

## Exceptions and the rule

### To the Editor:

I have a quibble with James A. Johnson's otherwise excellent article about Michigan Rule of Evidence 404(b) in the May 2019 *Michigan Bar Journal*. In the article, the writer falls into a common rhetorical trap in describing MRE 404(b). Specifically, the writer twice refers to the familiar list of "other purposes" set forth in the second sentence of MRE 404(b)—motive, opportunity, intent, etc.—as "exceptions" to the prohibition of propensity evidence found in the first sentence. But the first sentence of MRE 404(b) is absolute: it admits no exceptions. "The first sentence of this rule represents the deeply rooted and unwavering principle that other-acts evidence is inadmissible for propensity purposes." *People v Denson*, 500 Mich 385, 397; 902 NW2d 306, 314 (2017). The list presented in the second sentence offers different reasons why "other acts" might be logically relevant for purposes

*other than* propensity. *Id.*, at 397. So, properly understood, they are not exceptions to the rule against propensity evidence. Rather, they are a reminder that evidence of prior acts may be relevant to "other purposes"—purposes other than propensity, such as motive, opportunity, intent, etc.

Understanding the distinction between "exceptions" and "other purposes" in Rule 404(b) may seem unduly academic. But in my experience, it has practical, real-world value. Some lawyers and judges, when confronted with evidence of a prior act, anxiously try to place the evidence into an MRE 404(b) pigeonhole. If it's a poor fit, they struggle to comprehend that it might still be admissible. Those lawyers and judges who reject the exception trap can typically articulate a non-propensity reason why the evidence is admissible, often without reference to the MRE 404(b) list. It's better to be in the latter camp.


**Hon. Curt A. Benson**  
Grand Rapids, MI

The *Michigan Bar Journal* welcomes letters to the editor. Letters that appear in the *Bar Journal* do not necessarily reflect the official position of the State Bar of Michigan and their publication does not constitute an endorsement of views that may be expressed. Letters must not exceed 250 words. Preference may be given to letters responding to opinions, articles, or columns recently published in the *Bar Journal*. Unsigned letters, letters with profane or defamatory language, or letters promoting products, services, or political candidates will be rejected. Not more than three letters from any individual will be published in a given year. Publication is at the discretion of the editor and letters may be edited for grammar, style, or length. All letters become the property of the *Bar Journal* and may be republished in print or electronic form. Readers are invited to email letters to [lnovak@michbar.org](mailto:lnovak@michbar.org) or mail to Linda Novak, Editor, Opinion and Dissent, *Michigan Bar Journal*, State Bar of Michigan, 306 Townsend St., Lansing, MI 48933-2012.

 <http://tinyurl.com/SBMmembers-LinkedIn>

 [twitter.com/SBMNews](https://twitter.com/SBMNews)

 <http://www.facebook.com/sbm.news>

 <http://sbmblog.typepad.com>

smart lawyers

**socialize**  
for

friends • contacts • business • information • news

**SBM**  
STATE BAR OF MICHIGAN