assault case. The testimony was excluded. The Court held that character evidence may be shown only by reputation evidence or opinion evidence and not with or by specific acts of conduct, except in “certain instances” not applicable in the instant case. *Garcia v. State*, 819 S.W.2d 667 (Tex. App.—Corpus Christi 1991) citing *Schmidt v. State*, 449 S.W.2d 39, 40 (Tex. Crim. App. 1996). Unfortunately, the Corpus Christi court did not enlighten us with when such “certain instances” might occur.

b. In an aggravated assault of a police officer case, the defense attempted to introduce testimony concerning previous citizen complaints filed against the arresting (complainant) officer for excessive force. The defense argued that the reports were probative of the officer’s aggressive tendencies and that he was the aggressor in the present case. The defense was self-defense. The Court held that the State did not raise the issue of the officer’s character and the justification theory of self-defense does not inquire into, as an essential element, the character of the victim. See *Evans v. State*, 876 S.W.2d 459 (Tex. App.—Texarcana 1994) cf. *Torres v. State*, *supra*.

III. Rule 608

A. Rule 608. Evidence of Character and Conduct of a Witness

- (a) **Opinion and Reputation Evidence of Character.** The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, 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 conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of a crime as provided in Rule 609⁵, may not be inquired into on cross-examination of the witness nor proved by extrinsic evidence.

B. Relevant Case Law

1. Opinion and Reputation Evidence of Character (Rule 608(a))

- a. If a witness testifies that a person has a good reputation for truthfulness, it is not necessary that the witness be personally acquainted with the person, or that the witness previously discussed that reputation with anyone. If, however, the witness testifies that the person has a bad reputation the witness must have actually discussed the matter with someone, and that person must have told the witness that the defendant's general reputation for having that particular character trait was bad. *Jackson v. State*, 628 S.W.2d 446, 450 n.2 (Tex. Crim. App. 1982).
- b. Where the witness testifies only to appellant's reputation for truth and veracity, it is error to permit impeachment questions that relate to reputation for being a peaceful and law abiding citizen. *Baize v. State*, 790 S.W.2d 63, 66 (Tex. App.—Houston [1st Dist.] 1990, pet. ref'd).
- c. Presenting evidence that merely contradicts the witness is not a sufficient attack to merit proof of truthful character. *Stewart v. State*, 587 S.W.2d 148, 152 (Tex. Crim. App. 1979).

⁵ Rule 609 requires that any conviction admitted to impeach a witness be a felony or involve moral turpitude, that the probative value outweigh the prejudicial effect to the party, and that any conviction admitted against a witness be within the past ten years.

- d. Evidence of a person's tendency toward manipulation or fantasy, whether relating to mental capacity or moral disposition, should be analyzed under the same rules that govern evidence of truthful or untruthful character. Under 608(a), general capacity evidence includes whether a person can distinguish between reality and fantasy and/or whether the person's physical or mental condition adversely affects a person's ability to accurately perceive and/or relate to events. *Schutz v. State*, 957 S.W.2d 52, 72 (Tex. Crim. App. 1997).
- e. A question that merely requests from appellant a direct, self-serving assertion as to whether he was telling the truth during his testimony is not consistent with Rule 608(a) because it does not seek to support appellant's credibility by way of opinion or reputation and does not concern appellant's character for truthfulness. *Wills v. State*, 867 S.W.2d 852, 855 (Tex. App.—Houston [14th Dist.] 1993, pet ref'd).
- f. An impeached witness cannot logically rehabilitate him or herself. Absent some independent corroboration, there is no better reason to believe the witness's account of extraneous misconduct than there is to believe the initial impeached testimony. *Pavlacka v. State*, 892 S.W.2d 897, 903 (Tex. Crim. App. 1994).

2. Specific Instances of Conduct (Rule 608(b))

- 1. Appellant's attempted cross-examination regarding the witness's relationship with other witnesses was probative of the witness's alleged bias and motive in testifying against appellant. Because appellant sought to cross-examine the witness concerning this bias or motive, rather than attacking her general character for truthfulness, Rule 608 does not preclude the testimony. *Fox v. State*, No. 14-00-01367-CR, 2002 Tex. App. LEXIS 627, at *38 (14th Dist. Jan. 31, 2002).
- 2. Testimony regarding a specific occasion where a witness did not tell the truth is inadmissible under Rule 608(b) because it is an impermissible attack on the witness's general credibility. *Felan v. State*, 44 S.W.3d 249, 254 (Tex. App.—Forth Worth, 2001 pet ref'd).
- 3. For the confrontation clause to require admission of a specific prior instance of conduct, the defendant must still meet general requirements of admission under the Rules of Evidence. The confrontation clause does not require a *per se* exception to the Rules; each case must be examined on a fact-specific basis. *Lopez v. State*, 18 S.W.3d 220 (Tex. Crim. App. 2000).

4. Generally, a witness' credibility cannot be impeached with prior acts of misconduct unless the conduct resulted in a final conviction of a felony offense or a crime or moral turpitude. An exception exists when the witness, during direct examination, leaves a false impression as to the extent of his prior conduct which may include arrests, convictions, charges, or general "trouble." The rebuttal evidence to correct a false impression, however, may not exceed the scope of the question posed to the witness or the answer given to that question. Exceeding the scope in this case resulted in reversible error. *Veteto v. State*, 8 S.W.3d 805, 815 (Tex. App.—Waco, 2000 pet ref'd).
5. Rules 608(b) and 612(b) serve different purposes: Rule 608(b) addresses a witness's general character for truthfulness, and Rule 612(b) addresses a witness's trustworthiness in the particular case. *Dixon v. State*, 2 S.W.3d 263 (Tex. Crim. App. 1999).
6. Rule of Evidence 609 permits only evidence of convictions, and Rule 608 does not allow specific instances of a witness's conduct to be proved or inquired into on the issue of credibility. But evidence that involves unadjudicated crimes could be admissible under Rule 612(b) to show a witness's bias or interest in a particular case. *Moreno v. State*, 22 S.W.3d 482, 486 (Tex. Crim. App. 1999).
7. Rule 612(b) creates an exception to Rule 608(b)'s general prohibition against the use of specific acts to impeach where the evidence shows a bias or motive to testify untruthfully. *Sparks v. State*, 943 S.W.2d 513, 517 (Tex. App.—Fort Worth, 1997 pet. ref'd).
8. Rule 608(b) prohibits the use of specific instances of conduct for impeaching a witness' credibility except to expose bias or interest, rebut affirmative representations made on direct examination, or to demonstrate a lack of capacity. A history of past drug abuse is considered a specific instance of conduct and Rule 608(b) prohibits a party from asserting that a witness's prior drug abuse damaged his or her perceptual capacity. *Lagrone v. State*, 942 S.W.2d 602, 607-608 (Tex. Crim. App. 1997).
9. Rule 608(b), by its terms, is very restrictive. Unlike Federal Rule 608(b), it allows for no exceptions. *Ramirez v. State*, 802 S.W.2d 674, 676 (Tex. Crim. App. 1990).
10. The trial court erred in permitting the State to impeach appellant with evidence that he had falsified information about his prior criminal record when he purchased a pistol, since that was a specific act of misconduct

which had not resulted in a conviction. *Alexander v. State*, 740 S.W.2d 749, 764 (Tex. Crim. App. 1987).

11. It is improper to impeach defendant with a probation revocation, since this is not a conviction under Rule 609. Error, however, was found to be harmless. *Brown v. State*, 692 S.W.2d 497, 500-501 (Tex. Crim. App. 1985).
12. The general rule is that specific instances of misconduct are inadmissible for the purpose of attacking a witness' general character for truthfulness. *Crenshaw v. State*, 125 S.W.3d 651 (Tex. App. – Houston [1st Dist.] 2003, pet. ref'd.).
13. A well-settled exception to the impeachment rules arises when a witness testifies and leaves a false impression as to the extent of her prior arrests, convictions, charges against her, or “trouble” with the police generally. When the witness leaves this kind of false impression during her direct examination, she is deemed to have “opened the door” to an inquiry into the veracity of her testimony. *Winegarner v. State*, 188 S.W.3d 379 (Tex. App. – Dallas 2006). (State’s petition granted).

IV. Code of Criminal Procedure Art. 37.07 § 3

A. Evidence of Prior Criminal Record in all Criminal Cases After a Finding of Guilty

- (a)(1) **Regardless of the plea and whether the punishment be assessed by the judge or jury, evidence may be offered by the state and the defendant as to *any matter* the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, *his general reputation, his character, an opinion regarding his character*, the circumstances of the offense for which he is being tried, and notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act...(emphasis added)**

B. Using Art. 37.07 § 3 as a Defense Tool

Art. 37.07 § 3 of the Texas Code of Criminal Procedure provides for the admission of evidence of a defendant's reputation and character at the punishment phase of trial. Because the article permits the State to offer this evidence in the first instance, it is typically used by the State to admit evidence that is harmful to a defendant. Article 37.03 § 3 can, however, be used to admit positive character evidence. The plain language of Art. 37.03 § 3 allows a defendant to provide the trial court with any positive information regarding his or her character, reputation, or witness opinions. The language of the article appears to leave the door wide open and, at least in theory, its potential is only limited by what the trial court deems relevant to sentencing. As a caveat, it is important to remember that if you seek to establish the positive character, reputation, or general opinion of your client, you open the door for the State to ask questions regarding specific instances of misconduct that may tend to mitigate against the positive image you are trying to create of your client. *See, e.g., Griffin v. State, 787 S.W.2d 63, 67 (Tex. Crim. App. 1990)*. As with any other area involving character evidence, Art. 37.07 § 3 should be used with caution if your client has a criminal history or a poor reputation.

Using Art. 37.07 § 3 of the Texas Code of Criminal Procedure as a defense tool is a relatively new concept. Most of the relevant case law involves courts interpreting the article on an appeal where a defendant has claimed that the trial court allowed the State to present too much negative character evidence at the sentencing portion of trial. This has resulted in a very broad reading of Art. 37.07 § 3 of the Texas Code of Criminal Procedure. Defense attorneys can and should be taking equal advantage of the opportunities available under Art. 37.07 § 3 to admit positive character evidence at the sentencing phase of trial.

C. Relevant Case Law

1. Published Cases

- a. Under Art. 37.07 § 3(a), the Texas Legislature determined that evidence as to any matter may be offered during the punishment phase of a trial if the trial court deems it relevant to sentencing. The trial court is deemed the authority on the threshold issue of admissibility of relevant evidence during the punishment phase of trial, while the jury determines whether or not the burden of proof for the evidence presented has been met. ***Mitchell v. State*, 931 S.W.2d 950, 952-953 (Tex. Crim. App. 1996).**
- b. If evidence of the defendant's character or reputation is deemed relevant by the trial court, the evidence is admissible during punishment if it is permitted by the Rules of Evidence. A fair reading of Art. 37.07 § 3(a) implicates that the sentencer should be provided with all relevant evidence in order to assess fair and appropriate punishment. ***Beasley v. State*, 902 S.W.2d 452, 456-457 (Tex. Crim. App. 1995).** *See also Anderson v. State*, 901 S.W.2d 946, 950 (Tex. Crim. App. 1995). (These were, of course, cases where the State sought to introduce harmful character evidence against the defendant, but their holdings should apply with equal force when the character evidence is supportive of the defendant.)
- c. It has long been recognized that other circumstances such as family background, religious affiliation, education, employment history, and the like are appropriate considerations in assessment of punishment. ***Murphy v. State*, 777 S.W.2d 44, 67 (Tex. Crim. App. 1989).**
- d. The Texas Court of Criminal Appeals granted review in this case “to determine whether evidence of crimes *committed by others* is relevant to a defendant's sentence, and if relevant, whether such evidence is admissible under Rule of Evidence 403. (Emphasis added). The Court found that under 37.07, § 3(a)(1), evidence of other crimes is admissible “regardless of whether the defendant has previously been charged with or finally convicted of the crime or act.” The Court held “that the trial court did not err in admitting evidence of the crimes committed by persons other than the defendant at the defendant's sentencing.” ***Rodriguez v. State*, 2006 Tex. Crim. App. LEXIS 1931, (Tex. Crim. App. 2006).**
- e. “The plain language of this provision [(Tex. Code Crim. Proc. art. 37.07 § 3(a)] requires that such evidence may not be considered in assessing punishment until the fact-finder is satisfied beyond a reasonable doubt that [the extraneous bad acts and offenses] are attributable to the defendant.”

***Huizar v. State*, 12 S.W.3d 479 (Tex. Crim. App. 2000).** The Court further held that the jury must be instructed on the reasonable-doubt standard whenever the State uses extraneous offense evidence during the punishment phase. This duty does not require a timely request or objection by a party. *See however, Wright v. State, No. 03-05-00419-CR, 2006 Tex. App. LEXIS 9322, (Tex. App. – Austin 2006)*, distinguishing the need for a limiting instruction on the grounds that it was the defendant who had offered the extraneous offenses for his own purposes during the guilt-innocence stage of the trial.

2. Unpublished Cases

While the Texas rules of Appellate Procedure prohibit using unpublished opinions as authority, these cases provide some insight into how courts have recently interpreted Article 37.07 § 3(a).

- a. The State argued the testimony of a witness who would testify that appellant was always “nice and respectful” would have been inadmissible at the punishment trial. However, the plain language of article 37.07 § 3(a) specifically provides for the admission of evidence on “*any matter the court deems relevant* to sentencing, including but not limited to the prior criminal record of the defendant, *his general reputation, his character, . . .*” Under this plain language, the testimony of the witness appears to have been admissible. ***Ramos v. State, No. 13-01-1355-CR, 2002 Tex. App. LEXIS 4396, at *13 n.2 (13th Dist. June 20, 2002).***
- b. Under Article 37.07 § 3(a), the State may offer evidence during the punishment phase of trial as to “any matter the court deems relevant.” The Court of Criminal Appeals has explained that “determining what is relevant . . . should be a question of what is helpful to the jury in determining the appropriate sentence in a particular case.” *Mendilola v. State*, 21 S.W.3d 282, 285 (Tex. Crim. App. 2000). Evidence of the defendant’s character is relevant at the punishment phase of a criminal trial. ***Johnson v. State, No. 05-00-01343-CR, 2001 Tex. App. LEXIS 8349, at *3 (5th Dist. Dec. 18, 2001).***