HABIT AND CHARACTER EVIDENCE

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Lawyers sometimes confuse habit with character but one is not the other and the rules of admissibility couldn't be more different.

Habit refers to repetitive conduct that occurs with almost reflexive and predictable regularity when the same situation (over which the actor exercises complete control) presents itself. McCormick (Section 62, pg 340) describes it as a regular response to a repeated, specific situation such as always descending a staircase two steps at a time or using a hand-signal before making a left turn. Other examples include things like following the same routine (e.g. Tony Soprano walking down the driveway every morning in his open robe and slippers to pick up the paper at the edge of the driveway) or taking the exact same route and stopping at the same bakery every morning to pick up pastries on the way to the Bada Bing).

Put another way, habit consists of a course of behavior of a person in control of the circumstances (or of an organization), that is deliberate or regularly repeated in the same or similar circumstances. (Halloran v Virginia Chemical Co. 41 NY2d 386 [1977]).

Because habitual behavior is predictable (and predictive) by nature, evidence of a person's habit or of an organization's routine practice is admissible to prove that on a particular occasion the person or organization acted in conformity with the habit or routine practice. (Vivian Etienne Medical Care PC v Country Wide Ins. Co 25 NY3d 498 [2015]: billing company's regular office practices in handling no-fault claims admissible to prove that claims had been mailed; Rivera v Anilesh 8 NY3d 627 [2007]: dentist's regular practice of administering injectable anesthesia before performing tooth extractions [every day on 3 to 4 patients] admissible to prove that anesthesia was administered before pulling the plaintiff's tooth. In this case, the defendant had no independent recollection of the procedure so evidence of his regular practice was admissible to show that he most likely followed that practice on this occasion).

While there is no hard and fast number, the proponent has to demonstrate that the conduct was performed a sufficient number of times (setting forth at least generally the times and places) to qualify as habitual and invariable under the same circumstances. And unlike at common law, courts may admit habit evidence even when there is eyewitness testimony describing the incident in question. (Rivera v Anilesh supra).

While habit evidence is more frequently offered in civil cases, it is not entirely unheard of in criminal cases. In an Arizona case, State v Slover No.2 CA-CR 2007-0379 (2009), for example the defendant, on trial for vehicular homicide while under the influence of alcohol (involving the death of his passenger), offered the testimony of a gas station attendant that over the course of four years when the defendant and the victim came by to purchase gasoline, driving one or the other's vehicle, they would frequently

take turns driving. (The defendant's position at trial was that the victim, who was also intoxicated, was driving the defendant's vehicle on this occasion).

The court refused to admit the attendant's testimony because the defendant failed to establish that the victim's driving his was car was either situation-specific or frequent enough to qualify as habit.

Query whether a defendant could establish an alibi defense by calling a witness (e.g. a regular at the Erie County Bar and Grill), who, while not in the defendant's company on the date and time of the crime (a particular Friday at 5:30pm), would testify that "every Friday after work right at 5:30pm for the past year or more, the defendant would stop in at the County Bar and Grill in after work, order a shot and a beer, knock them back lickety split and then leave."

Conversely, if the defendant were charged with Vehicular Manslaughter (while under the influence of alcohol), for striking a pedestrian on his way home on that same Friday at 6:00pm, would that same witness be allowed to testify to the defendant's weekly routine of stopping into the County Bar to show that he consumed alcohol just prior to the accident? As inculpatory evidence, such testimony might be considered to be an improper character attack (i.e. prior bad act evidence rather than habit) offered to show that the defendant acted in conformity therewith.

In contrast to habit which focuses on repetitive behaviors, character refers to a person's general disposition (or personality) as perceived by others. It is usually characterized in conclusory terms describing someone as being: honest or dishonest, peaceful or violent, passive or aggressive, laid-back or high-strung, generous or parsimonious, cautious or reckless, low-key or flamboyant, chaste or promiscuous, gregarious or shy, empathetic or indifferent, worrisome or care-free and so on.

Unlike habit testimony, evidence of a person's character is NOT ADMISSIBLE to prove that the person acted in conformity therewith on a given occasion. The idea is that a defendant should be tried upon the evidence against him OF THIS CHARGE rather than upon evidence of peoples' perceptions of him on the off (if not likely) chance that he conducted himself in a manner that is consistent with his past proclivities. It is a rule of fairness that generally favors proof of the present crime over proof of propensity or predisposition toward criminal conduct. (See generally, People v Zackowitz 254 NY 192 [1930).

While the People may not be the first to introduce evidence of the defendant's character, the defendant has the option (in the intertest of fairness) to put his character in issue in the case by offering evidence of his GOOD CHARACTER with respect to a RELEVANT CHARACTER TRAIT. He may do so for the VERY PURPOSE of demonstrating (based on his good character) the unlikelihood of his committing the offense charged. (People v Aharonowicz 71 NY2d 678 [1988]; People v Van Gaasbeck 189 NY 408 [1907]).

As noted above, the evidence must pertain a relevant character trait, so if the defendant is charged with assault, a witness who is familiar with the defendant's reputation for honesty, for example, would likely not be allowed to testify about that since the pertinent character trait, based on the elements of the crime of assault, is that of violence not truthfulness. Conversely, a defendant charged with perjury would not likely be allowed to offer evidence of his good character for peacefulness.

In New York State Court, the permissible method of proving character is by evidence of reputation. (In contrast the federal rules [FRE 405(a)] allow reputation or opinion testimony). By way of foundation, the proponent must establish that the witness is familiar with the defendant's reputation in a particular

community with respect to the relevant character trait. In other words, the witness must be privy to or aware of the views of a sufficient number of individuals who have had sufficient experience with or knowledge of the defendant's reputation and have talked about it. In this respect, reputation testimony is a form of legally authorized scuttlebutt. (People v Fernandez 17 NY3d 70 [2011]).

What constitutes a community depends on whether a person's associations are of such quantity and quality to allow him or her to be observed by a sufficient number of people to render the reputation reliable. (People v Bouton 50 NY2d 130 [1980]). A community can be so large as to encompass a nation's general perception of its president or smaller in scope such as one's place of employment, membership in a group (e.g. Assigned Counsel Attorneys in Erie County), a person's school, neighborhood or even extended family. (See People v Fernandez supra where, in this child sex abuse case, it was deemed error to exclude the testimony of the victim's relatives [in an extended family of up to 30 people] with respect to her character for untruthfulness). As the Court of Appeals observed, "a reputation may grow wherever an individual's associations are of such quality and quantity as to permit [her] to be personally observed by a sufficient number of individuals to give reasonable assurance of reliability." (17 NY3d at 76).

One way to lay a foundation for reputation evidence as in Fernandez (where the community is the extended family) could be:

Q.Mr/Ms X, do you know the alleged victim in this case?

Q. How do you know her? (Or what is your relationship to her).

Q. How long have you known her?

Q. How often and in what situations have you been in her company in that time frame?

Q. How big is your extended family?

Q. Generally, who does that include?

Q Have you been in the company of extended family members when they were talking about V?

Q. How often?

Q. And specifically, have you heard other members of your family discuss V's reputation for truthfulness in your family?

Q. How often and in what contexts? (Technically, a compound question that can be broken down).

Q. How many different family members have you heard talk about her reputation for truthfulness?

Q Over what period of time?

Q. And did you participate in those conversations?

Q. Based on those discussions and conversations, have you become familiar with V's reputation in your extended family for truthfulness?

Q. And what is that reputation?

Note that the above example involves on attack on the victim's credibility for truthfulness which can be levelled at any witness (including the defendant, if he testifies). If the defendant chooses to introduce evidence of his good character on a relevant trait, the foundation could be laid in similar fashion or in whatever manner establishes the existence of a community and the witness' familiarity with and exposure to others within it who have spoken with sufficient frequency about the defendant's reputation.

Counsel should be aware that introducing good character evidence on behalf of the defendant can be like throwing a boomerang in the dark because doing so can invite potentially damning cross examination of the character witness with respect to his/her awareness of relevant bad acts or convictions of the defendant that tend to refute the good character evidence (People v Kuss 32 NY2d 436 [1973]), or contrary witnesses to say that the defendant's reputation, as they know it, is bad. (People v Richardson 222 NY 103 [1917]). While the cross examiner is permitted only to challenge either the character witness' awareness ("no I hadn't heard that the defendant had assaulted his girlfriend who then obtained an order of protection"), or bias ("yes I heard that but I don't believe it"), the effect can be to inform the jury of past misconduct by the defendant. (If such questioning is allowed, counsel should be sure to request a limiting instruction for whatever it may be worth). It should also be noted that the cross examiner is bound by the character witness' answer, so extrinsic evidence (proof of a prior bad act), would not be admissible to impeach.

However. the People are allowed to rebut evidence of the defendant's good reputation with INDEPENDENT PROOF (e.g. certificate of conviction) OF ANY PREVIOUS CONVICTION of the defendant for an offense that would tend to negate the good quality advanced by the character witness. (See CPL 60.40[2]). So, if a defendant chooses to OPEN THE DOOR to character testimony, he/she should be wary of who or what may come walking in behind the witness.

As a general rule, the Rules of Evidence do not permit evidence of specific instances of conduct to prove action in conformity therewith on a given occasion. However, there are situations where such evidence is admissible such as when CHARACTER IS IN ISSUE IN THE CASE because it is an ELEMENT OF A CHARGE OR DEFENSE, it is relevant to the defendant's state of mind (as in an assault case where the defendant claims justification), or where the People seek to introduce evidence of prior crimes or bad acts of the defendant to establish either an element of the crime charged or other material fact such as MOTIVE, INTENT, IDENTITY, COMMON SCHEME OR PLAN, ABSENCE OF MISTAKE, OR TO REBUT AN INNOCENT EXPLANANT FOR OTHERWISE CRIMINAL CONDUCT. (See People v Molineaux 168 NY 264 [1901]; People v Ventimiglia 52 NY2d 350 [1981]).

If a defendant, for example, were charged with illegal sale of drugs to an undercover officer or informant and claimed that he was entrapped into committing an act that he was not otherwise predisposed to do (PL 40.05), the People would likely be permitted to introduce evidence of prior drug sales by the defendant to rebut his claim that he was hornswoggled. Also, in a civil action alleging police brutality or department negligence in retaining an officer with a demonstrated history of excessive force or violence, prior bad acts would be relevant to the issue of knowledge of the officer's propensity toward violence.

In the above-referenced assault case where the defendant claims self-defense, evidence of the victim's reputation for violence or prior specific acts of violence (against the defendant or others), are admissible IF THEY ARE KNOWN TO THE DEFENDANT AND ARE REASONABLY RELATED TO THE

CRIME CHARGED. (See People v Rodawald 177 NY2d 408 [1904]; People v Miller 39 NY2d 543 [1976]). Such evidence is relevant to the defendant's STATE OF MIND i.e. his belief that (deadly) physical force was necessary to defend himself (or a third party), and to the reasonableness of his conduct. (This language is incorporated into the CJI Justification Charge [PL 35.05] for use in appropriate cases).

Such evidence is NOT, however, admissible to prove that the defendant was the FIRST AGGRESSOR. On the other hand, evidence of the victim's prior stated threats to or about the defendant, WHETHER OR NOT KNOWN TO HIM, are admissible to prove that the victim acted in accordance with those threats as the initial aggressor. (People v Petty 7 NY3d 277 [2006]).

As noted above, the People may, upon motion in limine, offer evidence of the defendant's prior bad acts in their case-in-chief if they are shown BY CLEAR AND CONVINCING EVIDENCE (People v Robinson 68 NY2d 541 [1986]), to be RELEVANT to an element of the crime or other material issue. AND the probative value of such evidence outweighs the prejudicial risk that the jury may consider it as proof of criminal predisposition. The court must identify ON THE RECORD the issue to which such evidence is relevant, determine whether it actually sheds light on an element or other material issue (e.g. motive, absence of mistake), consider the need for such evidence (if the People's proof is otherwise strong in its own right, prior bad acts may only constitute prejudicial piling on), and balance the evidentiary benefits against the potential harm of admitting it. If the court admits the evidence, it must give the jury A LIMITING INSTRUCTION setting forth the permissible purpose for which it may be considered.

Parenthetically, counsel should be careful not to confuse Molineaux evidence with the use of prior bad acts or convictions to impeach the defendant's credibility as a witness on cross examination pursuant to People v Sandoval 34 NY2d 371 (1974). While the court must still do a balancing act before allowing such inquiry, in this context, the court must weigh the probative value of the evidence on the defendant's credibility against the risk that allowing it might invite the jury to convict the defendant based upon propensity. As with character witnesses, the cross examiner is bound by the defendant's answer regarding prior bad acts but not so with a prior conviction that the defendant either denies or equivocates about. In such case, the People could introduce independent proof of the conviction.

Trial courts are generally quite generous in admitting prior bad act evidence in Domestic Violence (DV) cases. The rationale for the open-door policy was concisely expressed in People v Westerling 48 AD3d 965, 966 (3d dep't 2008) where the court stated that. "(p)rior bad acts in domestic violence situations are more likely to be considered relevant and probative evidence because the AGGRESSION AND BAD ACTS ARE FOCUSED ON ONE PARTICULAR PERSON… demonstrating the defendant's intent (to harm the victim), motive (to control or dominate the victim), identity, absence of mistake or accident." The court cautioned, however, that proof of prior bad acts must be specific and provable rather than broad-sweeping, and conclusory.

See also People v Bierenbaum 301 AD2d 119, 146 (1st dept 2002), a circumstantial domestic homicide case where the court admitted statements of the deceased wife (made to relatives), describing her tumultuous marriage with the defendant. The court observed that. "in a domestic violence homicide…it is highly probative…that a couple's marriage was strife-ridden and that the defendant previously struck the spouse/victim…Such evidence… is highly probative of the

defendant's motive (in this case, to silence the wife who threatened to expose his abusive ways to his professional colleagues if she didn't get what she wanted in a divorce), and is inextricably interwoven with the issue of his IDENTITY as the killer." (In this case, the defendant told police that he last saw his wife when she left their home in a huff after an argument to go sun bathing in Central Park. Her body was later chopped up and put in a suit case which was dropped into the ocean from an airplane flying from New York to New Jersey. The defendant neglected to mention his plane ride during his interview the police).

In People v Agina 18 NY3d 600 (2012), the Court of Appeals took an expansive view with respect to admitting Molineaux evidence (in that case, a very similar and sadistic kind of assault upon the defendant's ex-wife 18 months earlier), as proof of the defendant's identity as the person who assaulted his current wife over the course of a weekend. The defendant argued that the other evidence was irrelevant (and unduly prejudicial) because the defendant and victim knew each other and he admitted spending some time with her that weekend, admitting only to a verbal argument.

The Court reasoned that by denying the assault and implying that the victim was lying, the defendant put his identity (not as someone whom the victim knew but) AS THE PERPETRATOR in issue. Therefore, proof of the prior assault, with its very similar modus operandi, was admissible as evidence that the defendant, and not someone else, committed this assault.

There is no shortage of DV cases admitting prior bad act evidence for a variety of reasons including: to establish the nature and background of the relationship, to explain the basis for an order of protection, to complete the narrative in addition to the usual litany of Molineaux reasons set forth above. (As a sampling, see People v Wright 167 AD2d 959 [4th dep't 1990], People v Shorey 172 Ad2D 634 92D DEP'T 1991], People v LaFrance 182 AD2d 598 [1st dep't 1992], People v Williams 242 AD2d 911 94th dep't 1997]. People v Guiteau 267 AD2d 1094 [4th dep't 1999], People v Perez 49 AD3d 903 [2d dep't 2008], People v Doyle 48 AD3d 961 [3d dep't 2008], People v Trench 51 AD3d 951 [2d dep't 2008], People v Laverpool 52 AD3d 622 [2d dep't 2008], People v Sanchez 73 AD3d 1093 [2d dep't 2010]), People v Wolff 101 AD3d 1406 [4th dep't 2013])

Just because prior bad act evidence may be relevant, however, does not necessarily open the door to admissibility where the evidence is not offered IN ADMISSIBLE FORM. In People v Meadow 146 AD3d 1596 (4th dep't 2016), the Fourth Department held that the trial court erred in admitting statements made by the victim (who was found bound and strangled to death on her kitchen floor), to her friends and relatives describing the defendant's prior assaults upon her and expressing fear that he would kill her. In the court's view, there was no hearsay exception authorizing the admission of those statements. (In Bierenbaum supra, the court glossed over the hearsay issue simply stating that the victim's statements about her husband appeared reliable because they were made spontaneously).

Similarly, in People v Brooks 2018 NY Slip Op 01956 (3/22/18), the Court found that the trial court erred in admitting evidence of statements made by the murder victim (found strangled and drowned in a hotel bathtub), that the defendant had previously threatened her. Citing Meadows supra, the court stated that prior bad act evidence, however relevant, must still be presented in admissible form, and there is no blanket exception providing for use of such statements as background evidence in domestic violence prosecutions. (Citing People v Maher 89 NY2d 456 [1997]).

While character evidence seems to appear only sparingly in criminal cases, counsel should be mindful of using it in appropriate cases, for example, where the defendant has little or no criminal history and otherwise enjoys a good reputation in his community. This can be important because good reputation evidence which is admissible FOR ITS TRUTH can “give rise to a reasonable doubt of guilt where none would otherwise exist.” (People v Bouton supra 50 NY2d at 139 [1980]). Counsel must also be sure to thoroughly investigate the client’s background before calling character witnesses because this kind of evidence, as noted above, can be a double-edged sword.