Alabama Rules of Evidence

Article IV. Relevancy and Its Limits

Rule 406.

Habit; routine practice.

Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.

Advisory Committee's Notes

This rule is identical to Rule 406 of the Federal Rules of Evidence. The principle of relevancy expressed in this rule constitutes an exception to the general provision in Ala.R.Evid. 404(a) that character is not provable as a basis from which to infer how one acted on a particular occasion. A specialized application of the general exclusionary rule precludes the admission of evidence of a person's prior acts offered to prove that the person is of a certain character and acted in keeping with that character on a particular occasion. If these collateral acts, however, are of sufficient similarity and repetition to constitute a habit, then Rule 406 makes them admissible to prove conduct on a particular occasion. This rule regarding habit is consistent with preexisting Alabama law. See *Dothard v. Cook*, 333 So.2d 576 (Ala.1976); C. Gamble, Character Evidence: A Comprehensive Approach 13 (1987); C. Gamble, McElroy's Alabama Evidence § 42.01 (4th ed. 1991).

Equivalent collateral conduct of an organization, sometimes designated at common law as "custom," is referred to in this rule as "routine practice of an organization." Such organizational practice, consistent with preexisting Alabama law, is relevant to prove conduct on the occasion being litigated. *Ex parte McClarty Constr. & Equip. Co*., 428 So.2d 629 (Ala.1983).

Rule 406 offers no precise standard for determining how many times an act must be repeated, or how consistently behavior must be shown, in order for the act or the behavior to attain the status of habit. The committee assumes that the judiciary will continue to emphasize the concept that "habit" requires a regular response to a repeated situation. See *Pacific Mut. Life Ins. Co. v. Yeldell*, 36 Ala.App. 652, 62 So.2d 805 (1953); *Wilson v. Volkswagen of Am., Inc.*, 561 F.2d 494 (4th Cir. 1977), cert. denied, 434 U.S. 1020 (1978). As Professor McCormick so perceptively observed:

> "A habit... is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic." E. Cleary, McCormick on Evidence § 195 (2d ed. 1972) (emphasis added).

Some case law authority, not a model of clarity, requires proof of certain conditions precedent to the admission of evidence regarding a person's habit or an organization's routine practice. For example, evidence of an organization's custom has been held inadmissible unless that evidence is corroborated by other evidence. See M. Slough, *Relevancy Unraveled*, 5 Kan.L.Rev. 404, 449 (1957). Habit evidence has been held inadmissible to prove that a person was not contributorily negligent, unless it is first shown that there were no eyewitnesses to the event on which the claim of contributory negligence is based. See, e.g., *Montgomery Light & Traction Co. v. Devinney*, 200 Ala. 135, 75 So. 883 (1917); *Cereste v. New York, New Haven & Hartford R.R*., 231 F.2d 50 (2d Cir.), cert. denied, 351 U.S. 951 (1956); *Recent Cases –Evidence –Relevancy –Admission of Habit Evidence to Show Due Care*, 10 Vand.L.Rev. 447 (1957). Rule 406 abandons both the corroboration and the "no eyewitness" requirements. See C. Gamble, McElroy's Alabama Evidence § 42.01(6) (4th ed. 1991); W. Schroeder, J. Hoffman, & R. Thigpen, Alabama Evidence § 4-6(a) (1987) (suggesting that recent judicial silence may indicate that the "no eyewitness" requirement had already been abandoned under pre-rules Alabama law).

Collateral conduct of a party in a civil action may be admissible for the relevant purpose of showing design or plan. See Ala.R.Evid. 404(b). Nothing in Rule 406 is to be taken as requiring that such collateral conduct must constitute a habit in order to be admissible.

Most of the case law involving habit has arisen in civil cases. Nothing, however, precludes its recognition in criminal cases. Occasionally, the prosecution in a criminal case will offer evidence of the accused's collateral misconduct as a basis for the factfinder to infer that the accused had a habit of committing the kind of crime with which the accused is presently charged. If such evidence is to be admitted, it customarily should be admitted for the purpose of proving plan as an exception to Rule 404(b) rather than under Rule 406. See *United States v. Mascio*, 774 F.2d 219, 221-22 (7th Cir.1985); C. Wright & M. Graham, Federal Practice and Procedure: Evidence § 5273 (1980) (observing that "while there may be cases in which the commission of crime in a particular way can properly be considered to be a habit, in most cases it would seem better to admit the evidence under Rule 404(b) rather than stretch Rule 406 to cover it"). But see *United States v. Luttrell*, 612 F.2d 396 (8th Cir.1980) (in a prosecution for failure to file tax returns in 1974 and 1975, Rule 406 was applied to permit the Government to prove a failure to file in 1976, 1977, and 1978); *Wyatt v. State*, 419 So.2d 277, 281 (Ala.Crim.App.1982) (recognizing, in dictum, the applicability of the habit exception in a criminal prosecution).