The Role of "Character" in Libel Litigation

ROBERT P. LATHAM AND AMANDA THOMPSON

> Be more concerned with your character than your reputation, because your character is what you really are, while your reputation is merely what others think you are.
>
> ~John Wooden, former basketball player and coach

> Just because you are a character doesn't mean that you have character.
>
> ~Winston Wolfe, *Pulp Fiction*

Tiger Woods: A (Hypothetical) Cautionary Tale

To illustrate the roles of character and reputation in libel cases and to give emphasis to the differences between the two, let's consider a hypothetical situation based in the shadow of a real life situation with which most of us are familiar.

Reality: It is early 2009, and Tiger Woods is recovering from surgery after having won his 14th major golf championship—the 2008 U.S. Open—while hobbling on one leg. He is the highest paid athlete in the world, with endorsement deals with the likes of Gillette and Tag Heuer and with a seemingly enviable family situation: a wife and two kids who are always visible at golf tournaments and whom he references in at least one endorsement.

Hypothetical: Something is written about Woods that does not involve his family or romantic life. Let's say that it involves a financial deal and accuses Woods of financial improprieties. In order to protect his valuable endorsement deals and his reputation as a reliable pitchman, Woods brings suit for defamation. The case is going to trial in early 2009. The defense, whether or not it has a defense to liability for the alleged defamation, needs to deal with the possibility of a large damages award. After all, this is an extremely popular and richly compensated athlete.

Woods is claiming a reputation as the premier golfer in the world, a dedicated athlete, a dedicated family man, a reliable partner and spokesperson for sponsors, and a man with nothing sordid in his past. The defense—even before stories of Cadillac Escalades and golf clubs and Ambien and trees—acquires information, either by its own investigation or by someone with an ax to grind coming forward, that Woods is keeping company with a number of mistresses and is in effect living in a house of cards that could unravel at any time. Woods is asked about this information in his deposition. He refuses to answer. He seeks a protective order and files a motion in limine to prevent this information from not only coming out but even being raised, claiming that it is irrelevant to anything involving the financial deal at issue. The defense argues that maybe it isn't relevant directly to the issue of truth as to whether he was involved in the hypothetical financial improprieties but that it does go to his character, and that at trial Woods will no doubt offer evidence about his character as well as his reputation, as libel plaintiffs do.

To counter the defense's arguments, Woods's lawyers argue that these issues are irrelevant to his reputation because even if they were true, nobody knows about them. The defense then responds that the information relating to Woods's conduct should certainly be admissible in order to mitigate future damages if these matters were to ever come out. The judge, worried about going down a slippery slope by allowing the defense to bring in any bad facts that it can find about Woods, rules that any such conduct (whether true or not) does not relate to the alleged defamation, and he grants the motion in limine. The case goes to trial, and Woods prevails and recovers damages based on his generally solid reputation (other than an occasional ill-tempered moment on a golf course). He recovers not only past but also future damages.

Back to reality: We all know what happens in the next year. Woods's earnings are cut in half. Tag Heuer and Gillette drop him as a pitchman. He no longer tops the Forbes list of the world's most highly compensated athletes. And four years have passed without him winning another major.

Returning to our hypothetical: Despite the defense's prophetic arguments about Woods's conduct being relevant to future damages, Woods gets to keep the future damages that were awarded.

If this seems like an implausible scenario, it is not. The issue of what evidence to admit regarding a plaintiff's character or reputation is a fertile battleground in libel cases. One of the reasons that it has been so fertile is that those two words—*character* and *reputation*—have sometimes been used interchangeably when they should not be.

In this article, we will examine the confusing jurisprudence regarding the interplay between character and reputation. We also will identify the turning point in allowing evidence of character and why it is vitally important to allow defendants in defamation cases to be able to introduce evidence of specific instances of misconduct in order to prevent a potentially unjust result.

Muddy Waters: Confusing the Terms *Character* and *Reputation*

To illustrate how unclear the authority can be in this area, consider this from Corpus Juris Secundum (C.J.S.): "Since the plaintiff's general character

Robert P. Latham is a partner at Jackson Walker L.L.P. in Dallas and Houston, Texas, where he chairs the firm's media law practice. Amanda Thompson is an associate in the Dallas office of Jackson Walker L.L.P.

or reputation is necessarily involved in a defamation case, that type of evidence is admissible."[1] However, the excerpt goes on to state that "the proof must be confined to reputation with respect to the aspects of the plaintiff's reputation that were allegedly defamed, and testimony must also be presented to the effect of that trait, if true, upon the community's view of the plaintiff."[2]

This somewhat outdated treatment (as we shall further discuss) of the issue suggests that unless the evidence sought to be admitted was a component of the plaintiff's already existing reputation, it is inadmissible. "Evidence of particular instances of misconduct is not admissible to prove the plaintiff's general bad character or reputation so as to show the plaintiff was not damaged significantly by the alleged misrepresentation."[3] Thus, reading this excerpt as a whole, it would seem that a plaintiff is able to proffer evidence of his general good character, but the defense is not able to proffer evidence of his general bad character.

To further blur the analysis, the C.J.S. entry concludes thus: "[S]pecific instances of a plaintiff's conduct or a plaintiff's particular character traits are not relevant unless they were generally known by others in the community."[4] This of course is not character; it's reputation. Limiting proof of a libel plaintiff's character to only those things that are known in the community is to remove the component of character altogether.

If the C.J.S. treatment of this issue seems to be all over the map, it is perhaps because the case law has been as well. Some courts have taken a myopic view of a plaintiff's pleadings in a libel case where the plaintiff seeks recovery for damages to his reputation. A case in point is *Shirley v. Freunscht*.[5] Robert Shirley was a former salesman for New York Life Insurance Company who sued another New York Life agent about comments that agent made to clients of the company after Shirley had left.[6] The Oregon appellate court cited Oregon Evidence Code section 404(1) and held that because evidence of the plaintiff's character was admissible under section 404(1), the defendants could prove his poor business reputation by specific instances of misconduct, including instances unrelated to the content of the allegedly defamatory statements.[7] The Oregon Supreme Court, however, reversed, stating:

> Character and reputation are not synonymous. Character is internal; it is that set of personality traits and moral values actually possessed by an individual. *See State v. Johns*, 301 Or. 535, 548, 725 P.2d 312 (1986). Reputation, however, is external. It is the community's *perception* of an individual's character. Character is what a person is, reputation is what the person's neighbors think he or she is. *See* 1 A. Wigmore, Evidence 1147–48, § 5233 (1978). Plaintiff's pleadings in this case establish that he sought damages for harm to his reputation, not his character.[8]

However, the court ignored the interrelation between character and reputation, particularly regarding the potential for damages. This is an especially surprising result given that the Oregon Evidence Code makes character relevant in a libel case even though, by definition, a libel plaintiff will always seek damages to his reputation.

The South Carolina courts in *Weir v. Citicorp National Services, Inc.*, took to particular extremes the idea that evidence regarding a libel plaintiff's reputation is inadmissible unless the public knows about it.[9] Weir filed suit against Citicorp for making an allegedly false credit report, a report that indicated he owed a debt to Citicorp.[10] In attempting to mitigate damages, Citicorp sought to introduce a previous judgment that had been entered against Weir for an unrelated debt.[11] However, the trial court found that there was no evidence that such a judgment had been entered on the public "judgment roll;" therefore, the public would have not known about it, and it could not be a component of Weir's reputation.[12] The Supreme Court of South Carolina agreed.[13]

Similarly, in *Forster v. West Dakota Veterinary Clinic, Inc.*,[14] the Supreme Court of North Dakota, citing *Shirley*, stated initially that "evidence of a plaintiff's general bad reputation or bad character is admissible in a defamation action."[15] However, the court then went on to say that "specific instances of a plaintiff's conduct or a plaintiff's particular character traits are not relevant unless they were generally known by others in the community."[16] Once again, a court ignored any distinction between reputation and character in ruling on the type of evidence that would be admissible.

The Supreme Court of New Hampshire in *Small v. Chronicle & Gazette Publishing Co.*[17] engaged in a similar analysis. In *Small*, the court stated:

> A defendant in an action for slander may introduce, for the purpose of reducing the damages, evidence to show that the plaintiff's general character or reputation is bad, but evidence of particular facts tending to establish the plaintiff's reputation is inadmissible. True these acts of misconduct and the publicity given to them may have affected his reputation. If they have, then evidence of his reputation alone suffices to show it.[18]

Once again, while saying that evidence showing the plaintiff's general character or reputation is admissible, the court ultimately held that any such evidence would show up in the plaintiff's reputation and so no specific instances of misconduct would be admitted, thereby effectively removing character from the analysis.[19]

Finally, the Supreme Court of Kansas also muddied the waters in *Gobin v. Globe Publishing Co.*[20] Gobin sued the *Dodge City Globe* newspaper for reporting that he had pleaded guilty to animal cruelty charges when, the court found, he had not.[21] As one of the points of error on appeal, the *Globe* contended that the trial court should not have sustained the plaintiff's motion in limine, which excluded evidence of the plaintiff's involvement in other criminal proceedings. Such evidence included

 Published in *Communications Lawyer*, Volume 29, Number 2, November 2012.

a charge of negligent homicide for which Gobin was acquitted and a charge of attempted felony theft of hogs for which Gobin was convicted, though the Supreme Court of Kansas overturned that conviction.[22]

"Reputation is external, character is internal."

In deciding *Gobin*, the Kansas Supreme Court noted that a state evidentiary rule allows character to be proved, among other ways, by evidence of specific instances of the person's conduct.[23] But the court went on to state that:

> [i]t is damage to one's reputation in the community for which redress is sought in libel or slander actions. Reputation is what others say or think about a person, one's good or bad name in the community. Character, on the other hand, denotes those moral qualities which a person possesses, one's moral fiber. Reputation is external, character internal.[24]

The court concluded that "it is reputation, not character, which is the fact in issue," thereby apparently ignoring that the modern day common law of libel includes character as an element and instead relying on a treatise from 1940 and a law review article from 1957.[25] Further fusing the issues of character and reputation, the court did hold that the plaintiff's "character witnesses" "could be expected to know of one's brushes with the law and the effect, if any, of such instances upon one's reputation."[26] Thus, the court ultimately ruled that Gobin's previous brushes with the law, the extent of the character witnesses' knowledge of those brushes, and their effect on his reputation would be admissible.[27]

Evolution of Character as an Element of Libel Law

As Abraham Lincoln aptly noted, "character is like a tree and reputation like a shadow. The shadow is what we think of; the tree is the real thing." So how did a body of law develop that focuses on the "shadow" rather than the "real thing," in Lincoln's words? The answer lies in the occasional confusion over the purposes for which evidence of character is sought to be introduced, a failure to recognize the changes in the elements of a common law libel cause of action that have evolved over the last several decades, and a failure to recognize how historical precedent may have been altered by a new rule of evidence.

Purposes for Admissibility of Evidence of Bad Character

There are two arguments for the admissibility of evidence of bad character in a libel suit. The first argument is that proof of bad character may prove the substantial truth of the alleged misconduct. In other words, although the plaintiff may or may not have engaged in the specific misconduct at issue, he has engaged in other reprehensible conduct. This other reprehensible conduct makes it more likely that either: (1) he did engage in the conduct charged; or (2) even if he did not, the differences between the two incidents—the one asserted in the allegedly libelous publication and the previous occasion—are trivial and therefore can be ignored for purposes of showing substantial truth. The second argument is that proof of bad character may be relevant to damages, particularly to mitigating future damages.

Evidence of Other Misconduct to Prove Substantial Truth

On the first ground for admissibility, i.e., support of substantial truth, jurisdictions vary on how far they are willing to go. Some hold that the misconduct must relate in some direct way to what is being alleged in the suit.[28]

The court in *Fraser v. Park Newspapers of St. Lawrence, Inc.*, took a particularly draconian view in this regard.[29] This case from a New York appellate court involved a defamation action in which John Fraser sued Park Newspapers over an article about Fraser that was not literally true.[30] The article stated incorrectly that Fraser had pleaded guilty to a charge of public lewdness; in reality, the charge had been deferred in contemplation of dismissal.[31] The defense sought to depose four witnesses who allegedly saw Fraser performing the acts of public lewdness for which he was charged.[32] The court affirmed an order quashing the depositions on the grounds that the story was about whether the plaintiff pleaded guilty to acts of public lewdness, not whether he had committed them.[33]

In contrast, in *Shihab v. Express News Corp.*,[34] the court allowed evidence of earlier misconduct. In *Shihab*, the plaintiff, a former reporter, sued a newspaper and publisher claiming that he was falsely accused of fabricating a particular news story. The court allowed evidence of another news story that the reporter plaintiff had fabricated to show that the allegation was substantially true.[35] Nevertheless, it is important to note that the conduct admitted into evidence in *Shihab* related to the same type of misconduct alleged in the suit: fabricating a story.[36]

Evidence of Other Misconduct to Mitigate Damages

As the hypothetical at the beginning of this article suggests, we are focusing on the admissibility of evidence of bad character for the purpose of mitigating future damages. Similar to the development of the law of substantial truth, the more prominent role that character plays in the damages element of a modern day libel suit has been misunderstood. At common law, a plaintiff in a libel case was presumed to have a good reputation.[37] However, as libel law evolved, issues of character and reputation became an essential element of the plaintiff's case and, of course, the defense's case as well. Such issues are pertinent not only in assessing the damages the plaintiff has suffered but also for mitigation of future damages; however, not all courts view the interplay of character and damages in the same way.

Changes in Elements of Common Law Libel Action

One of the problems with this area of law is that courts have sometimes relied on ancient precedent without noting the changes that have occurred in libel law in the intervening years. The Supreme Court of Kentucky's

1990 opinion in *Warford v. Lexington Herald-Leader Co.* is a prime example of a court using outdated authority to deny the admission of specific acts that would reveal character.[38] The *Warford* case was a suit allegedly involving false statements that the plaintiff committed recruiting improprieties as the assistant basketball coach at the University of Pittsburgh. The court, citing a 1933 case, stated that "while character evidence may be admissible, in theory, in a defamation action where 'character' is made an issue in the pleadings by the defendant's defense of truth . . . the evidence must pertain to general reputation and not to particular acts."[39] The court failed to take note of the Supreme Court's 1986 holding in *Philadelphia Newspapers, Inc. v. Hepps* that the burden is on a libel plaintiff, even a private figure libel plaintiff, to prove falsity in a suit against a media entity on a matter of public concern.[40] The shift of burdens in libel cases—from the defendant having to prove truth as an affirmative defense to the plaintiff having to prove falsity and from the plaintiff being presumed to have a good reputation to the plaintiff having to show damages as an element of a libel case—makes reliance on authority from 1933 suspect.

Historical Precedent Altered by New Rule of Evidence

The clearest indication of the dawn of a new paradigm in libel law was the advent in 1975 of Federal Rule of Evidence 405(b), which would have an effect on the admissibility of character evidence in the future. Rule 405 provides as follows:

> (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.[41]

In the Advisory Committee Notes of the Federal Rules of Evidence, it is obvious that the Advisory Committee was sensitive to the fact that it might be opening up broad areas of inquiry into other aspects of a party's conduct:

> Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently, the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry.[42]

Progression from Common Law to Federal Rule of Evidence 405(b)

Speculation that Rule 405(b) would change the perception of the common law view of character evidence in libel law became reality in *Collins v. Retail Credit Co.*: "It is clear that the modern common law approach is to allow into evidence specific instances of conduct when character is at issue."[43] However, despite such recognition of the impact of Federal Rule of Evidence 405(b), the *Collins* court did not rely on the rule. It noted that at the time of trial when the defendant was trying to put in evidence other specific acts of the plaintiff, proposed Federal Rule of Evidence 405(b) had not yet become effective, and so the trial court "chose not to rely on Rule 405(b) when it restricted defendant's proofs."[44]

But Rule 405(b) would slowly work its way into libel jurisprudence, and rightfully so. As Aristotle observed: Our characters are the result of our conduct." This quote might be expanded to state that reputation, in turn, is a product of our character—at least eventually. Regardless, what is clear is that Aristotle's view has become more accepted in libel law. Character is now generally recognized as being "in issue" (to use the language of the Advisory Committee Note to Rule 405(b)) in a libel case[45]—and thus the advent of Rule 405(b) was, in some but not necessarily all cases, something of a game change on the issue of admissibility of specific instances of character-revealing conduct in libel cases.

Schafer *and Bad Character*

One of the more definitive treatments of this issue was provided by the U.S. Court of Appeals for the Eleventh Circuit in *Schafer v. Time*.[46] *Schafer* was a libel case arising from the false identification of the plaintiff as a double agent implicated in the Pan Am Flight 103 bombing over Lockerbie, Scotland.[47] In an attempt to mitigate damages and show evidence of the plaintiff's bad character, the defense was allowed to question the plaintiff about "a felony conviction, a possible violation of his subsequent parole, convictions for driving under the influence, arrest for writing a bad check, failure to file tax returns, failure to pay alimony and child support, and evidence concerning [the plaintiff's] efforts to change his name and social security number."[48]

Reputation, in turn, is a product of our character—at least eventually.

In reaching its decision to allow such testimony, the Eleventh Circuit first noted that character is, by definition, at issue in a libel case.[49] "In an action for defamation or libel, . . . the issue of the plaintiff's reputation and character scarcely can be avoided because the plaintiff typically seeks to recover compensation for damage to his or her reputation."[50] The *Schafer* court specifically applied Georgia law but noted that the law of other states also holds that a libel plaintiff puts his character at issue.[51] Accordingly, the court held that "given the plain language of 405(b), Schafer's

arguments that specific acts remain inadmissible to prove character in an action for libel are unpersuasive."[52]

Importantly, the Eleventh Circuit distinguished its holding from *Butts v. Curtis Publishing Co.*, noting that *Butts* was decided prior to the effective date of Rule 405(b) in 1975.[53] In *Butts*, the district court found that character was at issue in a libel case under Georgia law but precluded the defendant from relying on specific acts that would evidence bad character.[54]

Restatement and Character

At about the same time that Rule 405(b) was coming into effect, the *Restatement (First) of Torts* was amended to support a similar view.[55] The Restatement that was ultimately adopted states that "[i]n determining the amount of an award of general damages, the jury or other trier of fact may consider the character of the plaintiff and his general standing in the community as affecting the loss which he has sustained or will sustain."[56] Thus, the drafters of the Restatement specifically recognized the direct relationship between the character of the plaintiff and the loss that he might sustain in the future.

Evidence of specific instances of conduct to prove character must be admissible in libel cases to mitigate future damages.

The Supreme Court of South Dakota relied upon a draft of this Restatement in *Walkon Carpet Corp. v. Klapprodt*.[57] The allegation in *Walkon Carpet* was that Klapprodt had been slandered by allegations that he "drank to excess and was sexually promiscuous."[58] The court held that evidence of Klapprodt's "past misdeeds was admissible both in establishing truth . . . and in mitigating damages."[59] The Supreme Court of South Dakota refused to find, as Klapprodt urged, that an award of one dollar in damages to him was a mistake.[60]

Character: What Its Role Should Be in Libel Litigation

What the hypothetical Tiger Woods case shows is that when there is evidence of character that might very well affect future damages, it should be admissible; and, as noted in *Shirley*, such evidence need not be limited to instances of conduct similar to what is at issue in the allegedly libelous publication.[61]

Consider, for instance, a lawyer suing for damage to his reputation as an attorney. The defense—in order to test the lawyer's abilities—seeks in discovery state bar records regarding any grievances filed against the attorney. In most cases, those grievances have not seen the light of day and therefore are not central to the attorney's reputation. Thus, a court following the *Shirley* line of cases would find that such subject matter is immaterial because it cannot form the basis for the attorney's reputation.[62] But if, for instance, the lawyer has been privately censured multiple times, it stands to reason that the same may likely happen again and that such censure might be more serious and more public. That should be relevant to future damages; otherwise, the plaintiff is potentially getting a windfall to which he is not entitled, similar to what Woods received in our hypothetical.

Furthermore, any contrary holding would ignore the way in which both reputation and character witnesses testify for the plaintiff. Those witnesses almost invariably say that the plaintiff is a wonderful and honest human being rather than saying that people think that the plaintiff is a wonderful and honest human being. It seems highly disingenuous to suggest that a witness is allowed to take the stand and say that a plaintiff is a wonderful, honest human being but the defense cannot prove otherwise regardless of what the plaintiff's reputation is.

In addition, it seems counterintuitive to suggest that the defense may introduce only evidence of reputation and not evidence of character. If that were the case, a defendant would be able to present evidence of a plaintiff's bad reputation even if that negative reputation is built on unreliable premises but would be unable to present evidence that is reliable and reveals the plaintiff's true character even though no one knows about it.[63]

Courts that have rejected the suggestion that proof of a libel plaintiff's general character should be admissible have criticized the defense for trying to suggest that the analysis of reputation should not be what the plaintiff's reputation is but rather what it ought to be.[64] This viewpoint was summarized in *Prosser and Keaton on Torts*: "Nor is evidence of other misconduct of the plaintiff admissible since it shows 'not that the plaintiff's reputation is bad, but that it ought to be bad.'"[65] However, this way of thinking ignores the relationship between character and reputation and the fact that if the plaintiff's reputation "ought to be bad," in the future it might very well be bad.

As courts have noted, allowing evidence of specific instances of misconduct to show bad character of a libel plaintiff does not mean completely opening Pandora's Box. *Schafer*, for instance, recognized that the analysis of the admissibility of the specific acts of misconduct would still have to pass the tests of relevance (Federal Rule of Evidence 401) and prejudice (Federal Rule of Evidence 403).[66]

In the digital age, the gap between character and reputation will likely widen. People have the ability through widespread methods of self-publishing to establish not only their reputation but their own persona. However, as the Tiger Woods saga has shown us, once that persona begins to crack, a total break can occur at a dizzying speed—and the speed with which true character may affect a reputation will be equally as swift. It is for this reason that evidence of specific instances of conduct to prove character must be admissible in libel cases to mitigate future damages.

Endnotes

1. 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 246 (2012) (citing Faigin v. Kelly, 184 F.3d 67 (1st Cir. 1999)).
2. *Id.* (internal citations omitted).
3. *Id.* (internal citations omitted).
4. *Id.* (internal citations omitted).

5. 735 P.2d 600 (Or. 1987).
6. *Id.* at 601.
7. *Id.* at 602–03.
8. *Id.* at 602 (emphasis in original).
9. 435 S.E.2d 864 (S.C. 1993).
10. *Id.* at 866.
11. *Id.* at 868.
12. *Id.*
13. *Id.*
14. 689 N.W.2d 366 (N.D. 2004).
15. *Id.* at 382.
16. *Id.*
17. 74 A.2d 544, 545–46 (N.H. 1950).
18. *Id.* at 545.
19. *Id.*
20. 620 P.2d 1163 (Kan. 1980).
21. *Id.* at 1164.
22. *Id.* at 1166–67.
23. *Id.* at 1166 (discussing KAN. STAT. ANN. 60-446).
24. *Id.*
25. *Id.* (citing 1 WIGMORE ON EVIDENCE § 209, at 703–04 (3d ed. 1940); M. Slough, *Relevancy Unraveled II*, 5 KAN. L. REV. 404, 408 (1957)).
26. *Id.* at 1167.
27. *Id.*
28. *See, e.g.*, Forster v. W. Dakota Veterinary Clinic, Inc., 689 N.W.2d 366, 382 (N.D. 2004).
29. 257 A.D.2d 961 (N.Y. App. Div. 3d 1999).
30. *Id.*
31. *Id.*
32. *Id.*
33. *Id.* at 962. The *Fraser* court relied on two older cases, *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 477 (N.Y. 1955), and *Cudlip v. N.Y. Evening Journal Publ'g Co.*, 180 N.Y. 85, 87 (N.Y. 1904), in analyzing the issue.
34. 604 S.W.2d 204, 208 (Tex. Civ. App. 1980) (writ ref'd n.r.e.).
35. *Id.*
36. *Id.*; *see also* Bylers Alaska Wilderness Adventures v. City of Kodiak, 197 P.3d 199, 207–08 (Alaska 2008).
37. *See generally* SACK ON DEFAMATION: LIBEL, SLANDER AND RELATED PROBLEMS (2011).
38. 789 S.W.2d 758 (Ky. 1990).
39. *Id.* (citing Louisville Times Co. v. Emrich, 66 S.W.2d 73 (Ky. 1933)).
40. 475 U.S. 767 (1986).
41. FED. R. EVID. 405(b).
42. FED. R. EVID. 405 advisory committee's note.
43. 410 F. Supp. 924, 931 (E.D. Mich. 1976) (citing C. MCCORMICK, EVIDENCE § 153 (1954)).
44. *Id.* at 930–31.
45. *See supra* note 42.
46. 142 F.3d 1361 (11th Cir. 1998).
47. *Id.* at 1364–65.
48. *Id.* at 1371.
49. *Id.* at 1372; *see also* FED. R. EVID. 404(a) advisory committee's note (noting that character evidence is an essential element of "actions for defamation where the damage to one's reputation is a measure of damages").
50. *Schafer*, 142 F.3d at 1370; *accord* World Wide Ass'n of Specialty Programs v. Pure, Inc., 450 F.3d 1132 (10th Cir. 2006).
51. *Schafer*, 142 F.3d at 1372 (citing, among others, Johnson v. Pistilli, No. 95 C 6424, 1996 WL 587554, at *1 (N.D. Ill. Oct. 8, 1996); Longmire v. Alabama State Univ., 151 F.R.D. 414, 419 (M.D. Ala. 1992); Daniels v. Wal-Mart Stores, 634 So. 2d 88, 93 (Miss. 1993); MICHAEL H. GRAHAM, HANDBOOK OF FEDERAL EVIDENCE § 405.2 (4th ed. 1996)); *see also* World Wide Ass'n of Specialty Programs, 450 F.3d at 1137 (applying Utah law).
52. *Schafer*, 142 F.3d at 1372.
53. *Id.* at 1372 n.14 (distinguishing *Butts*, 225 F. Supp. 916 (N.D. Ga. 1964), *aff'd*, 351 F.2d 702 (5th Cir. 1965), 388 U.S. 130 (1967)).
54. *Id.*
55. Walkon Carpet Corp. v. Klapprodt, 231 N.W.2d 370, 374 (N.D. 1975) (citing RESTATEMENT (FIRST) OF TORTS § 621 cmt. d, at 287 (Tent. Draft No. 20, 1974)).
56. *Id.*; *see also* RESTATEMENT (FIRST) OF TORTS § 621 cmt. c (2012).
57. *Walkon Carpet*, 231 N.W.2d at 374.
58. *Id.*
59. *Id.*
60. *Id.*; *accord* Longmire v. Alabama State Univ., 151 F.R.D. 414, 419 (M.D. Ala. 1992) ("Because [plaintiff] has placed his character in issue by filing a defamation action, his good or bad character may be proven by specific instances of conduct.").
61. *See Schafer*, 142 F.3d at 1371–72.
62. *See* Shirley v. Freunscht, 735 P.2d 600, 602–03 (Or. 1987).
63. It is possible that specific instances of conduct that reflect on a libel plaintiff's character may also be admitted under Federal Rule of Evidence 608(d), which permits cross-examination using specific instances of conduct to attack the credibility of a witness. Thus, in the Woods hypothetical, even without showing how the cavalcade of mistresses might affect Woods's future reputation, the evidence of Woods's mistresses might be admitted if Woods were to take the stand and state that he was not only a dedicated and reliable pitchman for sponsors but also a dedicated and reliable family man. *See Schafer*, 142 F.3d at 1372–73.
64. A thorough treatment of the history of this view is set forth in R. P. Davis, 130 A.L.R. 854.
65. PROSSER & KEATON ON TORTS 847 n.43 (5th ed. 1984) (quoting Sun Printing & Publ'g Ass'n v. Schenck, 98 F. 925, 929 (2d Cir. 1900)).
66. *See Schafer*, 142 F.3d at 1371–72; *see also* Collins v. Retail Credit Co., 410 F. Supp. 924, 931 (E.D. Mich. 1976); Raymond U v. Duke Univ., 371 S.E.2d 701, 709 (N.C. App. 1988).

