

Alabama Rules of Evidence

Article IV. Relevancy and Its Limits

Rule 405.

Methods of proving character.

(a) *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.

(b) *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 that person's conduct.

[Amended 8-15-2013, eff. 10-1-2013.]

Advisory Committee's Notes

This rule tracks verbatim the corresponding federal rule, except to add the language "except under Rule 404(a)(1)." It establishes the permissible forms of evidence through which one is allowed to prove character or a trait of character. These are reputation, opinion, and specific instances of conduct.

Section (a). Reputation. In all cases where evidence of character or a trait of character is admissible, it may be proven through the medium of reputation. This is consistent with preexisting Alabama law. When the defense chooses to prove the accused's good character, for example, it may do so through evidence of general reputation. *Beaird v. State*, 215 Ala. 27, 109 So. 161 (1926); *Jones v. State*, 514 So.2d 1060 (Ala.Crim.App.), cert. denied, 514 So.2d 1068 (Ala.1987). See 1A J. Wigmore, *Wigmore on Evidence* § 56 (Tillers rev. 1983); C. Gamble, *McElroy's Alabama Evidence* § 27.01(2) (4th ed. 1991); J. Colquitt, *Alabama Law of Evidence* § 4.4(b) (1990). To be admissible, evidence of reputation must meet several foundational prerequisites. These requirements are unaffected by the adoption of this rule. See, e.g., *Steele v. State*, 389 So.2d 591 (Ala.Crim.App.1980) (dealing with definition of the term "community," which must be used whenever one asks a question calling for evidence of reputation); C. Gamble, *McElroy's Alabama Evidence* § 26.02 (4th ed. 1991) (dealing with foundational requirements, such as the contacts of the witness and the person whose reputation is in question with the community from which the reputation is drawn). See also C. Gamble, *Character Evidence: A Comprehensive Approach* 2 (1987).

Opinion. Whenever evidence of a person's character is admissible, that evidence may be in the form of a witness's opinion of the person's character, except when the defense is

proving an accused's good character or the prosecution is rebutting an accused's evidence of good character. This use of opinion evidence is new to the law of Alabama. Historically, the character witness has been limited to relating general reputation in the community.

Any witness who has testified on direct examination to another's character is subject to cross-examination regarding his or her testimony. A significant aspect of this witness's cross-examination is the historic right to ask the reputation witness if the witness has heard of an act, committed by the subject person, that is inconsistent with the character the witness has testified to on direct examination. Traditional common law has required that such a question contain the words "have you heard." The witness could not be asked about personal knowledge of such conduct. *Noel v. State*, 161 Ala. 25, 49 So. 824 (1909); *Peoples v. State*, 510 So.2d 554 (Ala.Crim.App.1986), *aff'd*, 510 So.2d 574 (Ala.), *cert. denied*, 484 U.S. 933 (1987). See C. Gamble, *McElroy's Alabama Evidence* §§ 27.01(6), 26.01(17) (4th ed. 1991); W. Schroeder, J. Hoffman, & R. Thigpen, *Alabama Evidence* § 4-5(c)(2)(A) (1987). Rule 405 permits the cross-examiner to omit the "have you heard" phrase and to inquire as to the witness's personal knowledge of specific conduct that is relevant to the character testified to on direct examination.

Section (b). Specific instances of conduct. A third form of character evidence, specific instances of conduct, is recognized in those cases where the character of a person is an essential element of a charge, claim, or defense. This represents conventional common law doctrine in both Alabama and the United States as a whole. See E. Cleary, *McCormick on Evidence* § 187 (3d ed. 1984); C. Gamble, *McElroy's Alabama Evidence* § 34.01 (4th ed. 1991). In a civil action based upon negligent entrustment of an automobile, for example, the character of the bailee is an essential element of the claim; evidence of the bailee's negligent driving is admissible against the bailor to show the bailee's incompetence or the bailor's knowledge of the bailee's incompetence. *Mason v. New*, 475 So.2d 854 (Ala.1985); *Bruck v. Jim Walter Corp.*, 470 So.2d 1141 (Ala.1985); C. Gamble, *Character Evidence: A Comprehensive Approach* § 28 (1987). See also E. Cleary, *McCormick on Evidence* § 18 (3d ed. 1984) (defamation action dealing with admissibility of evidence of specific acts of allegedly defamed person where defensive pleading of truth renders character at issue).

This concept of character as an essential element of the defense is perhaps best illustrated on the criminal side by a plea of entrapment. Such a plea is held to make the accused's propensity for committing the kind of act charged an essential element and thereby opens the door to evidence of collateral relevant misconduct. See *Jackson v. State*, 384 So.2d 134 (Ala.Crim.App.1979) (recognizing that the accused, by pleading entrapment, opens up inquiry into character or predisposition to commit the kind of crime for which the accused is being prosecuted), *cert. quashed*, 384 So.2d 140 (Ala.1980), overruled by *Lambeth v. State*, 562 So.2d 575 (Ala.1990). See also C. Gamble, *Prior Crimes as Evidence in Present Criminal Trials*, 1 Campbell L.Rev. 1 (1979); W. Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 Ala.L.Rev. 241 (1984); C. Gamble, *McElroy's Alabama Evidence* § 69.01(13) (4th ed. 1991).

**Advisory Committee's Notes to Amendment to
Rule 405(a) Effective October 1, 2013**

Rule 404(a)(1), Ala. R. Evid., provides that the criminal defense may prove the accused's good character as substantive proof from which to infer that the accused did not commit the crime in question. Additionally, the prosecution may offer evidence of the accused's bad character in rebuttal. Prior to this amendment, Rule 405(a) provided that the only medium of proof available to the defense or the prosecution to prove such character was evidence of the accused's general reputation. *Jolly v. State*, 858 So. 2d 305, 312 (Ala. 2002); see C. Gamble, *Gamble's Alabama Rules of Evidence* § 404(a)(1)(A) (2d ed. 2002); and 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 27.01(1) (6th ed. 2009). This amounted to a rejection of Fed. R. Evid. 405(a), under which opinion evidence is allowed as an alternate medium for proving the accused's character. In fact, precluding a character witness from giving an opinion of the accused's character likewise amounted to a rejection of the version of Rule 405(a) that was contained in the initially proposed and circulated version of the Alabama Rules of Evidence. See Order of Supreme Court of Alabama, Apr. 27, 1993, Ala. R. Evid. 405(a) (proposed) (found in 615 So. 2d Advance Sheets No. 2 (May 13, 1993)). Therefore, the purpose of the present amendment is to make available to the criminal defense, when exercising the right to prove the accused's good character under the mercy rule, as authorized under Ala. R. Evid. 404(a)(1), the medium of opinion evidence as an alternative to reputation evidence.

This additional medium of opinion as to the accused's character is also available to the prosecution in rebuttal. See Ala. R. Evid. 404(a)(1). Because the prosecution's character proof, authorized under Rule 404(a)(1), is in rebuttal to evidence presented during the defense's case-in-chief, the Committee expects that the scope and nature of the medium of the accused's evidence of good character will continue, as under preexisting caselaw, to generally form the parameters of the medium of the state's rebuttal evidence regarding bad character. C. Gamble, *Gamble's Alabama Rules of Evidence* § 404(a)(1)(B) (2d ed. 2002). See Ala. R. Evid. 404(a)(1) (Advisory Committee's Notes) (because the mercy rule is a right of special dispensation afforded the criminal defendant, the defendant is allowed some measure of power to limit the breadth of rebuttal).

Note from reporter of decisions: The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from ____ So. 3d.