



Uncharged Misconduct

Under Rule 404(b)

By James A. Johnson

A fundamental tenet of America jurisprudence is that an accused may only be tried for the offense with which he is charged and not for bad behavior.

The first sentence of Rule 404(b) of the Michigan Rules of Evidence codifies the prohibition against the use of character evidence to prove criminal propensity: “Evidence of other crimes, wrongs, or acts *is not* admissible to prove the character of a person in order to show that he acted in conformity therewith.” (Emphasis added.)

The second sentence of the rule incorporates exceptions to the general prohibition:

It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

In a criminal case, the prosecution cannot, in its case-in-chief, introduce evidence of a defendant’s character merely to show that he or she is a bad person and thus more likely to have committed the crime. Evidence of uncharged misconduct *to show criminal propensity is inadmissible* not because it is logically irrelevant, but because it is inherently and unfairly prejudicial.¹ It causes the jury to prejudge a person with an unsavory past and denies the defendant a fair opportunity to defend against the charged offense.

But there are exceptions in both state and federal courts that uncharged misconduct is admissible if it tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake.² Section 404(b) evidence is not limited to acts that occur before the events at issue in the case.³ The use of character evidence to prove intent, common scheme, motive, and the like need not be either similar to or constitute a crime. However, it cannot be so dissimilar that it demonstrates nothing more than a defendant’s proclivity for criminal behavior. For example, in a securities prosecution case, evidence that the defendant tried to rape his secretary is not relevant to prove fraud.

In federal court cases involving sexual assault, Federal Rule of Evidence 413 may apply. FRE 413 provides in relevant part:

- (a) Permitted Uses. In a criminal case in which a defendant is accused of sexual assault, the court may admit evidence that the defendant committed any other sexual assault. The evidence may be considered on any matter to which it is relevant.
- (b) Disclosure to the Defendant. If the prosecutor intends to offer this evidence, the prosecutor must disclose it to the defendant, including witnesses’ statements or a summary of the expected testimony. The prosecutor must do so at least 15 days before trial or at a later time that the court allows for good cause.

Keep in mind that evidence otherwise admissible under FRE 413 is still subject to FRE 403 balancing.

MRE 404(b) and FRE 404(b) are specialized rules of relevance, and uncharged misconduct or bad acts are admissible if independently relevant.⁴ The question for the court on admissibility is whether 404(b) evidence tends to prove a particular fact of consequence in the litigation.⁵ If the trial judge determines that the evidence is relevant, it must proceed to the next level of analysis mandated by MRE 403 or FRE 403. Although relevant, evidence may be excluded if its probative value is *substantially* outweighed by the danger of *unfair prejudice*, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presumption of cumulative evidence. Thus, 404(b) evidence is not automatically admissible and is left to the sound discretion of the trial judge.

Admissibility

The general criteria for admissibility are (1) the evidence must be similar and close in time to the alleged charges; (2) the other crime, wrong, or act must in fact have been committed by the party or witness against whom the evidence is offered; (3) it must be related to a disputed issue; and (4) the evidence must be directed toward establishing a matter that is of consequence to the litigation other than the party's bad character.

Rule 404(b) applies equally to civil and criminal cases.⁶ For example, in a civil product liability case, an offer of evidence of earlier defective claims of the same product is relevant to show that the defendant had *notice* of the defect but continued to manufacture the defective product and failed to warn consumers. Also, in a civil case in which the question is whether a design defect caused the accident at issue, proof of a similar accident involving the same product is highly probative of *causation*. How to keep this kind of evidence out of the trial is a topic for another day.

As a former prosecutor and chief of a civil division, I can say from experience that uncharged misconduct is powerful evidence against a criminal or civil defendant. It can change trial tactics and engender pleas and settlements. It has been my experience that if a civil plaintiff succeeds in introducing evidence of the defendant's uncharged misconduct, the plaintiff can expect a verdict larger than normal.

In Michigan, New York, California, and many other states, special requirements for pretrial notice are in place because uncharged misconduct evidence is uniquely probative and prejudicial. In Michigan, the prosecutor must specify a theory of relevance when offering uncharged misconduct evidence. The prosecutor must identify the theory in a pretrial notice or at the time of the proffer at trial.⁷ MRE 404(b) is a rule of inclusion, only prohibiting evidence that is used solely for the purpose of showing action in conformity with bad character.⁸

AT A GLANCE

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Effective January 1, 2018, amendments to Rule 404(b)(2) require written notice to be provided at least 14 days before trial, or orally on the record later if the court finds there is good cause.

MRE 404(b) states:

- (1) Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.
- (2) The prosecution in a criminal case shall provide *written notice at least 14 days in advance of trial*, or orally on the record later if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial and the rationale, whether or not mentioned in subparagraph (b)(1), for admitting the evidence. If necessary to a determination of the admissibility of the evidence under this rule, the defendant shall be required to state the theory or theories of defense, limited only by the defendant's privilege against self-incrimination. (Emphasis added.)

Effective January 1, 2018, amendments to Rule 404(b)(2) require written notice to be provided at least 14 days before trial or orally on the record later if the court finds there is good cause. This notice requirement replaces the former language that required only "reasonable notice" in advance of trial.

To admit evidence under MRE 404(b), the prosecutor must first establish that the evidence is logically relevant to a material fact in the case, as required by MRE 401 and MRE 402, and not simply evidence of the defendant's bad character or relevant to his propensity to act in conformance with his bad character.⁹ If the evidence is determined to be admissible, "upon request, the trial court may provide a limiting instruction to the jury under MRE 105 to specify that the jury may consider the evidence only for proper, noncharacter purposes."¹⁰

In addition, a defendant may be entitled to a jury instruction under MCL 763.9 that in any major felony involving a defendant in custody, any statement by the defendant must be audiovisually recorded. If the required recording is not available, the jury will be instructed that it may consider the absence of a recording in evaluating the evidence relating to the individual's statement. Whether the defendant is entitled to a jury instruction is a question of law that is reviewed de novo.¹¹

A trial court's decision to admit or exclude evidence will be reviewed only for an abuse of discretion.¹² An abuse of discretion occurs when the court's decision falls outside the range of principled outcomes.¹³

When evidence of bad acts is admitted against a party, he or she should consider requesting a limiting instruction by the judge. The trial judge should specify the precise purpose for which the evidence is admissible. Since most trial judges jealously guard their records and do not like to be reversed on appeal, a judge should give the limiting instruction twice: once when the evidence is admitted and again during the final jury instructions.

Concerning the admissibility or exclusion of bad acts or uncharged misconduct, I cannot overemphasize that attorneys and trial courts need to get it right the first time. FRE 404(b) has generated more reported cases than any other section of the rules.¹⁴

Conclusion

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person to show that he or she acted similarly in the current case. It may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. A prosecutor in a criminal case may introduce the proof of uncharged misconduct if the evidence is logically relevant to a fact in issue *other than character*. The prosecutor must lay a proper foundation and demonstrate that the evidence is logically relevant to a material fact in issue other than character. Also, the prosecutor must provide *written notice 14 days before trial* and convince the court that his or her need for the evidence outweighs its prejudicial effect. Uncharged misconduct or evidence of bad acts is a powerful tool in the hands of a prosecutor. In a civil case, the admissibility of a defendant's uncharged torts can also be devastating.

When uncharged misconduct evidence is admitted, defense counsel must decide whether to exercise the right to request a limiting instruction to the jury. It is an important and difficult decision, because a limiting instruction reminds the jury of evidence you want to keep out of deliberations. On the other hand, you waive the issue on appeal by not asking the trial court for a limiting instruction.

Keep in mind that uncharged misconduct or evidence of bad acts applies to civil cases as well as criminal cases. ■

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ENDNOTES

1. *People v Crawford*, 458 Mich 376, 383-384; 582 NW2d 785 (1998) and *People v Engelman*, 434 Mich 204; 453 NW2d 656 (1990).
2. *United States v Blankenship*, 775 F2d 735, 739 (CA 6, 1985) and *Old Chief v United States*, 519 US 172, 196; 117 S Ct 644; 136 L Ed 2d 574 (1997) (the list of permissible uses is illustrative and not exhaustive).
3. *United States v Perry*, 438 F3d 642, 647 (CA 6, 2006).
4. *United States v Carney*, 387 F3d 436, 452 (CA 6, 2004); *People v Golochowicz*, 413 Mich 298, 309; 319 NW2d 518 (1982); and *People v Sabin*, 463 Mich 43, 55-56; 614 NW2d 888 (2000) (Sabin outlines the evidentiary safeguards of MRE 404(b), MRE 104(b), MRE 402, and MRE 403).
5. *People v VanderVliet*, 444 Mich 52 (1993); 508 NW2d 114; *United States v Mandoka*, 869 F3d 448 (CA 6, 2017) (evidence of the defendant's prior violent acts is admissible to show why the defendant's victims submitted to the defendant's abuse or failed to report the abuse in a timely manner); and *People v Smith*, 282 Mich App 191, 194; 772 NW2d 428 (2009). See also *United States v Plumman*, 409 F3d 919, 928 (CA 8, 2005); *United States v Escarsega*, 182 F App'x 595, 598 (CA 8, 2006); and *People v Chase*, 277 App Div 2d 1045; 716 NYS2d 486 (2000).
6. *Huddleston v United States*, 485 US 681, 685; 108 S Ct 1496; 99 L Ed 2d 771 (1998).
7. *People v Knox*, 469 Mich 502, 509; 674 NW2d 366 (2004) (the prosecution bears the initial burden of establishing the relevancy of the evidence to a permissible purpose under MRE 404(b)(1), MRE 404(b)(2), and FRE 404(b)(2)(A)(B)) and *United States v Barnes*, 49 F3d 1144, 1149 (CA 6, 1995) (adequate notice is defined as sufficiently clear to permit pretrial resolution of the issue of its admissibility).
8. *People v Mardlin*, 487 Mich 609; 790 NW2d 607 (2010) and *People v Denson*, 500 Mich 385; 902 NW2d 306 (2017) (admission of prior act of assault was erroneous because it was not logically relevant to a proper noncharacter purpose and was not harmless). See also *United States v Asher*, 910 F3d 854 (CA 6, 2018).
9. *People v Mardlin*, 487 Mich at 615.
10. *Id.* at 616.
11. *People v Dobek*, 274 Mich App 58, 82; 732 NW2d 546 (2007).
12. *People v Gursky*, 486 Mich 596, 606; 786 NW2d 579 (2010) and *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).
13. *People v Blackston*, 481 Mich 451, 460; 751 NW2d 408 (2008).
14. Sonenshein, *The Misuse of Rule 404(b)*, 45 Creighton L Rev 217 and Imwinkelried, 50 Mo L Rev 1, 2 (1985).