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Memorandum To: Advisory Committee on Evidence Rules
From: Daniel J. Capra, Reporter
Re: Consideration of Possible Changes to Rule 404(b)
Date: October 1, 2017

The Pepperdine Conference in Fall 2016 was largely devoted to the important case law developments regarding the use of Rule 404(b), especially in criminal cases. These case law trends essentially seek to assure that Rule 404(b) arguments are scrutinized so that the rule is not used as a device to admit evidence that is in fact offered for propensity. The fact that some courts --- especially the Seventh and Third (and most recently a panel of the Fourth) Circuits --- are taking a fresh look at the scope and meaning of Rule 404(b) raises questions about whether the rule can or should be amended to accommodate these new developments. It also raises questions about what, if anything should be done about the conflict between the circuits that are looking more closely at Rule 404(b) and those that are still taking the traditional broad approach to admissibility.

At the last meeting, the Committee reviewed three strands of new case law that are intended to provide for more careful analysis of admissibility under Rule 404(b). These limiting principles are:

> 1. The prosecutor must explain particularly why and how the bad act evidence is admissible for a proper purpose, and the probative value as to the proper purpose must not depend on a propensity inference.
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> 2. When the government is offering the bad act as proof of an element of the crime --- particularly intent and knowledge --- the evidence is not admissible under Rules 404(b) and 403 unless the defendant actively contests that element. An active contest is not found simply by entering a not-guilty plea.

3. The “inextricably intertwined” doctrine --- which holds Rule 404(b) to be inapplicable to bad acts that are part of the charged crime --- is limited to bad acts that directly prove an element of the crime. Acts that require an inference and are not part of the crime itself--- such as a threat to a witness --- must proceed through Rule 404(b), even if they “complete the story” or are labelled “intrinsic”.

The Committee engaged in extensive discussion of these three limiting principles at the last meeting, and also discussed possible changes to the Rule 404(b) notice requirement. Some proposed changes to the notice requirement actually went toward addressing the proposed substantive limitations on Rule 404(b) admissibility (such as requiring the prosecutor to provide notice of the proper purpose for the evidence), while others were intended to improve notice procedures (such as requiring that the notice be made 14 days before trial). At the end of this discussion, the Committee resolved to continue consideration of possible amendments to Rule 404(b). The minutes of the last meeting describe the Committee’s resolution:

> At the conclusion of the discussion, Judge Sessions noted that the question for the Committee was whether to continue consideration of Rule 404(b) at the fall meeting or whether to abandon efforts to improve the operation of the Rule for the time being. The consensus of the Committee was that Rule 404(b) is one of the most important and most litigated evidence rules and that the issues it raises merit further consideration. The Committee members agreed that adding an “active contest” requirement to the Rule was ill-advised, but resolved to devote more attention to the issues of the “inextricably intertwined doctrine,” the division in courts about proper articulation of non-propensity inferences, and the Rule 404(b) notice requirements. The Reporter stated that he would provide the Committee with a Rule 404(b) case outline for its fall meeting, including district court opinions, to help determine the level of care applied to Rule 404(b) rulings in criminal cases. One Committee member suggested that the Committee, at the very least, could rely on the case digest to formulate a best practices manual for Rule 404(b) evidence, should the Committee decide not to proceed with amendments to the Rule.

This memorandum is in four parts. Part One discusses the recent case law involving two of the three case law trends: articulating non-propensity inferences and limiting the “inextricably intertwined” doctrine. This discussion is in large part reproduced from the spring memo to the Committee, but it is updated in parts. (The case law on the “active contest” requirement has been dropped). Part Two provides a digest of many of the Rule 404(b) cases decided since the last meeting. Part Three sets forth and discusses drafting alternatives that would implement the two case law trends that the Committee is still considering; and, importantly, it includes a different alternative that would change the Rule 404(b)/403 balancing test to make it more protective for criminal defendants. Part Four sets forth the proposed amendment to the notice provision of Rule 404(b) that the Committee has already approved unanimously. That amendment would delete the provision stating that the defendant must request notice before the government is required to provide it. Finally, appended to this memo is a report by Professor Richter on state law variations on Rule 404(b).

It should be emphasized that nothing in this memorandum involves an action item at this meeting.

I. Two Case Law Developments Imposing More Rigor on the Rule 404(b) Determination

Rule 404(b) currently provides as follows:

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Traditionally, the analysis of Rule 404(b) issues has not been rigorous. Typically a court presented with a Rule 404(b) objection would take three quick steps:

1. Emphasize that Rule 404(b) is a rule of inclusion, not exclusion.

2. Find that the proffered bad act is probative of a not-for-character purpose (or, often, a laundry list of such purposes), regardless of whether the defendant actually contested the purpose for which the bad act was purportedly relevant.

3. Find that the probative value for the proper purpose was not substantially outweighed by the prejudicial effect.

As discussed at the last meeting, one of hundreds of examples of the traditional, "knee-jerk" approach to Rule 404(b) is found in *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017).[1] The defendant was charged with aiding and abetting sex trafficking by force, fraud or

[1] The Federal Rules of Evidence Manual contains more than 300 pages of summarized circuit court cases that treat Rule 404(b) as a "rule of inclusion" and find bad acts admissible essentially whenever they are found probative of some not-for-character purpose, even if that purpose is not actively contested --- and even when the probative value for the purpose proceeds through a character inference. In addition, the case digest of recent cases, in Part Two of this memo, contains a number of examples of almost automatic admissibility of bad act evidence under the 404(b) "rule of inclusion."

coercion. He moved to exclude testimony that four years earlier, he had physically assaulted and threatened to kill his girlfriend because of a text message that he found on her phone. The court stated first that there is no error under Rule 404(b) "unless the evidence clearly had no bearing on the case and was introduced solely to prove the defendant's propensity to commit criminal acts." It stated that Rule 404(b) is a rule of "inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial, unless it tends to prove only criminal disposition." The court found that the prior act was probative of knowledge and intent, both of which were called into question because the statute required proof of knowing transportation in interstate commerce and intent to coerce. Those elements were in issue because of the defendant's not guilty plea --- regardless of whether they were actively contested by the defendant. Finally, the court noted that a limiting instruction was given and so the danger of unfair prejudice did not substantially outweigh the probative value of the act in proving knowledge and intent.[2]

The Rule 404(b) analysis in *Geddes* is arguably thin for a number of reasons. First, threatening to kill his girlfriend is relevant to prove intent to coerce the alleged victim only if you go through a propensity inference. Saying "if he had an intent to hurt his girlfriend it is more likely he had an intent to coerce the alleged victim" is just another way of saying that threatening his girlfriend shows a propensity to threaten women. Thus, the bad act is not truly offered for a non-propensity purpose. Second, the defendant was not actively contesting intent. He argued that he never made any threat at all. If simply pleading not guilty is enough to put intent into issue for purposes of Rule 404(b), then virtually any act somewhat similar to the charged act will be admissible. Third, the court's statement that the government overcomes a Rule 404(b) objection by coming up with one non-propensity purpose for which evidence is at all relevant ignores the work that Rule 403 is supposed to do when the probative value for the non-propensity purpose is weak.

Finally, the *Geddes* court's emphasis that Rule 404(b) is a "rule of inclusion" mischaracterizes the rule. It is true that Rule 404(b) directs the court to non-propensity purposes. But it remains the case that the bad act is excluded if the bad act is in fact offered to prove propensity. Calling Rule 404(b) a rule of inclusion distracts the court from analyzing whether the evidence is really being offered to prove propensity, even though the government has thrown in a non-propensity purpose. The Third Circuit, in *United States v. Caldwell,* 760 F.3d 267, 275 (3rd Cir. 2014) had an arguably more honest take on what it might mean for Rule 404(b) to be a "rule of inclusion":

> Throughout the nineteenth century and into the twentieth, American courts differed as to whether the common law rule was "exclusionary" or "inclusionary." Both of these descriptors can be misleading. To be sure, no one doubted that evidence relevant only for the limited purpose of showing a defendant's general propensity to commit the charged offense was inadmissible. Instead, the debate

2 For another typical case involving drug charges, see *United States v. Smith,* 741 F.3d 1211 (11th Cir. 2013). The defendant was charged with cocaine distribution, and his prior convictions for *possessing* cocaine were admitted at trial. The court found no error, reasoning that 1) Rule 404(b) is a "rule of inclusion"; 2) "a not guilty plea in a drug conspiracy case makes intent a material issue and opens the door to admission of prior drug-related offenses"; and 3) prior convictions for possession were sufficiently probative of intent to distribute.

> concerned whether the list of previously recognized non-propensity purposes was exhaustive (or "exclusive"), or whether *any* non-propensity purpose, even if not previously recognized, could support admission of the prior act evidence (the "inclusive" approach). *See* David P. Leonard, *The New Wigmore: Evidence of Other Misconduct and Similar Events* § 4.3.2, at 224 (2009) ("[T]he real question ... is whether the courts actually confine admissibility to a set of enumerated purposes.").
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> The matter was settled in 1975 with the adoption of the Federal Rules of Evidence. * * * By introducing the list of permissible purposes with the words "such as," the drafters made clear that the list was not exclusive or otherwise limited to a strictly defined class.
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> We have on occasion noted that Rule 404(b) adopted an inclusionary approach. Our use of the term "inclusionary" merely reiterates the drafters' decision to not restrict the non-propensity uses of evidence. It does not suggest that prior offense evidence is presumptively admissible. On this point, let us be clear: Rule 404(b) is a rule of general exclusion, and carries with it "no presumption of admissibility." 1 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 4:28, at 731 (4th ed.2013). The Rule reflects the revered and longstanding policy that, under our system of justice, an accused is tried for *what* he did, not *who* he is. And in recognition that prior offense evidence is generally more prejudicial than probative, Rule 404(b) directs that evidence of prior bad acts be excluded—*unless* the proponent can demonstrate that the evidence is admissible for a non-propensity purpose.

So to the *Caldwell* court, Rule 404(b) as a "rule of inclusion" simply means that the list of proper purposes in the rule is not exclusive. (Just recently, a panel of the Fourth Circuit, in *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017), rejected the broad "rule of inclusion" analysis and adopted the *Caldwell* view of Rule 404(b)).

The peril in following the traditional interpretation of "rule of inclusion" --- in *Geddes* and like cases --- is that the court will treat Rule 404(b) as a rule providing for presumptive admissibility of uncharged misconduct.

At the spring meeting the DOJ representative suggested that the Reporter's memo set forth only one case --- *Geddes* --- in which there was an asserted problem of "knee-jerk" admissibility under Rule 404(b), and that the trial court in that case was actually quite careful in its application of the Rule. The response to that argument is that *Geddes* is only one example of a typical analysis in many courts --- as is seen in the copious annotations in the Federal Rules of Evidence Manual, and in the case law digest *infra*. The case law digest sets out only the most recent examples of cases at both the district and appellate level that cite "rule of inclusion" as a mantra and find evidence admissible under Rule 404(b) even though it is essentially offered for propensity.

Geddes was chosen as an example because it involves the most frequent road to easy admissibility under Rule 404(b) --- offering the bad act to prove intent. The line between intent and propensity is definitely thin: to say "he intended to do it before and therefore it is more likely that he intended to do it this time" is not a lot different from saying "because he did it before he is more likely to have done it this time." Professor Imwinkelried has surveyed the case law in drug cases and concludes as follows:

> It is a commonplace observation that the courts have been very liberal in admitting uncharged misconduct evidence of other drug transactions to prove intent in drug prosecutions. Especially when the accused is charged with a possessory offense with intent to distribute, the courts routinely admit evidence of the accused's other drug offenses. Although the accused is charged with intent to traffic and distribute, a large number of courts admit uncharged misconduct evidence that the accused possessed mere user quantities. The opinions are replete with sweeping assertions that "virtually any prior drug offense" is admissible to prove intent in a drug prosecution.[3]

We now proceed to two strands of case law that seek to impose limitations on Rule 404(b) so that it will be more carefully applied.

A. Requiring a showing that the probative value for a proper purpose proceeds through a non-propensity inference.

Under Rule 404(b), bad act evidence is inadmissible if offered to prove that the defendant committed the charged conduct because he has the propensity to do so. But the evidence "may be admissible" if offered for a non-character purpose. Once the prosecution articulates a proper purpose, then the court assesses whether the probative value for that purpose is substantially outweighed by the risk of prejudicial effect, i.e., that the jury will 1) impermissibly use the evidence for the propensity purpose or 2) convict the defendant just for being a bad person, regardless of whether he has a propensity to commit the crime charged.

There is unquestionably a dispute in the courts about how to assess the probative value of bad acts offered for a proper purpose. Some circuits have recently pointed out that in assessing probative value for the non-character purpose, the court must assure itself that the inferences to be derived from the act are *independent of any propensity inference*. Other courts, like *Geddes* and *Smith*, discussed above, tend to find it sufficient that the bad act evidence is probative of one of the listed purposes, without worrying too much about whether the probative value is dependent on a propensity inference. The leading example of the more careful approach is the Seventh Circuit's decision in *United States v. Gomez,* 763 F.3d 845, 862-63 (7th Cir. 2014) (en banc). In *Gomez,* the government had evidence that someone nicknamed "Guero" was a reseller of drugs. The government claimed that Gomez was Guero. Gomez claimed that it was his brother-in-law who was the drug dealer Guero. The trial court admitted evidence of the defendant's prior cocaine possession, ostensibly for the proper, non-character purpose of proving

[3] Imwinkelried, *Criminal Minds: The Need to Refine the Application of the Doctrine of Objective Chances as a Justification for Introducing Uncharged Misconduct Evidence to Prove Intent,* 45 Hofstra L.Rev. 851, 871 (2017), quoting *United States v. Sanders,* 688 F.3d 1298, 1314 (11th Cir. 2012).

identity. The court of appeals instructed that it was not enough for the bad act evidence to be relevant for a non-character purpose. Rather, "the district court should not just ask whether the proposed other-act evidence is relevant to a non-propensity purpose *but how exactly the evidence is relevant to that purpose*—or more specifically, how the evidence is relevant without relying on a propensity inference. Careful attention to these questions will help identify evidence that serves no permissible purpose." (emphasis added). The *Gomez* court concluded that the cocaine possession was improperly admitted to prove identity, because the probative value for identity was dependent on an inference that because the defendant sold drugs before, he sold them again. It explained as follows:

> Because the proponent of the other-act evidence must explain how it is relevant to a non-propensity purpose, the government needed a rationale for connecting the cocaine found in Gomez's bedroom to his identity as Guero *without relying on the forbidden propensity inference.* * * * Gomez's mistaken-identity defense singled out another person—his brother-in-law and housemate Victor Reyes—as the "real" Guero. The government introduced the user quantity of cocaine found in Gomez's bedroom for the purpose of showing that as between the two, it was more likely that Gomez was Guero. * * * [But] the evidence of the defendant's history of drug dealing tended to prove his identity as a participant in the charged drug deal only by way of a forbidden propensity inference: Once a drug dealer, always a drug dealer. * * *
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> * * * The government's sole theory is that Gomez's possession of a user quantity of cocaine 26 days *after* the conspiracy ended shows that he, rather than Reyes, was Guero. That argument is extraordinarily weak, but the more important point is that it rests on pure propensity: Because Gomez possessed a small quantity of cocaine at the time of his arrest, he must have been involved in the cocaine-distribution conspiracy. The district court should not have admitted this evidence.

Another illustration of a case holding that prior misconduct must be excluded where its probative value for the expressed purpose proceeds through the propensity inference is the Third Circuit's decision in *United States v. Smith*, 725 F.3d 340, 342 (3d Cir. 2013). Smith was charged with threatening a federal officer with a gun and possessing a firearm during a crime of violence. The trial court admitted evidence that two years before Smith allegedly committed the charged crimes, he had been observed dealing drugs at the same location. The court of appeals found that the prior bad act evidence "violates our long standing requirement that, when seeking to introduce evidence of prior bad acts under Rule 404 (b), the proponent must set forth 'a chain of logical inferences, *no link of which* can be the inference that because the defendant committed … offenses before, he therefore is more likely to have committed this one.' *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1982) (emphasis added)." The government argued that the prior drug dealing at the location was probative of the defendant's motive to commit the charged crime, i.e., it was evidence that he was protecting his turf. The court rejected that argument because, "for the evidence of the 2008 drug sale to speak to Smith's motives in 2010, one must necessarily (a) assume something about Smith's character based on the 2008 evidence (that he was a drug dealer) and (b) infer that Smith acted in conformity with that character in 2010 by dealing drugs and therefore had a motive to defend his turf." Thus, the mere fact that the government *articulated* a non-character purpose was not enough to admit the evidence for that purpose—that was because the evidence was probative of motive only under the assumption that the defendant had a bad character. The government was proceeding through a propensity inference.

But as stated above, many courts simply look to find probative value for the proper purpose cited by the prosecution without investigating whether the probative value for that purpose relies on a propensity inference. Exemplary is *United States v. Mathews*, 431 F.3d 1296, 1311 (11th Cir. 2005), a case in which the defendant's prior uncharged drug transaction was held properly admitted to prove his intent to conspire to commit drug transactions. The court stated its approach as follows:

> The * * * question is whether the 1991 arrest is relevant to the intent at issue in the current conspiracy charge. In *United States v. Butler*, 102 F.3d 1191 (11th Cir.1997), this court held that a three-year-old prior conviction for possession of cocaine for personal use was relevant and admissible for purposes of demonstrating defendant's intent in the charged conspiracy for possession with intent to distribute. * * * It must follow then that, at least in this circuit, Matthews's 1991 arrest for distribution of cocaine was relevant to the intent at issue in the charged conspiracy to distribute cocaine.

Judge Tjoflat, in dissent in *Matthews*, argued that the majority had failed to explain how the probative value of the evidence of prior drug activity to show intent actually proceeded through a non-propensity inference:

> I concede that the line between evidence admitted to demonstrate intent and evidence admitted to demonstrate propensity is hardly clear. It is difficult to argue that a person had an intention to do something on a similar occasion because he or she demonstrated that intention previously without implicitly suggesting that the person has a proclivity towards the intent. * * * [But] the rules distinguish between the two and so must we. * * * At the very least, where the evidence sought to be admitted demonstrates nothing more than a criminal intent … it must be excluded as propensity evidence. If the inferential chain must run through the defendant's character—and his or her predisposition towards a criminal intent—the evidence is squarely on the propensity side of the elusive line. Where, on the other hand, an inference can be drawn that says nothing about the defendant's character—for example, based on the "improbability of coincidence"—the evidence is more properly permissible for non-propensity purposes.

See also United States v. Henry, 848 F.3d 1 (1st Cir. 2017) (noting that the court had "repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute"; concurring opinion concluding that prior drug activity to prove intent was nothing more than a propensity inference and suggesting that the Circuit should reconsider its case law); *United States v. Logan*, 121 F.3d 1172 (8th Cir. 1997) (evidence of prior possession of drugs was probative of knowledge and intent to distribute, with no analysis of how the bad act was probative for those purposes independent of any propensity inference); *United States v. Gadison*, 8 F.3d 186 (5th Cir. 1993) (same). *See generally* Ranaldo, *Is Every Drug User a Dealer?:*

Federal Courts are Split in Applying Fed.R.Evid. 404(b), 8 Fed. Cts. L.Rev. 147 (2014) (noting the dispute in the courts on whether prior acts of possession are probative of intent to distribute, and characterizing the difference as whether or not the court is considering that the probative value for intent proceeds through a propensity inference).

Most of the cases involving bad acts that proceed through the propensity inference are, like *Matthews,* cases involving use of prior drug activity in drug cases, with the prosecution arguing that the prior drug activity is offered for intent. Many have argued that when bad acts are offered, "intent" cannot be readily separated from the propensity inference. See Sonenshein, *The Misuse of Rule 404(b) on the Issue of Intent in the Federal Courts,* 45 Creighton L.Rev. 215, 218 (2011) ("What chain of reasoning can link the prior drug history to the charged crime other than one that infers that the defendant has a drug-related propensity * * *? The earlier drug use, which is behavioral evidence, can be relevant only if we assume that the defendant's behavior forms an unchanging pattern.").

But the problem of using propensity inferences for so-called proper purposes occurs for other purposes as well, such as identity (*Gomez, supra),* and motive. An example of the propensity problem with offers to prove motive is *United States v. Roux,* 715 F.3d 1019 (7th Cir. 2013). The court in *Roux* affirmed the defendant's conviction for coercing a minor to create sexually explicit images. It held that the trial judge did not abuse discretion in admitting testimony from the victim's minor sisters that they too had been sexually abused by the defendant. The court reasoned that "[t]he district court properly determined that the acts of abuse described by CC and SH [minor sisters] were probative of Roux's motive to commit the charged child pornography offense" because "prior instances of sexual misconduct with a child victim may establish a defendant's sexual interest in children and thereby serve as evidence of the defendant's motive to commit a charged offense involving the exploitation of children." But the court's use of "motive" is really nothing but "propensity": a defendant who has a "sexual interest in children" has the *propensity* "to commit a charged offense involving the exploitation of children." Other examples are found in the case digest in Part Two.

In sum, there is conflict in the courts, and significant difficulty, in how and even whether to determine if the probative value of the bad act to prove the proper purpose actually proceeds through a non-propensity inference. An attempt to draft an amendment and Committee Note to deal with this conflict is set forth in Part Three.

B. Limiting the "inextricably intertwined" doctrine:

Rule 404(b) requires that "crimes, wrongs, or other acts" cannot be offered as proof of character when character evidence is offered to prove conduct. But it is often difficult to determine which acts are "other acts" as opposed to acts that are part of the offense charged. The test used by most courts is whether the acts that are the subject of the proof are "inextricably intertwined" with the basic elements of the crime charged. If so, Rule 404(b) is considered inapplicable and there is no need to articulate a "not-for-character" purpose for the evidence. Nor is there any need to give prior notice of the intent to use the evidence, as is required if the evidence is covered by Rule 404(b). Of course, Rule 403 will still apply to the evidence.[4] However, it would be the rare case in which proof of an inextricably intertwined act could be considered so prejudicial as to justify exclusion under Rule 403.

Sometimes it is pretty clear that bad act evidence is part of the charged misconduct. Take for example *United States v. Lyle*, 856 F.3d 191 (2nd Cir. 2017). The defendant was convicted of charges related to distribution of methamphetamine, including conspiracy. The charges resulted after he was arrested in a car containing a large quantity of meth. While on release after that arrest, the defendant was found in a hotel room weighing out baggies of meth, consistent with distribution. The court found that this evidence was inextricably intertwined. The defendant was charged with conspiracy, and the bad act was evidence in furtherance of the conspiracy --- during the time in which the conspiracy was operating. Thus the bad act evidence was direct proof of the crime charged.[5] *See also*, *United States v. Pace*, 981 F.2d 1123, 1135 (10th Cir. 1992) ("Rule 404(b) only applies to evidence of acts extrinsic to the charged crime. Evidence of Leonard's sale was direct evidence of the conspiracy, which the indictment charged as occurring between July 1 and October 26, 1990. Conduct during the life of a conspiracy that is evidence of the conspiracy is not Rule 404(b) evidence.").

Lyle is fairly easy because any act that was part of the conspiracy is directly related to the conduct that the government alleged in the indictment, so there is no concern that evidence of that act is primarily used to prove propensity. This would be true whether or not the act was specifically alleged as an overt act.

The notion of "inextricably intertwined" evidence becomes more complicated when it is examined in cases such as *United States v. Hilgeford*, 7 F.3d 1340, 1346 (7th Cir. 1993). Hilgeford suffered what the court described as "hard times." He had borrowed over one million dollars from a bank and the Farmer's Home Administration using the two farms he owned as security for the debt. When he suffered financial difficulties, the bank foreclosed on the mortgage it held on one of his farms. The bank then bought the farm at the foreclosure sale and evicted Hilgeford. The United States foreclosed on his other farm.

Hilgeford retaliated by sending bills to employees of the bank and the FHA and then taking deductions on his tax return for the unpaid bills. Among the charges brought against him were counts alleging willful filing of false tax returns. To prove the tax counts, the government offered evidence that in the years prior to the challenged tax returns, Hilgeford had generated "a blizzard of complicated and groundless litigation, primarily involving his fruitless attempts to regain his two farms." Hilgeford objected at trial under Rule 404(b). The court held that Rule 404(b) was not applicable to this evidence, because it was "intricately related to the fact of the case at hand."

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[4] See *United States v. Hilgeford*, 7 F.3d 1340, 1344 (7th Cir. 1993):

> When deciding if the other acts evidence was admissible without reference to Rule 404(b), we must determine whether such evidence was intricately related to the facts of the case at hand. If we find the evidence is so related, the only limitation on the admission of such evidence is the balancing test required by Rule 403.

[5] The court held alternatively that the evidence was admissible to show knowledge and intent --- a critique of that analysis is found in the case digest in Part Three.

Cases such as *Hilgeford* are more difficult than a conspiracy case like *Lyle*, where the bad acts offered occurred while the conspiracy was ongoing. The bad acts in *Hilgeford* did not occur in the time period covered by the indictment. The fact that the groundless litigation was probative of an element of the prosecution's case (the willfulness in the tax return filings) does not distinguish it from bad act evidence covered by Rule 404(b); all evidence offered by the prosecution in a criminal trial must be somehow probative of an element of the crime. The court's statement that the groundless litigation concerning the farm was "intricately related" to the tax counts is vague and conclusory.

Hilgeford is hardly the only case in which courts have been muddled in applying the rule that evidence of acts "inextricably intertwined" with the charge is exempt from Rule 404(b). Part of the problem is that courts often use different phrases to capture the concept. Examples include acts that are "intrinsic" to the crime charged; acts that form part of a "single criminal episode"; acts that are an "integral part" of the crime; and acts that "complete the story" or "explain the context" of the crime. *See, e.g., United States v. Lucas,* 849 F.3d 638 (5th Cir. 2017) ("background" evidence is "intrinsic" to the crime charged --- even though many cases evaluate background evidence under Rule 404(b)); *United States v. Payne-Owens,* 845 F.3d 868 (8th Cir. 2017) (in a felon-firearm prosecution, gang membership evidence was "intrinsic" because "contributed to the narrative of the charged crime" and "it helped to provide a total picture").

It gets even more confusing in some courts that have more than one doctrine for determining whether the bad acts are "other" acts outside Rule 404(b). Consider *United States v. Loftis,* 843 F.3d 1173 (9th Cir. 2016). In a wire fraud prosecution, the government sought interlocutory relief after the trial judge, in an *in limine* motion, held that evidence of frauds not specified in the indictment would be evaluated under Rule 404(b). The Court of Appeals held that Rule 404(b) was inapplicable for two separate reasons. First, the frauds not specified in the indictment were not "other" acts because the crime charged included not only the specific executions of the fraud scheme alleged in the indictment, but also "the overall scheme." Thus the acts were part of the charged conduct. This was because an element of the crime of wire fraud is "the existence of a scheme to defraud." Second, the uncharged acts were "inextricably intertwined" with the frauds specified in the indictment because the uncharged transactions were "part of the overall scheme" and "part of the same transaction." The Court did not explain why it had two separate doctrines that found this evidence to be outside Rule 404(b), when the reason that both doctrines applied was exactly the same.

One noted commentator has summed up the "inextricably intertwined" doctrine with the following criticism:

> "Inextricably intertwined" is the modern de-Latinized version of *res gestae*, and it has been savaged by a similar critique. The standard has been described as "lacking character" and "obscure" because it does not embody a clear principle. * * * The vacuous nature of the test's wording gives courts license to employ sloppy analysis and allows them quickly to slip from a conclusory analysis to a desired conclusion. Simply stated, the indefinite phrasing of the doctrine is a virtual invitation for abuse."

Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 Cath. U. L.Rev. 719, 724 (2010) (citations omitted).

Several Circuits have been questioning whether there should even be an exception from Rule 404(b) for acts that are inextricably intertwined with charged offenses. For example, in *United States v. Green*, 617 F.3d 233, 246–247 (3rd Cir. 2010), a defendant charged with drug crimes challenged evidence that he threatened to kill the person who turned him over to authorities. The trial court admitted this evidence as inextricably intertwined with the charged crime. The court affirmed, but in an extensive and detailed analysis it rejected any broad use of the "inextricably intertwined" doctrine. The court noted three problems with the "inextricably intertwined" test:

> The first is that the test creates confusion because, quite simply, no one knows what it means. Such an impediment stands as an obstacle to helpful analysis. Indeed, we have criticized the "inextricably intertwined" standard as "a definition that elucidates little." * * * Whether evidence qualifies as intrinsic in a particular case may well depend on which version of the test one employs. For example, Green's threat to kill A.G. would qualify as intrinsic if the test is whether it "pertain[s] to the chain of events explaining the context" of the crime * * *. The same threat would not be intrinsic, however, if the test were whether that threat was "an integral part of the immediate context of the crime charged." * * * We see no principled way to choose among these competing incarnations of the test, yet that choice could well be determinative. * * *
>
> The second problem with the inextricably intertwined test is that resort to it is unnecessary. The most common justification for admitting evidence of "intertwined" acts is to allow a witness to testify freely and coherently; we do not want him to have to tiptoe around uncharged bad acts by the defendant, and thereby risk distorting his narrative. This is a worthy goal, but it can be accomplished without circumventing Rule 404(b). * * * [T]he same evidence would also be admissible within the framework of that rule because allowing the jury to understand the circumstances surrounding the charged crime—completing the story—is a proper, non-propensity purpose under Rule 404(b). * * * All that is accomplished by labeling evidence "intrinsic" is relieving the government from providing a defendant with the procedural protections of Rule 404(b).
>
> The third problem with the inextricably intertwined test is that some of its broader formulations, taken at face value, classify evidence of virtually any bad act as intrinsic.

The *Green* Court declared that the "inextricably intertwined" standard "is not our test for intrinsic evidence. Like its predecessor res gestae, the inextricably intertwined test is vague, overbroad, and prone to abuse, and we cannot ignore the danger it poses to the vitality of Rule 404(b)."

But the *Green* court did not "reject the concept of intrinsic evidence entirely." It explained as follows:

[W]e will reserve the "intrinsic" label for two narrow categories of evidence. First, evidence is intrinsic if it "directly proves" the charged offense. This gives effect to Rule 404(b)'s applicability only to evidence of "*other* crimes, wrongs, or acts." If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime. Second, uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime. But all else must be analyzed under Rule 404(b).

Applying the narrowed test of "intrinsic" evidence to the defendant's threat to kill the witness, the court held that it was not intrinsic and so was covered by Rule 404(b). First, it did not directly prove that Green attempted to possess cocaine with intent to distribute (it created an inference, but that was circumstantial, not direct). Additionally, it was not performed contemporaneously with the crime itself and did not facilitate the commission of the crime charged. Notably, though, the court affirmed the conviction, because the evidence was properly admitted under Rule 404(b), as providing context to the jury and as proof of motive.

The Seventh Circuit, in *United States v. Gorman*, 613 F.3d 711, 719 (7th Cir. 2010), appears to have discarded the "inextricably intertwined" doctrine. Gorman was charged with lying to a grand jury when he testified that he did not store a particular car in the parking garage of his condominium; the car was owned by his cousin and was related to drug activity. At trial the government offered evidence that the defendant had the car towed from his garage after police inquired about its location, and took two bags of money from the car. The trial court admitted this theft-related evidence as "inextricably intertwined" with the perjury charge. The court affirmed the conviction but stated that "[h]enceforth, resort to inextricable intertwinement is unavailable when determining a theory of inadmissibility." The court explained as follows:

There traditionally have been subtle distinctions between direct evidence of a charged crime, inextricable intertwinement evidence, and Rule 404(b) evidence, but our case law has not often focused on these fine distinctions. We have often lumped together these kinds of evidence, and this has only served to further cloud the already murky waters of the inextricable intertwinement doctrine.

There is now so much overlap between the theories of admissibility that the intertwinement doctrine often serves as the basis for admission even when it is unnecessary [because the act is direct evidence of the crime]. Thus, although this fine distinction has traditionally existed, the inextricable intertwinement doctrine has since become overused, vague and quite unhelpful. To ensure that there are no more doubts about the court's position on this issue—the inextricable intertwinement doctrine has outlived its usefulness.

As applied to the facts, the court found that the theft-related evidence was admissible, without the need to invoke the intertwinement doctrine. "Because the basis for the perjury charge was that [the defendant] denied 'having' the car in his garage, his theft of the car and extrication of the money from within were direct evidence of his false testimony. The fact that [the defendant] removed the Bentley from the garage demonstrated that he 'had' a Bentley in the garage in the first instance. Therefore, this evidence was properly admitted, albeit as direct evidence rather than under the inextricable intertwinement doctrine." The court noted that "any confusion of the proper channel of admissibility" was "insignificant" to the ultimate outcome of admissibility.[6]

Relatedly, in *United States v. Bowie*, 232 F.3d 923, 927 (D.C. Cir. 2000), the court rejected the "inextricably intertwined" rule where evidence was offered to "complete the story" of a charged crime. The court found the doctrine unnecessary.

> As a practical matter, it is hard to see what function this interpretation of Rule 404(b) performs. If the so-called "intrinsic" act is indeed part of the crime charged, evidence of it will, by definition, always satisfy Rule 404(b). * * * So far as we can tell, the only consequences of labeling evidence "intrinsic" are to relieve the prosecution of Rule 404(b)'s notice requirement and the court of its obligation to give an appropriate limiting instruction upon defense counsel's request.

In the end, the *Bowie* Court concluded that "there is no general 'complete the story' or 'explain the circumstances' exception to Rule 404(b) in the D.C. Circuit. Such broad exclusions have no discernible grounding in the 'other crimes, wrongs, or acts' language of the rule. Rule 404(b), and particularly its notice requirement, should not be disregarded on such a flimsy basis."

But other circuits still employ the "inextricably intertwined" doctrine to find that Rule 404(b) is inapplicable. In these circuits, evidence used to "complete the story" is pretty much the same as evidence admitted for "context" --- and yet "context" is a Rule 404(b) purpose while "complete the story" is not. And evidence found "intrinsic" often could also be characterized as evidence of state of mind or consciousness of guilt and so covered by Rule 404(b). *See, e.g., United States v. Ali,* 799 F.3d 1008 (8th Cir. 2015) (evidence that one defendant supported a terrorist group before it was designated as a terrorist organization was "intrinsic" to the crime charged because it explained how the fundraising began); *United States v. Ford,* 784 F.3d 1386 (11th Cir. 2015) (common methods used by the defendant to commit fraud were "intrinsic" because they were similar to the charged offenses); *United States v. Castleman,* 795 F.3d 904 (8th Cir. 2015) (in a drug prosecution, evidence of death threats against witnesses, offered to prove consciousness of guilt, were "direct evidence of the crime charged" and so "not subject to a Rule 404(b) analysis" --- though such evidence is clearly circumstantial, not direct). *See also* Imwinkelried, supra, at 726 ("In many of the cases in which the courts have invoked the [inextricably intertwined] doctrine, they could just as easily have relied on a recognized noncharacter theory, such as motive.").

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6 For further discussion of the Seventh Circuit's position, see Padgett, *How Less is More: The Unraveling of the Inextricable Intertwinement Doctrine under United States v. Gorman,* 6 Seventh Circuit Review 196 (2010). The author applauds the court for abandoning the "inextricably intertwined' doctrine and concludes as follows:

> This area of the law is contentious enough, with Rule 404(b) being the most litigated rule in the Federal Rules of Evidence. Compounding the complexities of this Rule by continuing to have a vague and misused doctrine was wasteful of the judiciary's already scarce time and dangerous for defendants.

Restyling and the "Inextricably Intertwined Doctrine"

As seen above in the discussion of the *Green* case --- and as discussed at the last Committee meeting --- the linchpin of the "inextricably intertwined" doctrine is that Rule 404(b) applies to "*other* crimes, wrongs or acts." Specifically the original rule provided that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." That phrase is quoted in *Green* to indicate that acts that are actually part of the crime charged are not "other" and so are not covered by Rule 404(b).

Green was decided before the rules were restyled. And the restyling made a change to the phrase. The first sentence of Rule 404(b) now states that "[e]vidence of a crime, wrong, or *other* act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." This change was raised at the last Committee meeting as one that might have affected the scope of any "inextricably intertwined" doctrine. It can be argued that the relocation of the word "other" makes a substantive change, because now "other" is just describing acts that are neither crimes nor wrongs --- it is no longer describing the kind of evidence that is covered by Rule 404(b) *because it is not part of the charged crime*.

That argument would lead to the conclusion that the restyling made a substantive change to the coverage of Rule 404(b). There are two responses to that argument. The first is that any inference of a substantive change is forestalled by the Restyling Committee Note, which says that no substantive change is intended. The second and more important response is that the substantive change described would make no sense. It would mean that *all* bad act evidence is covered by Rule 404(b), even the evidence of the charged crime itself. That is to say, the rule would mean that evidence of *any "*crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." And it makes no sense for Rule 404(b) to cover evidence of the crime itself, because that evidence by definition is not offered to prove the defendant's character. For example, in a murder case, could the restyling be interpreted to mean that evidence of the murder itself is covered by Rule 404(b)? Literally, perhaps, because it is evidence of a "crime, wrong, or other act." But the coverage is silly because the charged act of murder is not offered to prove character; it's offered to prove the murder.

Ultimately, then, it would seem that the restyling had no effect on the scope of Rule 404(b)'s coverage of bad act evidence --- and there is no call to propose an amendment designed only to correct the restyled iteration. That said, the phrase "other crimes, wrongs, or acts" is *different* from the phrase "crimes, wrongs, or other acts." It seems to describe something that is different. And the former seems a better way to capture the point that the rule is covering acts that are "other" --- and so not part of the crime charged. So the Committee may wish to consider changing the language back to the original, *as part of a broader amendment*. Though the counterargument is that it might be taken as a concession that there was an error in the restyling, and the differential here does not really amount to an error --- not an error with any practical effect, at any rate.

Drafting Possibilities

Trying to regulate the “inextricably intertwined” doctrine through a textual change is a challenge. There will always be some line-drawing required between the acts that are charged in an indictment and those that are not but yet appear pretty “close” to the charged acts or covered by the indictment. The courts above that try to reject the doctrine are still left to define the line between the crime charges and “other” acts --- such as through the distinction between direct and indirect evidence as in *Gorman* and *Green*. Perhaps a test that distinguishes direct and indirect evidence of the crime could be workable if its application was addressed in detail in a committee note. Perhaps not.

In Part Three, an attempt is made to codify a limitation on the “inextricably intertwined” doctrine.

II. Case Law Digest

Rule 404(b) Case Law Digest

Note: This digest covers circuit court cases decided since April, 2017. It covers all the reported circuit court cases with any meaningful discussion.

As to district court cases, only a sample from the last year is included as there are just too many that are too alike.

Circuit Court Opinions

1. Evidence Found Improperly Admitted

Not “background” but propensity: *United States v. Steiner*, 847 F.3d 103 (3rd Cir. 2017): In a felon-firearm prosecution, a prior arrest warrant was offered and admitted as “background” to the police investigation. The court found this to be error. Despite the government’s representations, the arrest warrant was not in fact what led the police to the defendant. “The only purpose the arrest warrant served was to improperly suggest that Steiner was predisposed to commit criminal acts.” The court “admonish[ed] the government to take greater care in its representations and not brandish Rule 404(b) so cavalierly.”

Prior drug conviction offered solely for propensity: *United States v. King,* 865 F.3d 848 (6th Cir. 2017): The defendant was charged with laundering what he thought was drug money (but was actually money provided by a confidential informant). On cross-examination of the defendant at trial, the prosecutor raised the defendant’s prior arrest and misdemeanor conviction for cocaine possession. The court found that there was no ground for introducing the evidence “other than to show that he had a propensity to commit crimes.” The government argued that the defendant opened the door to the drug evidence when he testified about his history of substance abuse to garner juror sympathy. But the court responded that the drug evidence was not contradictory of the defendant’s testimony but rather consistent with it. The court found the error to be harmless.

2. Questionable Application of "Inextricably Intertwined"

"Background" is "intrinsic" evidence: *United States v. Lucas*, 849 F.3d 638 (5th Cir. 2017): The defendant was tried for wire fraud arising from a fraudulent real estate investment. The defendant had told investors that Watson was providing him information about the investment. The court found no error in admitting the fact that the defendant had met that man at a methadone clinic. Because that background explained the true nature of the relationship between the defendant and the man, it was "intrinsic" to the crime charged.

> **Comment: Where the defendant met Watson was not direct evidence of the crime, and would have been more usefully and fairly analyzed as background evidence under Rule 404(b).**

"Contributing to the narrative": *United States v. Payne-Owens*, 845 F.3d 868 (8th Cir. 2017): The court affirmed the defendant's conviction for being a felon and an unlawful drug user in possession of a firearm. An ATF agent who investigated the defendant obtained a search warrant to access the defendant's Facebook account and found photos showing the defendant with ammunition and a handgun and holding up four fingers --- which was a sign associated with a gang. The court found no abuse of discretion in admission of the gang evidence. It reasoned that the evidence was admissible under Rule 404(b) because it tended to prove the defendant's motive to possess a real gun. But the court also stated that the Rule was inapplicable because the gang evidence was "intrinsic." The court found the evidence intrinsic because it "contributed to the narrative of the charged crime" and "it helped to provide a total picture." The court provided no analysis that would explain how these descriptions made the evidence "intrinsic"; and it mentioned no limit on characterizing evidence as intrinsic.

"Plan" evidence is inextricably intertwined: *United States v. Horner*, 853 F.3d 1201 (11th Cir. 2017): The court affirmed convictions of a husband and wife for assisting in the preparation of a fraudulent tax return and filing a false individual income tax return. The couple failed to tell their tax preparer that they had deposited substantial amounts of cash into business and personal accounts, and none of the funds was included on their tax returns. The IRS determined that the cash amounted to diverted income. The court concluded that the government's evidence of the cash deposits was admissible and references to them as "structuring" were permissible. The court reasoned that the deposits were inextricably linked to the tax charges because "the cash deposits formed the basis of the tax fraud itself." The court also held that evidence of their taxes and finances for other years was also inextricably intertwined because it was part of the same plan. Alternatively, the court concluded that the evidence of conduct in other years was relevant to prove motive and intent.

> **Comment: The court seems right about the deposits that were the basis of the fraud because you couldn't prove that there was tax fraud without proving the deposits. But the evidence of other years is not direct proof of the crime and should be analyzed under Rule 404(b).**

3. Questionable Applications of Intent or Knowledge

Intent in a drug case: *United States v. Henry,* 848 F.3d 1 (1st Cir. 2017): The defendant was convicted of possession of crack cocaine with intent to distribute. His defense was that the officers lied in claiming that they had found drugs on him. The court found no error in admitting the defendant's prior drug conviction to prove intent. It stated that it had "repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute." The court emphasized that the defendant's failure to challenge intent did not remove the issue of intent from the case. The court did, however, step back from the government's argument that "evidence of a prior drug distribution offense is *always* relevant under Rule 404(b) to show knowledge and intent in a prosecution for possession of a controlled substance with intent to distribute." The court noted that "in many cases, impermissible propensity reasoning lurks as one of the links in the logical chain of relevance" and "encourage[d] district courts to carefully consider the proponent's assertion of why a prior conviction has special relevance and examine whether, in the particular case-specific circumstances, the proponent is simply attempting to disguise propensity evidence by artificially affixing it with the label of a permitted Rule 404(b)(2) purpose." It also noted that the defendant did in a way contest intent, by seeking a lesser included offense instruction for simple possession. [That said, it remains the case that the court found no abuse of discretion in admitting the conviction, even though the trial court did not establish that the conviction was probative of intent independent of a propensity inference.]

Two judges in *Henry* concurred, questioning the First Circuit case law establishing that evidence of prior drug crimes is properly admitted to prove intent to distribute drugs. The judges pointed out that the authority was "contrary to Rule 404(b)" because proof of intent in drug cases proceeds through a propensity inference: "that is, his propensity is to be a seller, rather than a buyer or user." The judges found that any error in admitting the bad act was harmless, but noted that "one can make a good argument for going en banc in a future case to reconsider our Rule 404(b)(1) jurisprudence."

Intent and knowledge in a drug case: *United States v. Lyle,* 856 F.3d 191 (2nd Cir. 2017): The defendant was convicted of charges related to distribution of methamphetamine, including conspiracy. He was arrested in a car containing a large quantity of meth. His defense was that he was a user and not a distributor, and that he did not know that a large quantity of meth was in the car. The trial court admitted evidence that after that arrest, the defendant was found in a hotel room smoking meth, and weighing out baggies of meth on a scale. The court found no error. It stated first that the evidence was inextricably intertwined, because the defendant was charged with conspiracy, and the bad act was evidence in furtherance of the conspiracy --- during the time in which the conspiracy was operating. [This part of the ruling is discussed in Part Two, supra.] Second, the evidence was admissible to show knowledge and intent. The court noted that knowledge and intent was actively disputed by the defendant, and declared that "possession of 14-15 grams of methamphetamine and tools of the drug trade less than a month after he was arrested with the rental car is probative of his knowledge and intent regarding the contents of the rental car."

Comment: The court's ruling on intent seems justified because the defendant was actively contesting intent and the act was close in time and involved the same drug --- so its probative value was high. But the court is simply wrong on knowledge. That is because the bad act took place *after* the crime charged. A bad act is properly offered for knowledge when it shows that the defendant learned something from the prior experience --- you are more likely to know about something if it happened before. But by definition you can't learn from a future experience. So the path of inference for knowledge derived from a future act is just a smokescreen for propensity --- because the bad act shows he was a drug dealer, he must have known he was dealing drugs before.

"Intent" but no explanation of why the bad act is probative: *United States v. Sterling,* 860 F.3d 233 (4th Cir. 2017): A former CIA agent was convicted of unauthorized retention and disclosure of classified information. He argued on appeal that the trial court erred in admitting evidence that he improperly kept four classified documents --- unrelated to the charges --- in his home. The court stated that a not guilty plea puts the defendant's intent at issue; it specifically "declined to adopt the rule of some other circuits that evidence of other crimes may not be offered when the defendant unequivocally denies committing the acts charged in the indictment." The court in conclusory fashion stated that "evidence showing that Sterling improperly retained four classified documents in the past encouraged the proper evidentiary inference that any subsequent retention of classified documents was, if proven, intentional."

"Intent" but really propensity: *United States v. Thomas,* 847 F.3d 193 (5th Cir. 2017): The court affirmed the defendant's convictions for theft from a program receiving federal funds, money laundering and payment structuring, all arising from work the defendant did for the New Orleans Traffic Court. It found no plain error in the admission of evidence of the defendant's actions prior to the crime charged, in which he submitted inflated and duplicate invoices to the traffic court. The court found that the evidence "was relevant to an issue other than Thomas's character, as it lessened the likelihood that Thomas committed the charged offenses with innocent intent." But the court did not explain how the bad act evidence raised an inference of intent to commit the charged crime in any other way than by a propensity inference.

Prior acts of drug sales and drug use admissible to show intent to distribute: *United States v. Jackson,* 856 F.3d 1187 (8th Cir. 2017): In a case charging heroin distribution, the court found no error in the admission of: 1. Evidence that a search of the defendant's home at an unrelated time showed that the defendant was involved in drug-dealing, and 2. Testimony of a witness that he and the defendant did heroin together. The court held that: 1) Rule 404(b) is a rule of inclusion; 2) pleading not guilty places intent in issue; 3. Prior acts of drug distribution are probative of intent to distribute; and 4. Prior acts of drug *use* are probative of intent to distribute. [So this is as automatic as it gets.]

"Intent" but really propensity: *United States v. LaFontaine,* 847 F.3d 974 (8th Cir. 2017): The court affirmed the defendant's conviction for making a threat in a 2015 call to the Department of Justice and held that the trial judge did not abuse discretion in admitting a 2013 call by the defendant to a federal court employee. It concluded that the earlier call was relevant to intent, which was the key issue in the case. The court did not explain, however, why a prior threat was relevant to an intent to make a later threat, other than by way of a propensity inference. The court stated that Rule 404(b) is "one of inclusion, such that evidence offered for permissible purposes is presumed admissible absent a contrary determination."

"Rule of inclusion", etc.: *United States v. Johnson,* 860 F.3d 1133 (8th Cir. 2017): In a trial on charges of rape and assault, the court admitted the defendant's prior assault convictions. The court found no error, applying its basic template: 1. Rule 404(b) is a rule of inclusion; 2. By pleading not guilty, the defendant put intent in issue; and 3. Prior acts of assault were probative of intent to commit the charged assault.

"Rule of inclusion," etc.: *United States v. Riepe,* 858 F.3d 552 (8th Cir. 2017): The defendant was charged with attempted enticement of a minor. The government offered evidence that he had approached other minors previously. The court found no error in the admission of the bad act evidence. It stated that Rule 404(b) is a rule of inclusion; and that the prior acts were probative of intent to entice.

Conclusory application of knowledge and intent: *United States v. Rembert,* 851 F.3d 836 (8th Cir. 2017): The court affirmed the defendant's firearm and drug convictions and held that the trial judge did not abuse discretion in admitting a video posted on a media website that showed the defendant holding a firearm and smoking what appeared to be marijuana. The court stated that "evidence that a defendant possessed a firearm on a previous occasion is relevant to show knowledge and intent." The court gave no explanation that this was so absent reliance on a propensity inference.

No explanation of a non-propensity inference: *United States v. Ubaldo,* 859 F.3d 690 (9th Cir. 2017): Affirming the defendant's conviction for illegally smuggling weapons, the court held that the trial judge did not abuse discretion in admitting evidence of a previous attempt to smuggle weapons, as it was relevant to intent, knowledge and absence of mistake. But it gave no explanation of how this was so absent reliance on a propensity inference.

4. Questionable Applications of Other Purposes

Motive: *United States v. Williston,* 862 F.3d 1023 (10th Cir. 2017): The defendant was charged with murdering the two-year-old daughter of his girlfriend. The trial court admitted evidence that the defendant had previously spanked the girl, often lashed out at her, disciplined her by hitting her, and threw a cup at her. The court found no error and affirmed. It noted first that "Rule 404(b) is a rule of inclusion, and we regularly affirm the admission of other-acts evidence unless it tends to prove *only* a criminal propensity." (emphasis added). The court stated that the bad act evidence proved motive --- that the defendant's history with the girl showed his resentment and thus the "reason" that the defendant would beat her to death.

> **Comment: Surely the listing of "motive" as a proper purpose must mean more than "he had the same motive to do the bad act as he had to do the charged act." That is just propensity. The most sensible meaning of "motive" is that the bad act *gives* the defendant the motive to do the charged act --- such as if the victim was going to report the defendant for having done a previous bad act.**

5. Careful Explanations of Probative Value and Non-Propensity Inference

Requiring an explanation of probative value independent of a propensity inference: *United States v. Repak,* 852 F.3d 230 (3^{rd} Cir. 2017): The defendant was charged with public corruption --- conditioning the issuance of redevelopment grants on personal favors. He challenged the admission of evidence of other solicitations and items he received that were unrelated to those charged. The trial court found the bad act evidence admissible to prove knowledge and intent. The court, after noting that Rule 404(b) was a rule of *exclusion*, found that the trial court had erred in not specifically finding that the evidence was probative of these purposes without involving a propensity inference. The court recognized that the defendant actively contested his mental state. But it also "reiterated the importance of concretely connecting the proffered evidence to a non-propensity purpose." It found that the government's proffer and the trial court's ruling "fell short, failing to explain how evidence of uncharged solicitations would have a tendency to make Repak's knowledge and intent more probative in the mind of a juror." The government never explained "how the proffered evidence should work in the mind of a juror to establish knowledge and intent" and the trial court's analysis was "inexact and fails to adequately link the other-acts evidence to a non-propensity purpose with careful precision."

Nonetheless the court affirmed because it was itself able to discern a chain of inferences that did not rely on propensity: 1. The prior solicitations showed that the defendant had knowledge that his arrangements did not involve unilateral favors by the grantees; therefore they tended to establish that he knew he was getting favors in the charged transactions as a condition of giving the grants; 2. They also showed intent because they made it more likely "that Repak did not unwittingly solicit and receive [services] without knowing or intending that the services were meant to influence him in his role as . . . Executive Director." The court also found that the trial court erred in its Rule 403 balancing because all it did was conclude that Rule 403 was satisfied. But the court found that it was apparent that the probative value of the evidence was significant --- because the defendant actively contested his mental state. And the prejudicial effect was diminished by the trial court's limiting instruction and by the fact that the bad-act evidence did not involve criminal convictions (only acts).

Fourth Circuit panel adopts the *Gomez-Caldwell* approach: *United States v. Hall,* 858 F.3d 254 (4^{th} Cir. 2017): The defendant was charged with possession of marijuana with intent to distribute, as well a firearms offense. Six kilograms of marijuana and three firearms were found in a house in which the defendant resided with others. The drugs and guns were found in a locked bedroom and the government had no direct evidence linking the defendant to the bedroom. To establish constructive possession, the government offered and the trial court admitted the defendant's four prior convictions --- one for possession of marijuana and three for possession with intent to distribute. The court found error under Rule 404(b). The bad act evidence was ostensibly offered for purposes of knowledge and intent, but the court found that the relevance for those purposes mostly proceeded through a propensity inference, and where it did not the probative value was nonetheless substantially outweighed by the prejudicial effect. The court made the following points:

1. Following *Caldwell,* the court stated that Rule 404(b) is a rule of *exclusion* --- the references to it as a rule of inclusion are intended to mean only that the list of proper purposes is not exclusive.

2. Possession offenses generally are not relevant to intent to distribute (other than for propensity) because "the *mens rea* requirements for possession and distribution offenses are fundamentally different" --- so because the prior possession offenses did not require specific intent, "the only relevance that conviction could have to his intent to distribute marijuana on a later, unrelated occasion is that it tends to suggest that Defendant is, in general, more likely to distribute drugs because he was involved with drugs in the past."

3. Possession offenses are not always relevant to establish knowledge of the drug for purposes of distribution. That is because "distribution quantities of a drug are often packaged differently than quantities possessed for personal use, rendering a defendant's knowledge of the packaging of a personal use amount of a drug irrelevant to his knowledge of how a distribution amount of the same drug might be packaged." Also, a drug may be distributed in a number of forms, so that possession of one form might not be probative of knowledge of possession of another form.

4. But possession offenses may be relevant to knowledge "if the particular characteristic of the drug used to establish knowledge does not materially vary based on quantity, form, or packaging, for example." Applied to this case, the court found the prior convictions probative of knowledge of the smell of unburnt marijuana. But that probative value did not substantially outweigh the prejudice, because the defendant did not contest that he knew the smell of marijuana. He just claimed he had no access to the marijuana in the locked bedroom. That is, knowledge was not actively contested --- meaning that the probative value of the bad act to prove knowledge was diminished. The court rejected the government's argument that by pleading not guilty, the defendant automatically placed his intent and knowledge at issue for Rule 404(b) purposes --- if that were so, it would "swallow up the general rule against admission of prior bad acts."

5. As to the intent-based convictions, they were not sufficiently probative of intent as to the charged crime because of their "lack of factual similarity and temporal proximity." Given the lack of linkage, the only probative value of the intent-based convictions was through the criminal propensity inference.

6. As to the intent-based convictions, they were probative of knowledge because "past experience with distribution amounts of marijuana makes it more likely that Defendant knew, based on the pervasive smell of marijuana, that there was marijuana inside the residence." But that probative value was minimal because the defendant did not contest his knowledge of marijuana or the smell --- he contested access.

***Comment:* The *Hall* majority took pains to establish that its *Gomez/Caldwell*-type analysis was supported by existing Fourth Circuit precedent. It devoted six pages to a rebuttal of the dissenter's claim that Fourth Circuit precedent allowed virtually automatic admissibility of uncharged drug activity to show intent and knowledge in a drug case. It's**

fair to state that the majority's adoption of a stricter approach for Rule 404(b) evidence is, unfortunately, on shaky ground in terms of Fourth Circuit authority.

Absence of mistake: *United States v. Jimenez-Elvirez,* 862 F.3d 527 (5th Cir. 2017): The defendant was convicted of transporting undocumented aliens into the U.S. The trial court admitted his previous conviction for illegally transporting aliens. The court found no error. The government argued that it was "intrinsic" because the same tractor-trailer was used in the prior event. But the court was "skeptical" that there was enough evidence to link the two acts for purposes of finding the prior act to be "intrinsic" to the charged crime. The court found, however, that the prior smuggling event was properly admitted to prove absence of mistake. The defendant argued that he was in the wrong place at the wrong time. But the prior event involved the same tractor trailer and the two events were only three months apart --- making it less likely that the defendant was clueless as to what was going on.

Absence of Accident: *United States v. Henthorn,* 864 F.3d 1241 (10th Cir. 2017): The defendant was charged with murder, by pushing his wife off a cliff in Rocky Mountain National Park. He claimed it was an accident, she slipped and fell. The circumstances were suspicious --- including the fact that the defendant had taken out a large life insurance policy on his wife shortly before the incident. The trial court admitted evidence of two other incidents, one in which his prior wife died when she was crushed by the family car while the defendant was changing a tire in a remote location (just after the defendant had purchased life insurance on her), and one in which his second wife was injured at a remote cabin when hit with a large wooden beam that the defendant dropped from the roof. The court of appeals found no error in admitting these incidents. It reasoned that the government was not relying on a propensity inference, but rather that "the use of the prior incidents here rests on a logic of improbability that recognizes that prior incidents involving similar circumstances decrease the likelihood that Henthorn lacked the requisite intent, motive, and plan in committing the charged offense. Indeed, the prior incidents make it more likely that the charged offense was the product of design, rather than an accident."

> ***Comment:*** **The court essentially relied on the "doctrine of chances." That reliance seems very sound. How many similar tragic accidents can one guy be around ---especially after having bought life insurance? The *Henthorn* court was certainly not engaged in a "knee-jerk" resolution. The entire 17-page opinion is devoted to a careful analysis of Rule 404(b) and 403.**

Knowledge: *United States v. Gaskins*, 849 F.3d 1345 (11th Cir. 2017): The court affirmed the defendant's conviction for sex trafficking of a minor. It held that the trial judge did not abuse discretion in admitting evidence that the defendant drove two other minors to meet clients for prostitution and only later discovered that they were minors. The evidence was offered to prove that the defendant was on notice not to rely on the age listed on a website. The evidence tended to show defendant's knowledge that the victim in the instant case was a minor.

6. Reverse 404(b) --- Evidence Offered by the Defendant

Not relevant: *United States v. Canales*, 857 F.3d 963 (8th Cir. 2017): In a prosecution for distributing methamphetamine, the defendant claimed that he had been entrapped by the confidential informant. He offered evidence that the CI shot at him because the CI believed the defendant robbed his friend. But the trial court excluded the evidence, and the Court of Appeals found no error. The shooting occurred after the distribution charged in the case and moreover was unrelated to drug trafficking; so it was not relevant to any entrapment defense.

Not admissible to prove identity: *United States v. Plume*, 847 F.3d 624 (8th Cir. 2017): Affirming the defendant's convictions for assault resulting in serious bodily injury and child abuse involving his wife's infant grandson, the court held that evidence that the wife had previously committed child abuse not involving the grandson was inadmissible propensity evidence. The court noted that the prior abuse involved "different victims, different injuries, and different degrees of severity" and so could not be admitted to prove identity.

7. Cases on Notice

One week's notice is sufficient: *United States v. White,* 819 F.3d 976 (8th Cir. 2017): The defendant argued that the Rule 404(b) notice requirement was violated because he did not receive notice until one week before the trial. The court found that one week was sufficient time to reply and the defendant was not prejudiced. The court stated that "Rule 404(b)'s notice standard is flexible" and that what constitutes a reasonable disclosure "will depend largely on the circumstances of each case."

District Court Opinions

1. Cases that admit bad act evidence without much of a bother -- especially for intent or knowledge:

United States v. Steele, 2016 WL 4036843 (N.D. Ga. July 28, 2016): The defendant was charged with a Hobbs Act Robbery. The government sought to admit evidence of a previous Hobbs Act Robbery. The court wrote that "the evidence of the September 27, 2007 Hobbs Act robbery conviction is relevant to an issue other than the defendant's character. Given that the prior conviction is for Hobbs Act robbery, the very same crime with which the defendant is charged in this case, the evidence of the 2007 conviction is relevant to showing the defendant's intent." The court did not explain how the prior robbery was probative of intent in any way other than through the propensity inference.

United States v. Franklin, 2016 WL 4033105 (D. Idaho July 27, 2016): The defendant was charged with wire fraud. He was accused of creating fake credit cards and licenses to purchase a large quantity of goods from various retail stores. These events took place in Idaho, but the government wanted to introduce a similar spending spree involving the defendant that occurred in Colorado a few months earlier. The court permitted the government to do so. The court stated that the Colorado evidence "tends to prove issues clearly material to this case – the defendant's knowledge, intent, modus operandi, pattern of behavior and the absence of any mistake." The court does not go into detail about *how* the previous spree fits into any of the laundry list of permitted uses. Moreover, it does not discuss whether knowledge or intent were contested by the defendant.

United States v. Escobar, 2016 WL 3676176 (D. Minn. July 7, 2016): In a narcotics case, the government sought to admit three prior drug-related convictions, each against a separate defendant. After quoting Rule 404(b), this is the entirety of the court's analysis:

> Such evidence is generally admissible unless it is offered only to prove a defendant's character. Evidence of other acts is especially probative when intent is an issue, if those other acts are material to the defendant's intent.
>
> The prior convictions listed above are relevant and probative in this matter to establish motive, intent, and knowledge, among other matters. All of these convictions are therefore admissible.

United States v. Jones, 2017 WL 2124084 (S.D. Miss. May 15, 2017): In a narcotics case, the court heard post-trial motions regarding admission of unrelated drug activity. In three sentences, the court determined there was a "sufficient nexus" between the defendant and the evidence, and that the evidence was "relevant to the issue of intent." It did not note whether the defendant actively contested intent, nor did it explain how it proceeded through a non-propensity chain of reasoning to admit the evidence.

United States v. Cotton, 2016 WL 6666943 (D. Nev. Nov. 10, 2016): The defendant was charged with marijuana and firearms offenses. The defendant was stopped for a traffic violation and officers found a gun and a bag of pre-packaged marijuana. In an in limine ruling, the court found that three convictions would be admissible under Rule 404(b). The convictions were for: 1. maintaining a place for the purpose of selling a controlled substance; 2. possession of a controlled substance for the purpose of sale (cocaine); and 3. trafficking in a controlled substance (ecstasy). All three prior convictions were admitted as probative of the defendant's intent. The defendant argued that if he put on a defense that the bag with the marijuana was not his, none of his prior convictions would be probative except to prove propensity. The court rejected this argument by explaining that the defendant put intent at issue by pleading not guilty.

United States v. Jacobs, 194 F. Supp. 3d 216 (E.D.N.Y. 2016): The defendant was indicted on 27 counts of aiding in the preparation of false returns. The government filed a motion in limine to admit evidence of additional uncharged false tax returns prepared by the defendant for the same clients. The false tax returns were for a previous year and could not be charged due to the statute of limitations. The court found the prior returns were probative of motive. But the court did not explain how filing false tax returns in one year would give the defendant a motive to file false tax returns in a subsequent year. In the absence of any probative value to prove motive, it would appear that the prior filing is being offered to show propensity --- though if the defendant were contending that he didn't know that the later returns were fraudulent, the prior returns would be admissible to prove knowledge.

United States v. Harris, 2017 WL 2118284 (E.D. Tex. May 12, 2017): The defendant was charged with conspiracy to use, carry, or possess firearms during a crime of violence (home invasions). The defendant moved in limine to exclude six prior bad acts involving home invasions. The court stated that a not guilty plea puts intent at issue, and that similar acts are admissible to show intent.

United States v. Hayes, 2016 WL 7046747 (D. Utah Dec. 2, 2016): The defendant was charged with participating in a conspiracy to distribute methamphetamine. The prior bad act evidence that the court admitted was the defendant's admission to smoking methamphetamine on the day of his arrest and evidence that he previously used methamphetamine. The court found that "Defendant's prior use of methamphetamine may be used to show knowledge, plan, motive or intent to participate in the alleged crimes. Therefore, the evidence is probative of a material issue other than character and is admissible." The court did not explain any chain of inference by which uncharged drug activity would be probative for *four* separate proper purposes in a drug case.

United States v. Cowden, 2016 WL 5794763 (N.D.W. Va. Oct. 4, 2016): The defendant was charged with use of excessive force. He filed a motion in limine to exclude allegations of his use of excessive force on an unrelated occasion, where the defendant allegedly subdued a man in a domestic violence situation. The government claimed that the prior act (the domestic violence incident) was "relevant, necessary, and reliable" because it proved the defendant's willfulness. The court found Rule 404(b) to be a rule of inclusion. Then it simply stated that "the evidence is relevant to the element of willfulness in Count One and the defendant's state of mind." No further explanation or analysis was provided.

2. Cases where the probative value appears to proceed through a propensity inference to get to the "proper" purpose:

United States v. Minnick, 2016 WL 7131470 (D. Md. Dec. 5, 2016): The defendant filed a post-trial motion challenging his conviction for distributing heroin. He argued that it was error to admit a recorded conversation in which the defendant discussed selling cocaine, while using drug slang. The court first noted the recorded conversation about cocaine was not intrinsic to the crime because the defendant was charged with distributing heroin. Still, it admitted the evidence "as probative of [Defendant's] knowledge of coded language relating to drugs and his intent to engage in drug trafficking." The court explained as follows:

> Here, the Government's case centered on recorded conversations in which Minnick and others used language that the Government argued constituted coded language relating to drug dealing. The defense countered, through expert testimony, that the language used was typical of ordinary conversation among individuals from a particular community or social circle. In the context of this case, therefore, the conversation in question was relevant to establish that Minnick had knowledge of drug

slang and coded language and that when he used such language, he had the intent to engage in drug dealing. It was particularly probative because it occurred in September 2014, within the period of the charged conspiracy, and was captured on the same telephone that Minnick had used for other conversations in which he allegedly used coded language to discuss drug dealing.

Comment: **There is a good argument that the evidence of the other transaction is offered for propensity. That argument relies on the difference between drug "slang" --- like "a quarter" --- and coded conversation, like "chimneys." The conversation regarding the uncharged conversation was not coded, it was slang. So it really shows little to nothing about the defendant's knowledge of coded language.**

United States v. Bigham, 2016 WL 4944138 (E.D. Mich. Sept. 15, 2016): The defendant was charged with three counts of possession with intent to distribute a controlled substance. One of the counts of possession was based on a traffic stop where the defendant didn't have his license and fled the scene in a black 1998 Lexus and evaded the police. An eyewitness, however, called 911 and said that someone driving rapidly in a black Lexus dropped a bag out of their window. When the police investigated, they found drugs on the ground, packaged in a manner that indicated narcotics trafficking. To tie the drugs to the defendant, law enforcement tried to introduce several other instances where the defendant was pulled over, had either no license or a suspended license, fled the scene, and threw drugs out of his car window. The defendant claimed this was inadmissible under Rule 404(b). The court concluded that the other incidents were indicative of a modus operandi -- the defendant was pulled over, didn't have a valid license, fled, and threw the drugs out of his car, which was registered to someone else (twice to his mother). The court found this to be a "distinctive pattern of behavior," showing the defendant's M.O. As such, it admitted the prior bad acts to prove identity.

Comment: The most compelling portion of the prior bad acts in this instance was that the cars were registered to the defendant's mother in two of the events. But this was not always the case. The other factors the court said helped to prove identity -- fleeing from the cops and throwing the drugs out of the window -- seem to be normal reactions to being chased by the police while carrying drugs, not an indication of one's M.O. The more generic a so-called modus operandi, the more likely it is that the evidence is probative only to show propensity.

United States v. Dumire, 2016 WL 4507390 (W.D. Va. Aug. 26, 2016): The defendant was charged with two counts of being a felon in possession of a firearm. The government sought to introduce evidence of the defendant possessing guns on other occasions. This evidence was admitted. The court held that the other possessions tended to prove that the defendant knowingly and intentionally possessed the firearms on the times charged. ***See also United States v. Payne***, 2016 WL 5794810 (W.D. Va. Oct. 4, 2016) (prior gun possession admitted to prove knowledge; knowledge placed in question by the plea of not guilty).

Comment: **These cases are very similar to *Caldwell* but reach the opposite result. The defendant in each case was denying he had firearms. He wasn't contending lack of knowledge or intent. So the only path of inference is that he had a firearm because he had a firearm on other occasions. It is notable that in each of these cases the court cites a bevy of Fourth Circuit cases holding that prior possession is admissible to show intent and knowledge in firearms cases. So there is a clear split of authority in the circuits on this issue (and indeed within the Fourth Circuit itself*, see Hall, supra)*.**

3. Cases where the court conducts a rigorous 404(b) analysis and admits the evidence under Rule 404(b):

United States v. Shayota, 2016 WL 5791376 (N.D. Cal. Oct. 4, 2016): The defendants were charged with conspiring "to manufacture and distribute counterfeit bottles of a liquid dietary supplement known as 5-Hour ENERGY." They filed motions to exclude evidence showing they previously engaged in schemes similar to the one charged. The government sought to admit the evidence to prove "the defendants' knowledge, intent, preparation, plan, and absence of mistake or accident." The court looked at four factors (materiality, remoteness in time, sufficiency of the evidence, and similarity between the alleged acts and charged acts) outlined by the 9th Circuit and determined that the previous acts were all admissible to show that the defendants were sophisticated and knew what they were doing when they sold the counterfeit 5-Hour ENERGY. The court declared that "the defendants' past history of working together on similar schemes indicates that they understood their roles as well as the objects of the conspiracy, and demonstrates how they gained knowledge, skills, and networks necessary to carry out the alleged 5-Hour ENERGY conspiracy."

United States v. Hassanshahi, 195 F. Supp. 3d 35 (D.D.C. 2016): The defendant was charged with conspiracy to violate the International Economic Emergency Powers Act and the Iranian Transactions and Sanctions Regulations, commonly referred to as the United States' trade embargo against Iran. The government intended to elicit evidence that the defendant had knowledge that a license from OFAC was required to do business in Iran. In a prior lawsuit, documented with a court opinion, the defendant was advised of the rules regarding doing business in Iran. The court found that the prior conduct was not being used to show that the defendant had a particular character and acted in conformity with that character; instead, it was used to show an absence of mistake, which is permissible under Rule 404(b). The court did an extremely thorough job of dealing with all of the defendant's arguments, explaining why the evidence at issue was admissible.

United States v. Laskowski, 2016 WL 4011230 (N.D. Ill. July 27, 2016): The defendant sought to exclude evidence that he encouraged a witness to not answer her front door to accept a grand jury subpoena, where the grand jury was investigating the criminal conduct that the defendant was eventually charged with. The court found the evidence was supported by a propensity-free chain of reasoning --- not that the defendant had a propensity to commit crime, but rather that he was conscious of his guilt on the crime charged. Citing *Gomez,* the court declared that "[c]onnecting Defendant's attempt to prevent someone from aiding the government's investigation to his consciousness of guilt requires no propensity inference."

United States v. Hodge, 2017 WL 2312238 (D.V.I. May 26, 2017): The defendant was one of six defendants who were charged with conspiracy to possess controlled substances (cocaine powder and marijuana) and related offenses. The defendant sought to exclude evidence of his violating drug laws during the time period of the alleged drug conspiracy. The court explained Rule 404(b) in a detailed manner and concluded that the two specific drug trafficking events the defendant sought to exclude "constitute[d] intrinsic evidence, and [were] not subject to the requirements of Rule 404(b)." The court, nevertheless, properly examined the evidence under Rule 403, too, and it concluded that, although the evidence was certainly damaging to the defendant, it was not unfairly prejudicial.

4. Cases that conducted a rigorous analysis and excluded the evidence offered under Rule 404(b):

United States v. Hitesman, 2016 WL 3523854 (N.D. Cal. June 28, 2016): The defendant was charged with committing attempted bank robbery. The government sought to admit evidence of the defendant's six prior bank robbery convictions under Rule 404(b). The government's theory was that this evidence demonstrated the defendant's modus operandi. After a thorough analysis, the court refused to admit the evidence. The government noted that there were a few characteristics from the prior crimes that were found in the charged crime: the perpetrator was alone, did not wear a mask, used a demand note, and said he had a gun without showing the gun. The court cited an array of circuit court decisions where similar evidence was found insufficiently unique to prove identity. The court recognized that if the circumstances are not sufficiently unusual, the evidence ostensibly offered for identity is actually being used to show propensity.

United States v. Shirley, 214 F. Supp. 3d 1124 (D.N.M. 2016): The defendant was indicted for unlawfully killing a person within Indian country with a knife with malice aforethought, and related offenses. The defendant objected to admission of evidence of many knives owned by the defendant, including one he was clutching when arrested. The court rigorously went through the case law, and it accurately laid out how to evaluate bad act evidence. (Judge Browning's opinions on evidence are extraordinarily thorough and detailed). The government argued that the knives would show the defendant's "access to, familiarity with, and use of" the type of weapon used in the crime, but the court found that sort of "propensity inference is impermissible." The court concluded that "such evidence suggests that Maynard Shirley is a person who possesses and is predisposed to use knives, and that therefore, he must have been the person who used 'sharp objects' to stab the victims in this case." The court also noted that under Rule 403 this evidence would be minimally probative, because showing familiarity with a particular weapon is not the same as showing intent or knowledge. Finally, the court held that evidence that the defendant was found fleeing prosecution with a knife *would* be admissible, for the non-propensity purpose of consciousness of guilt. See also Judge Browning's opinion in ***Sec. & Exch. Comm'n v. Goldstone***, 2016 WL 3996384 (D.N.M. June 27, 2016) for a remarkably thorough Rule 404(b) analysis.

United States v. Williams, 2016 WL 4536864 (E.D.N.Y. Aug. 30, 2016): The defendant was charged with conspiracy to distribute narcotics and a firearm violation. While the court ruled on two motions and several pieces of evidence (and admitted some 404(b) evidence), it also excluded evidence that the police recovered firearms and marijuana as a result of a traffic stop of the defendant. The government sought to admit evidence of the guns and marijuana on the theory that this demonstrated the defendant's modus operandi --- specifically that the defendant kept these in a trap (i.e., a hidden compartment). The court, however, was unpersuaded. It required that evidence offered for identity under a theory of modus operandi must be such that has "unusual characteristics." The court found that using a secret compartment was hardly unique. The court, however, did allow the government to introduce the fact that the defendant was involved in the traffic stop (though not what the fruits of that stop were) because he was stopped while driving with three of his co-conspirators, which allowed the government to demonstrate there was a longstanding relationship between the co-conspirators. The court did a very careful job of parsing the evidence and assuring that it was probative of a proper purpose.

United States v. Bey, 2017 WL 1547006 (E.D. Pa. Apr. 28, 2017): The defendant was charged with being a felon in possession of a firearm. He moved to exclude his 2002 conviction for a firearms offense and 2002 arrest for a separate firearms offense. The court noted that the first step in the Rule 404(b) analysis is to demonstrate a non-propensity purpose for admitting the evidence. The government argued the evidence was probative to show "knowledge and absence of mistake in possessing a firearm." But the court, relying on *Caldwell*, responded that because the case involved actual possession (as opposed to constructive possession), the issues of knowledge and absence of mistake were not being contested. Here, the defendant claimed the police planted the gun on him. The court concluded that "the only purpose of introducing this evidence is to demonstrate that if [the defendant] knowingly possessed firearms in the past, he is more likely to have knowingly possessed the firearm on [the date at issue]. This is exactly the type of evidence that Rule 404(b) prohibits."

United States v. Sneed, 2016 WL 4191683 (M.D. Tenn. Aug. 9, 2016): The defendant was charged with conspiracy to possess and distribute cocaine and possession and distribution of cocaine within 1,000 feet of an elementary school. The defendant argued for exclusion of a YouTube rap video entitled "4ThARightPrice," which depicted the defendant and other individuals performing a rap song containing lyrics about drug sales and gang activity. The government argued that the video was probative of the defendant's participation in the charged conspiracy and his intent to distribute cocaine. The court, in a thorough analysis, concluded that "[t]he Government's argument has a fatal flaw; rapping about selling drugs does not make it more likely that the defendant did, in fact, sell drugs." The court stated that "the video will suggest to the jury that because the defendant rapped about selling drugs on one occasion, he acted in accordance with the behavior described in the rap on another occasion, the definition of prohibited propensity evidence." The court noted that the statements in the video were general, and nothing in them tied in any way to the details of the charged crime.

III. Drafting Alternatives

This section considers drafting alternatives for addressing the two case law trends discussed in Part Two, as well as other suggestions for change that have been raised by Committee members, the Reporter and Professor Richter. The changes will be taken, and commented upon, one by one.

A. Requiring the probative value of the bad act to proceed through a non-propensity inference.

Alternative 1. Adding a simple statement to the substantive provision.

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***~~Permitted~~ Other Uses~~; Notice in a Criminal Case~~.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. But the probative value for the other purpose may not depend on a propensity inference.

(3) Notice in a Criminal Case. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Reporter's comment:

If the sentence is added as above, it makes sense to drop the notice provision to another section. *Frankly, including the notice provision together with the most important substantive provision of Rule 404(b) --- a decision made in the Restyling --- was not an elegant choice.* And it would be most inelegant to retain the current structure if another sentence is added to the middle of the provision.

Moreover, the word "permitted" in the title of (b)(2) is not exactly correct because the bad act evidence is "permitted" only if the probative value for the purpose is not substantially outweighed by the prejudicial effect. The text catches that point by stating that the evidence "may be admissible" if offered for another purpose. But "may be admissible" is not the same as "permitted." So if the Rule is going to be amended, there is a good argument that the heading should be changed as indicated, from "permitted" to "other". This is another thing that probably should have been caught in the restyling.

Committee Note for this change:

The amendment emphasizes that it is not enough simply to articulate a non-character purpose for evidence of other crimes, wrongs or acts. In order for Rule 404(b) to protect in accordance with its intent, the probative value of the evidence for the proper purpose cannot be dependent on a propensity inference. For example, if evidence of uncharged misconduct is offered to prove intent, it cannot be admitted for that purpose if the inference is, "because the bad act shows he has a propensity to commit a crime like the one charged, it tends to prove he had the intent to commit the charged crime." The proponent must therefore articulate to the court the chain of inferences from the bad act evidence to the purpose for which it is offered, and explain how that chain of inferences does not depend on the actor's propensity.

Alternative 2: A more elaborate statement requiring a chain of reasoning without a propensity inference.

Judge Marten proposes that the *Gomez* principle be set forth in a more particularized form. His proposed amendment reads as follows:

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***~~Permitted~~ Other Uses~~; Notice in a Criminal Case~~.*** ~~This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.~~ The court may admit this evidence for another purpose only upon making the following findings:

(A) The other act is relevant to a specific purpose other than the person's character or propensity to behave in a certain way;

(B) the specific purpose is established through a chain of reasoning that does not rely on the inference that the person has a certain character and acted in accordance with that character on the occasion charged in the case; and

(C) the probative value of the other act evidence is not substantially outweighed by the risk of unfair prejudice, after taking account of the extent to which the non-propensity fact for which the evidence is offered is disputed.[7]

(3) Notice in a Criminal Case. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

Reporter's Comment: This proposal can probably have the same Committee Note as the prior one. It gets at the same point of protecting against propensity inferences but is more elaborate and specific. That may well be a good thing for such an important rule.

It seems drastic to cut out the list of proper purposes, though, as there are literally thousands of cases that have cited and used that rule language. (This point is discussed more fully below). And for purposes of this amendment it might well not be necessary. The amendment seems to work fine even with the list of proper purposes retained. Subdivision (A) might then seem a bit repetitive, but perhaps repetition is a good thing in this context.

Query whether it is useful to specifically incorporate a Rule 403 balancing test here. All courts agree that Rule 403 applies here. And it is not usual to specify that Rule 403 does apply --- for example, there is nothing in Rules 407, 608, or 801 that refers to Rule 403, and yet the Rule is applied underneath those rules. Arguably mentioning Rule 403 here draws the use of Rule 403 in doubt when applied in these other contexts. [8] Moreover, the "in dispute" clause fits somewhat awkwardly in a list of findings. To the extent that the "in dispute" language is added to incorporate an "active dispute" requirement, the Committee has determined that it does not wish to pursue that requirement in rule text. So it may be appropriate to drop subdivision (C).

Alternative 3: Adding to the notice provision:

One of the options being explored by the Committee is incorporating an emphasis on non-propensity inferences in the notice provision. It might look like this:

(b) Crimes, Wrongs, or Other Acts.

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[7] I added friendly amendments to Judge Marten's draft that I found necessary to comport with the structure of findings having to be made by the court. I also took the liberty of changing the term "at issue" in (2)(C) to "disputed." "Disputed" is the word used in Rule 407 and it accomplishes a similar purpose here --- subsequent remedial measures can be offered to prove feasibility, for example, only if feasibility is "disputed." Moreover, the term "at issue" might raise confusion when considered together with "character *in* issue" --- which refers to cases in which character must be proven under the substantive law.

[8] The only exception is Rule 609(a)(1), but Rule 403 is mentioned there because there are so many other balancing tests at work in that rule that it was thought that it would be confusing if Rule 403 were not specified.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ [9] In a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; ~~and~~

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice~~.~~;

(C) articulate in the notice the non-propensity purpose for which the prosecution intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Reporter's Comments:

1. There are two important differences between adding to the substantive provision (alternatives 1 and 2) and addressing the problem in a notice provision (alternative 3).

The first difference is that if the provision is one of notice, it will not apply in civil cases. Perhaps that is a permissible result because most of the problems of overbroad application of Rule 404(b) have occurred in criminal cases. But there have been complaints that bad acts ostensibly admitted for non-character purposes in civil cases are actually nothing but propensity evidence. One commentator has noted the following problem of motive shown through propensity inferences in Title VII cases:

> [W]hen plaintiffs offer evidence of an employer's "motive" they overwhelmingly do so based on the following logic; The employer's prior acts reveal that the employer has some discriminatory mindset; ipso facto, the employer was motivated to discriminate [by that mindset in taking the adverse action.] Nothing more than semantics differentiates this "motive" from character propensity.

Marshall, *The Character of Discrimination Law: The Incompatibility of Rule 404 and Employment Discrimination Suits*, 114 Yale L.J. 1063, 1076 (2005).

It would seem that requiring that probative value for a proper purpose must proceed through a non-propensity inference is a worthy goal in both criminal and civil cases. Therefore,

[9] The Committee has unanimously agreed that the request requirement should be eliminated.

if the Committee agrees to beef up the notice requirements, it is worth considering expanding those requirements to all cases. The reason given by the Advisory Committee for limiting the notice requirement to criminal cases was that the Civil Rules already contain broad discovery provisions, which are likely to result in full disclosure of all bad acts that the proponent would seek to admit. So at first glance a notice requirement for civil cases in Rule 404(b) would be superfluous at best and might be confusing. But if the "articulation" requirements are added to the notice provision, then the overlap with civil discovery rules is not so clear. That is, the proposed *addition* to the Rule 404(b) notice requirement --- which is not about production but about articulating a proper purpose --- will in fact add something important to what the Civil Rules already provide. Therefore, if the Committee does decide to add an articulation requirement to the Rule 404(b) notice provision, it should also consider extending the provision to civil cases.

Extending the proposal to civil cases would look like this:

(2) ***Permitted Uses; Notice ~~in a Criminal Case~~.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

(A) provide reasonable notice of the general nature of any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice~~.~~;

(C) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

It should be noted that the above changes to the notice requirement would also result in a criminal defendant having an obligation to provide pretrial notice of "reverse 404(b)" evidence. That is of course a judgment call for the Committee. On a drafting level, it gets awkward to state that the notice requirement applies in civil cases and to the prosecutor in criminal cases, but not to the criminal defendant. On the merits, there is no obvious reason to exclude criminal defendants from having to articulate how evidence of other acts is probative to a proper purpose without proceeding through a propensity inference. Moreover, the extension would not result in a dramatic change because "reverse 404(b)" evidence is rarely offered.

The second difference between a substantive provision and a notice provision is that a substantive provision actually governs the admissibility of evidence. A violation of a substantive provision means that the evidence is inadmissible. A violation of the notice provision, in this instance, means only that the proponent failed to timely articulate a non-propensity purpose. Whether that results in exclusion of evidence is within the discretion of the court, which may instead impose other sanctions or even excuse the violation under the circumstances. The point is that a notice provision does not itself guarantee that the bad act evidence will have to proceed through non-propensity inferences; rather it guarantees only a timely articulation of the proponent's arguments.

This discussion leads pretty clearly to a third alternative: adding the substantive requirement that the evidence must proceed through non-propensity inferences, *and* adding to the notice provisions to require the proponent to *articulate* those inferences. Adding both provisions will assure that the non-propensity arguments are laid out for the court early on, and also will provide specific authority for the court to exclude the bad act evidence if the probative value for the asserted purpose actually proceeds through a propensity inference. The court can and must exclude the bad act evidence that proceeds through a propensity inference, even if the proponent satisfies the notice provision by articulating a chain of inferences. That is because the proponent's act of articulating a chain of inferences doesn't preclude the possibility that in fact the probative value is based on a propensity inference.

Combining both alternatives:

For ease of reference, a change that would add the requirement that the probative value proceed through non-propensity inferences, and would also add the requirement that the proponent articulate those inferences, could look like this --- with the inclusion of extending the notice requirement to a civil case, and deleting the request requirement (a point that has already been approved by the Committee):

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***~~Permitted~~ Other Uses~~; Notice in a Criminal Case~~.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. But the probative value for the other purpose may not depend on a propensity inference. [*Or adding Judge Marten's subdivisions here, see Alternative 2*.]

(3) Notice ~~in a Criminal Case.~~ ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

(A) provide reasonable notice of the general nature of any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice~~.~~;

(C) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence; and

(D) articulate the chain of reasoning supporting the purpose for offering the evidence.

Concern expressed about pretrial notification of proper purposes:

At a previous meeting, two concerns were expressed about requiring the proponent, in advance of trial, to disclose a proper purpose and articulate a chain of inferences that does not proceed through propensity. The first concern is that the proponent will over-notify; that is, the proponent will articulate every proper purpose under the sun so as not to be caught short for failing to articulate the purpose at a later date. It seems, though, that the risk of over-designation is not high because under the proposal the proponent must not only articulate a proper purpose but must also explain how, exactly, the bad act is probative for such a purpose without proceeding through a propensity inference. That required explanation is likely to temper the incentive to over-declare permissible purposes --- because if the purpose is way off, the explanation of probative value should fail in the making. For example, take a felon-firearm case in which a prosecution witness says he saw the defendant with a gun and the defendant denies it. If a previous act of gun possession is offered, a prosecutor's designation of "knowledge" would have to be followed by an explanation something like "the prior act shows he has familiarity with guns and so it makes it more likely that the defendant knew he was possessing a gun on the night in question." But the probative value under that explanation is close to zero, because nobody is arguing that the defendant didn't know what a gun was. The only probative value is that because he had a gun once he is more likely to have had one on the night in question. Thus, the potential over-designation of "knowledge" in this circumstance would be "outed" by the need to explain its true probative value.

Another concern about a pretrial "articulation" requirement is that the proponent might not be aware at the early stages of all the possible ways in which a bad act might become relevant. Proper purposes may reveal themselves as the case further develops. That is a legitimate point, and surely a rule that imposes a requirement of advance articulation of a proper purpose needs to have some flexibility. That flexibility can be provided by a good cause exception. Of course, the Rule 404(b) notice requirement currently *has* a good cause exception. But as drafted above, there is a possible argument that the good cause requirement could be interpreted as applying only to *providing* the notice, not to the new articulation requirements. That reading is possible because the good cause exception is placed ahead of the new requirements. The problem looks like it is solved if the provisions are rearranged, as follows:

Extending the good cause protection to the requirement that the proponent articulate a proper purpose and a non-propensity chain of reasoning:

(3) Notice ~~in a Criminal Case.~~ ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

(A) provide reasonable notice of the general nature of any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(~~B~~ D) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

This rearrangement could be coupled with a Committee Note providing that the good cause exception will apply to cases in which a proper purpose for the evidence does not become evident until after the trial begins. That excerpt of a Committee Note could look like this:

> As restructured, the good cause exception applies not only to the timing of the notice but also to the obligations to articulate a non-propensity purpose and explain how the evidence leads to that purpose independent of a propensity inference. A good cause exception for the articulation requirements is necessary because in some cases a permissible purpose for the evidence may not become clear until just before, or even during, trial.

B. Amendment to Deal with the "Inextricably Intertwined" Doctrine

As discussed above, there is much to dislike about the "inextricably intertwined" doctrine --- it is fuzzy, it overlaps with Rule 404(b) for such matters as "context" and "background", and it is not at all uniformly applied by the courts. But that said, there must be some line drawn between acts that are part of the charged crime and acts that are "other" and so covered by Rule 404(b). Otherwise Rule 404(b) would be applicable to eyewitness testimony such as "I saw the defendant rob the bank he is charged with robbing."

One possibility is to try a "direct/indirect" distinction --- indirect evidence would be covered by Rule 404(b) while direct evidence would be proof of the crime itself. A "direct/indirect" line --- currently employed by some reform-minded courts, as discussed above ---seems miles better than other possible fixes. For example, adding language that Rule 404(b) doesn't apply to evidence of acts "inextricably intertwined" with the charged crime or "intrinsic" to the charged crime adds nothing to the enterprise. Also, courts are obviously familiar with the direct/indirect terminology. And finally, if applying Rule 404(b) to all indirect evidence would end up expanding the rule's coverage in some courts, the consequences are not terrible. All that happens under current law is that the notice requirement of Rule 404(b) will apply --- that is because indirect evidence that is close to the crime will almost certainly fit a non-character purpose like "background" or "context" and so will be admissible even if Rule 404(b) applies to it.

The question arises whether the direct/indirect distinction should apply to civil cases. Again, in theory there is no reason to distinguish civil and criminal cases in determining whether bad acts are "other" acts or whether they are part of the claim or defense. There do not appear to be any reported civil cases applying the "inextricably intertwined" doctrine. But it would not seem to hurt to give the same guidance to courts in civil cases as is given in criminal cases.

If the Committee wishes to address the "inextricably intertwined" doctrine in an amendment to the text of Rule 404(b), it might look something like this:

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act <u>--- offered as indirect evidence of a matter in dispute ---</u> is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

A Committee Note excerpt might look like this:

The amendment provides that Rule 404(b) does not apply to direct evidence of the matter in dispute. For example, in a prosecution for bank robbery, Rule 404(b) does not apply to testimony from an eyewitness that he saw the defendant rob the bank. Rule 404(b) has no application because there can be no argument that by presenting that evidence the government is trying to raise the inference that the defendant has a propensity; rather it is just proving the crime charged. On the other hand, evidence that the defendant threatened an eyewitness a week after the crime is indirect evidence of the bank robbery, and should be evaluated under Rule 404(b). Many courts, in determining the coverage of Rule 404(b), have held that evidence of acts "inextricably intertwined" with the charged crime, or "intrinsic" to it, are outside the rule's coverage. But that iteration has led to confusion and conflicting results in the courts. The Committee believes that a "direct/indirect" distinction is easier to apply and will provide the proper scope of coverage for Rule 404(b).

Moving "other":

Another possibility, discussed earlier in the memo, is to return the word "other" to its original placement before "crimes" in the rule. That change would in some way be related to the "inextricably intertwined" doctrine because courts have relied on the original rule's placement of "other" to implement that doctrine. See Kenneth Graham, *Federal Practice and Procedure* § 5239 ("One of the key words in determining the scope of Rule 404(b) is 'other'; only crimes, wrongs or acts 'other' than those at issue under the pleading are made inadmissible under the general rule."). It would not at all solve the problem of the breadth and fuzziness of the inextricably intertwined doctrine, however --- because all that breadth and fuzziness was *created* at a time when "other" was placed before "crimes." And the courts that have cut back on the doctrine --- discussed earlier in the memo --- have not relied on the text (or the restyling) to do so. They have cut back on the doctrine because it is amorphous and unhelpful. Moreover, courts that do continue to employ the inextricably intertwined doctrine cite and quote the restyled rule without missing a beat. *See, e.g., United States v. Loftis*, 843 F.3d 1173 (9th Cir. 2016) (quoting the restyled Rule 404(b)(1) in full, and then applying the inextricably intertwined doctrine after stating that "Rule 404(b) applies solely to evidence of 'other' acts, not to evidence of the very acts charged as crimes in the indictment"). So putting "other" back in its original place will not solve the problems caused by the "inextricably intertwined" doctrine. That doctrine was a disaster when "other" was in its original place.

Independently of any move to resolve the inextricably intertwined doctrine, however, there is something to be said for returning to "other crimes, wrongs, or acts." For the reasons discussed earlier, the original location of "other" makes more sense and avoids the nonsensical interpretation that Rule 404(b) governs evidence of the charged crime itself. On the other hand, the restyling, while arguably resulting in a weird change of meaning in Rule 404(b), has not actually created any practical problem. I have not found a case in which a court relied on the restyled rule to come to a result on "other" crimes that is different than it would have under the original rule.

If the Committee does wish to change the location of "other" then that change is pretty simple and it can be coupled with the direct/indirect distinction. It looks like this:

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of ~~a~~ <u>any</u> <u>other</u> crime, wrong, or ~~other~~ act <u>--- offered as indirect evidence of a matter in dispute ---</u> is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

It should be noted that the rule cannot be turned back to the original exactly, because the original version was "evidence of crimes, wrongs, or other acts." But the plural is frowned upon in restyling, and is no longer used throughout the Evidence Rules, so using the plural would raise hackles with the style consultants.

Also, it probably needs to be "any other"; it can't be "another." Because "another" is singular, it could raise the inference that *only one* other crime, wrong or act would be covered by the Rule. That problem was raised in the restyling when Rules 413-415 were proposed to be restyled as "another sexual assault." The Evidence Rules Committee determined that this could be a substantive change --- limiting admissibility to only one sexual assault --- and so it was changed to "any other." That's probably what needs to be done here if the change is to be made.

One problem in moving "other" though, is the Committee Note. What could be said? Here are two possibilities, only partly in jest:

> "Other is being returned to its original placement, because it makes more sense there, even though the restyling change hasn't made a difference in any case." Or

> "Other is being returned to its original placement to provide better guidance on which acts are covered by Rule 404(b) and which are not --- even though when it was in its original place the courts responded by establishing a formless and confusing 'inextricably intertwined' doctrine."

But it could be fair to conclude that nothing need be said about the restyling, if moving "other" is in tandem with adding a direct/indirect distinction. Then the draft Committee Note, set forth above, seems to adequately cover both changes without having to comment specifically on the change of "other."

C. Other suggestions regarding the notice requirement.

1. Disclosure of the "General Nature" of the Evidence.

At a previous meeting, a Committee member argued that practice under Rule 404(b) would be improved if the government were required to provide a more detailed description of the other acts that it intends to introduce. The operative language in the Rule is that the government must disclose the "general nature" of the Rule 404(b) evidence. The assertion was that the notice provided was sometimes so general that it gave little if any assistance in knowing about or preparing for the evidence. There is case law that does support the contention that the term "general nature" requires relatively little of the government. *See, e.g., United States v. Watson,* 409 F.3d 458 (D.C.Cir. 2005), where the prosecution gave pretrial notice that it would offer the testimony of a cooperating witness, but did not provide the name of the witness, nor the facts or circumstances of the proposed testimony. The court found that this notice was sufficient because it provided the "general nature" of the testimony. Other examples of vague notice found sufficient under the Rule 404(b) "general nature" language include *United States v. Kern,* 12 F.3d 122, 124 (8th Cir.1993) (holding that the government's statement that it "might use evidence from some local robberies" was sufficient to describe the general nature of the acts under Rule 404(b)); and *United States v. Schoeneman,* 893 F.Supp. 820, 823 (N.D.Ill.1995) (rejecting the defendant's motion that the government provide notice of the dates, times, places and persons involved in the acts it planned to admit under Rule 404(b)).

The argument for more specificity in the notice requirement is straightforward: in order to determine whether the evidence is admissible for a proper purpose, and that the probative value does not proceed through a propensity inference, it is critical to know just what the evidence is. There might also be a dispute over whether the defendant even did the act --- again that argument cannot be made effectively if the defendant doesn't know what the act is. Moreover, it is important to get the court attuned to proper purposes and propensity inferences as soon as possible --- and that is difficult to do if the court does not know what the evidence is.

Assuming the Committee wishes to require more specificity in the notice provision, the question is how to accomplish this objective.

One possible solution is simply to delete the "general nature" language --- in which case the notice provision could look like this:

> **(2) Permitted Uses; Notice in a Criminal Case.** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of ~~the general nature of~~ any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

A Committee Note excerpt might look like this:

The notice provision has been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term "general nature" has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would be offered to prove, and without describing the source or form of the evidence. Deleting the term "general nature" means that the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose.

Another possibility is to borrow from the amendment to the Rule 807 notice provision that has been unanimously approved by the Committee. That amendment requires the proponent to disclose the "substance" of the evidence. Employing the same language in Rule 404(b) would of course promote uniformity. And the word "substance" arguably provides a bit more guidance than no guidance at all.

If the term "substance" is used, the amendment to the notice provision would look like this:

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the ~~general nature~~ <u>substance</u> of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

The Committee Note excerpt could look like this (borrowing from the Note to the proposed amendment to Rule 807):

The notice provision has been amended to require the government to provide a more detailed description of the evidence that the government intends to offer. The term “general nature” has been read in some courts to allow the government to meet its disclosure obligation without describing the specific act that the evidence would tend to prove, and without describing the source or form of the evidence. The notice needs to be sufficiently detailed to allow the defendant (and the court) to determine how the act to be proved is probative for a specific articulated purpose. The Rule requires the proponent to disclose the “substance” of the evidence. This term is intended to require a description that is sufficiently specific under the circumstances to allow the opponent a fair opportunity to meet the evidence. Cf. Rule 103(a)(2) (requiring the party making an offer of proof to inform the court of the “substance” of the evidence). Under the amendment the government must describe the source of the evidence, the form of the evidence, and the act that the government seeks to prove with the evidence.

2. Timing Issues.

A number of Committee members have indicated an interest in moving up the timing of the notice of intent to use Rule 404(b) evidence. This could be a useful way to get the parties and the court attuned at the outset to whether the asserted purpose for the evidence proceeds through a non-propensity inference.

Currently, Rule 404(b) requires the government to provide “reasonable notice * * * before trial.” This essentially means that there is no clear time period within which notice must be provided, and courts have varied on what is “reasonable.” *Compare United States v. Perez-Tosta,* 36 F.3d 1552 (11th Cir. 1994) (stating there are three factors to consider whether notice was reasonable: 1) when the Government could reasonably have learned of the evidence; 2) the extent of prejudice to the defendant from a lack of time to prepare; and 3) how significant the evidence is to the prosecution’s case), *with United States v. Williams,* 792 F.Supp. 1120 (S.D. Ind. 1992) (holding that reasonable notice under 404(b) requires notice to be provided at least ten days prior to the start of trial, unless the government can show a reason to deviate from that rule), and *United States v. White,* 819 F.3d 976 (8^{th} Cir. 2017) (one week is sufficient). *See also United States v. White,* 816 F.3d 976, 984 (8^{th} Cir. 2016) (rejecting the argument that notice must be provided two weeks prior to trial, because the standard is one of reasonableness under the circumstances; finding that notice provided one week before trial was reasonable).

Adding a specific time before trial by which notice must be provided would do a better job of accelerating the notice requirement than any “reasonableness” standard can provide. It is true that the virtue of clarity also leads to the possibility of rigidity. Surely there will be situations in which the proponent will not be able to comply with a specific deadline. But that concern is ameliorated by the good cause exception that is currently provided for in Rule 404(b).

The proposal for an amendment to the notice requirement that was made by a Committee member would require notice to be provided “at least two weeks before trial, unless the court, for good cause, excuses this requirement.” Setting the date in terms of weeks would be unusual for the national rules --- which are set in terms of days. See, e.g., Evidence Rules 412 (14 days); Civil Rule 27(a)(2) (21 days); Civil Rule 12 (21 days); Criminal Rule 12.1 (14 days). Thus it would appear preferable, for purposes of uniformity, to set the period as “at least 14 days before trial.”

One problem with a specific-days requirement is how to count the days. The other sets of rules have a specific method for counting days. See, e.g., Civil Rule 6. But these time-counting rules do not explicitly apply to the Evidence Rules. So there might be questions of what happens when a 14-day period falls on a weekend or holiday. The time-counting rules clearly say that you automatically add another day to the period (which means a 15-day notice period if the 14th day is a holiday). But, again, those rules do not apply to the Evidence Rules. But if the period is a multiple of 7, there is not much of a problem, because the time is counted backward from the day of trial, so counting multiples of 7 backward can at least never land on a weekend. While it might end on a holiday, a court in such a rare case could use the time-counting rules as guidance even though they are not binding.

If the time period for notice is to be 14 days before trial, the change could look like this:

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature [substance] of any such evidence that the prosecutor intends to offer at trial; and

(B) do so at least 14 days before trial — or at a later date ~~during trial~~ if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

The Committee Note excerpt for this change could look like this:

The rule has been amended to add a requirement that notice be provided at least 14 days before trial unless the court for good cause allows notice at a later date. The “reasonableness” standard under the original rule led to differing results, and in some cases courts found it “reasonable” when the notice was provided only a few days before trial. With Rule 404(b) evidence, it is particularly important to have accelerated notice, because it is critical for the parties and the court to discuss and evaluate the purpose for which the evidence is offered at an early point in the proceedings. Early notice allows the court to focus at the outset on whether the evidence is offered for a proper purpose, and on whether
the probative value of the evidence for that purpose is dependent on a propensity inference.

3. Notice in Writing

The proposed amendment to Rule 807, currently out for public comment, requires notice to be in writing. There would appear to be no reason to have an inconsistency in Rule 404(b).

The DOJ has argued that such a requirement is not necessary because they always give notice in writing. But if that is the case, there is no harm in adding a written notice requirement to Rule 404(b). The benefit, even if already complied with, is that the Rules are made consistent, which is a good thing. Moreover, if the notice requirements are beefed up in any way --- such as by requiring articulation of proper purposes--- or are extended to parties other than the government, then there is all the more reason for adding a requirement that notice be in writing.

The writing requirement is easy to add:

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ In a criminal case, the prosecutor must:

(A) provide reasonable, written notice of the ~~general nature~~ substance of any such evidence that the prosecutor intends to offer at trial; and

(B) do so at least 14 days before trial — or at a later date ~~during trial~~ if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

And the Committee Note on the change can simply say what the Rule 807 Committee Note says:

> The Rule now requires that the pretrial notice be in writing—which is satisfied by notice in electronic form. See Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.

Putting all the notice provisions together --- articulation requirements and procedural requirements, and extending it to all cases, would look like this:

(3) Notice ~~in a Criminal Case.~~ ~~On request by a defendant in a criminal case, the prosecutor~~ The proponent must:

(A) provide reasonable, written notice of the ~~general nature~~ substance of any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(~~B~~ D) do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses ~~lack of pretrial notice~~ this requirement.

E. The Suggestion to Delete the Proper Purposes Language in Rule 404(b)(2)

At the last meeting, a Committee member suggested that Rule 404(b)(2) should be amended to delete the list of proper purposes. One possible rationale for deleting the provision is that it states the obvious. The first sentence of Rule 404(b)(1) states that other acts evidence is not admissible to prove conduct in accordance with character. By inference that means the bar does not apply if the bad act evidence is offered to prove something *other* than conduct in accordance with character. So while the proper purposes provision might be useful to highlight the principle that the Rule 404 bar applies only if the evidence is offered to prove conduct in accordance with character, it is not necessary and arguably has no substantive effect.

Another possible argument for deleting the proper purpose language is that it has been read to mean that Rule 404(b) is one of presumptive admissibility --- which should not be the case and which some courts have found to be an improper expansion of the rule, as discussed above. Deleting the language, with an explanatory Committee Note, might be used to signal that Rule 404(b) is not a rule of inclusion but rather a rule that excludes bad act evidence unless the government can come up with a proper purpose, free of propensity inferences.

With that said, there are strong reasons to be cautious about deleting the proper purposes language. It has been cited and applied in thousands of opinions and so deleting the language could throw decades of precedent into some question. It would be looked at as a major change, when theoretically it is no change at all to the meaning of the Rule. It can be argued that any problem with the rule does not really come from the language, but rather from the knee-jerk application of the rule over time. It could be argued that deleting the language is a necessary wake-up call to courts, to get them to apply the rule with more care. But the change seems so profound that perhaps the other suggested amendments regarding non-propensity inferences --- such as the balancing test proposal below --- would be a better way to provide a wake-up call.

F. A Different Solution --- Changing the Balancing Test

Professor Richter has suggested that a different solution might be used that would take account of and perhaps correct the case law based on the concept that Rule 404(b) is a rule of inclusion. This solution is pretty straightforward and could be a way to provide more protection without tinkering too much with Rule 404(b). The solution is to import the balancing test from Rule 609(a)(1), that provides a little more protection to criminal defendants --- the court must find that the probative value *outweighs* the prejudicial effect. This means that the rule is no longer a rule of inclusion, because there is a mild presumption for exclusion. But it does not go all the way to reversing the Rule 403 test --- the probative value only has to outweigh, and not substantially outweigh, the prejudicial effect.

Here is what the balancing proposal could look like, when coupled with other changes previously discussed:

(b) <u>Other</u> Crimes, Wrongs, or ~~Other~~ Acts.

(1) ***Prohibited Uses.*** Evidence of ~~a~~ any other crime, wrong, or ~~other~~ act --- when offered as indirect evidence of a matter in dispute --- is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ~~***Permitted***~~ ***Other Uses***~~***; Notice in a Criminal Case***~~***.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. If the evidence is offered against a defendant in a criminal case, its probative value must outweigh its prejudicial effect to that defendant. In all other cases, admissibility is subject to Rule 403. ~~On request by a defendant in a criminal case, the prosecutor~~

(3) Notice. The proponent must:

(A) provide reasonable, written notice of the ~~general nature of~~ [the substance of] any such evidence that the ~~prosecutor~~ proponent intends to offer at trial; ~~and~~

(B) articulate in the notice the non-propensity purpose for which the proponent intends to offer the evidence;

(C) articulate the chain of reasoning supporting the purpose for offering the evidence; and

(~~B~~ D) do so at least 14 days before trial — or ~~during trial~~ at a later date if the court, for good cause, excuses this requirement ~~lack of pretrial notice~~.

Such a balancing test could assist with the problem of pure propensity uses for other acts evidence without imposing a rigid propensity prohibition. By setting a higher standard for the admission of other acts evidence against criminal defendants, a heightened balancing test might encourage prosecutors and trial judges to articulate the probative value of other acts evidence to ensure that it clears the higher hurdle set by a more protective balancing and that its admission survives appellate scrutiny. A more protective test would also tilt the scales against admission of other acts evidence that creates significant propensity concerns. And it would be useful to help to exclude bad act evidence where the point to be proved is not actively disputed, because the evidence would be of minimal probative value and unlikely to satisfy the more protective balancing test. In other words, the change in balancing might solve many of the problems seen by courts like *Gomez*, without having to add new and potentially complex language to the rule.

Here is a Draft Committee Note for a New Balancing Test

Rule 404(b)(2) has been amended to provide a more protective balancing test for criminal defendants. This is the same balancing test in favor of a criminal defendant prescribed by Rule 609(a)(1)(B). The more protective balancing test for criminal defendants clarifies that Rule 404(b) is not a rule of "inclusion" as some federal opinions have stated. The Committee has determined that in many cases bad acts have been admitted against criminal defendants that are, in effect, used as proof of the defendant's bad character and propensity to commit a crime. The chances of such an outcome are reduced by a more protective balancing test. The new test will help to ensure that other bad acts are admissible only when they are highly probative for a non-character purpose. It will also help to ensure that other bad acts, even when offered for a proper purpose, are admissible only when the government shows a substantial need for admitting them, such as when the issue is actively disputed by the defendant. For example, the balancing test is unlikely to be met when a bad act is offered to prove the defendant's intent to commit the charged crime, and the defense contends that the defendant never committed the crime in the first place.

Comments on the New Balancing Draft:

1. The change seems much less disruptive than language requiring a chain of non-propensity inferences. And it has the virtue of applying a balancing test with which courts and litigants are already familiar. Moreover, as Professor Richter's memo on state variations points out, a few states are already employing this balancing test, apparently to good effect (i.e., it provides a measure of protection without excessively barring bad act evidence).

2. The draft excludes language about non-propensity inferences and active disputes, because the idea is that a stricter balancing test will work in a flexible way to deal with those issues on a case by case basis.

3. If this change were to be adopted, the distinction between "intrinsic" and "extrinsic" acts would take on a greater importance --- because the former would be governed by Rule 403 and the latter governed by the more protective balancing test. That is why the draft *retains* the "direct/indirect" language, which is designed to provide more clarity and more regulation of the inextricably intertwined doctrine. Alternatively, a Committee Note could address the inextricably intertwined problem. That might look like this:

> Rule 404(b) and the amended balancing test for criminal defendants apply only to evidence of "other" crimes, wrongs, or acts. Trial judges must, therefore, determine which acts are "other" or extrinsic to the charged offense, necessitating Rule 404(b) analysis, and which are direct proof of the charged offense and free from Rule 404(b) scrutiny. Courts should not circumvent the more protective balancing test by attaching vague and conclusory labels to a defendant's other acts, such as "inextricably intertwined" or "complete the story." Trial judges should explain *how* an act is so connected to the charged offense so as to avoid Rule 404(b) treatment, in place of employing conclusory labels. Because appropriate line-drawing in this context is impossible to capture with precision, close calls in classifying a defendant's acts should be resolved in favor of Rule 404(b) application --- especially given the importance of filtering bad act evidence through the new and more protective balancing test.

4. If the balancing test is changed for criminal defendants, then it is important to add in text that Rule 403 applies to everything else. It is true that Rule 403 applies now, even though it is not specified. But there will be a negative inference that could be drawn if a specific balancing test is added for criminal defendants and nothing is said about other cases. The precedent for

including a reference to Rule 403 is found in Rule 609(a)(1). It wasn't absolutely necessary to mention Rule 403 there in cases not involving criminal defendants, as Rule 403 applies by default. But it was considered helpful to do so in order to differentiate the Rule 403 test from the special balancing test set forth for criminal defendants in Rule 609(a)(1), and to clarify that Rule 403 applies wherever the special balancing test does not.

5. The changes to the notice provision discussed previously are included in this draft, because they are useful even with the changed balancing test. That is, the Committee might find that even with a more protective balancing test it would be useful to require the proponent to provide an explanation of proper purpose and probative value. And the proposed procedural changes to the notice requirement, such as timing and substance of the notice, work independently of the balancing test.

IV. The Proposal to Delete the Requirement that the Defendant Must Ask for Notice

The Committee has already decided unanimously to go forward with an amendment to the notice provision of Rule 404(b). That amendment would delete the requirement that the defendant must ask the government to provide notice. If the Committee eventually decides that it does not wish to consider any broader amendment to Rule 404(b), then this minor amendment to the notice provision could be proposed to the Standing Committee with the recommendation that it be issued for public comment. But if the Committee decides to continue consideration of broader amendments to Rule 404(b), then this minor proposal will be held back, because amendments to the same rule should be packaged if possible.

The text of the proposed amendment to delete the request requirement is as follows:

Rule 404. Character Evidence; Crimes or Other Acts

*** * ***

(b) Crimes, Wrongs, or Other Acts.

(1) ***Prohibited Uses.*** Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ***Permitted Uses; Notice in a Criminal Case.*** This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in~~ <u>In</u> a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice.

The Committee Note for the amendment to delete the request requirement is as follows:

> The amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, the benefit to the government of the requirement is minimal, because many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is inevitably provided anyway when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus become a technicality that has outlived any usefulness it may once have had.

TAB 5B

The University of Oklahoma
COLLEGE OF LAW

To:	Professor Daniel J. Capra, Reporter to the Advisory Committee on Evidence Rules
From:	Liesa L. Richter, Academic Consultant to the Advisory Committee on Evidence Rules
Re:	State Variations on Federal Rule of Evidence 404(b)
Date:	September 19, 2017

In light of recent opinions from the Third, Fourth, and Seventh Circuit Courts of Appeal restricting the admissibility of "other acts" evidence offered against criminal defendants, the Advisory Committee has been exploring the possibility of amendments to Federal Rule of Evidence 404(b). Many state counterparts to Federal Rule 404(b) vary from the federal provision in certain respects that may prove helpful to the Advisory Committee in contemplating potential amendments.

Some states impose stricter procedural requirements on the admission of evidence of other crimes, wrongs, or acts. For example, several pre-trial notice provisions require notice within a specific time period. Others demand more particularized notice of the details of any other acts evidence the prosecution intends to proffer, as well as the rationale supporting admissibility. Some states demand hearings outside the presence of the jury to determine the admissibility of other acts evidence and require detailed findings on the record supporting a judge's decision to admit such evidence.

Some state provisions provide enhanced substantive restrictions on the admissibility of other acts evidence offered against a criminal defendant. Several states have modified the traditional Rule 403 balancing test in the context of Rule 404(b) evidence. In place of the Rule 403 balancing that favors admissibility of other acts evidence, these states have recalibrated the balance to reject other acts evidence in close cases. Similar to federal judicial opinions that have emphasized the importance of a defendant "actively contesting" an issue proved by other acts evidence, at least one state has a genuine "dispute" requirement in the text of its counterpart to Rule 404(b). Importantly, some states combine enhanced procedural protections with substantive restrictions on the admission of other acts evidence to ensure that their versions of Rule 404(b) constitute rules of "exclusion" designed to limit evidence of other crimes, wrongs, or acts.[1]

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[1] *See e.g.*, Tenn. R. Evid. 404(b), *discussed supra*, p. 16-18 (requiring: a hearing outside the presence of the jury to consider other acts evidence; a finding by the trial judge that the defendant committed the other crimes, wrongs, or

Finally, some state rules of evidence contain language that seeks to differentiate between "other" crimes, wrongs, or acts that are not part of the charged offense for which a defendant is on trial from "inextricably intertwined" or "integral" acts that should be proved as part of the charged offense. As described below, these provisions have not necessarily created greater clarity than the federal courts have achieved in drawing lines under Federal Rule 404(b).

This memorandum will address the state variations on Federal Rule of Evidence 404(b) summarized above in four sections:[2]

- Procedural Protections: Notice/Record Findings
- Protective Balancing Tests
- Active Contest Requirements
- Inextricably Intertwined Provisions

A. Procedural Protections: Notice/Record Findings

Several state provisions contain procedural requirements for the admission of other crimes, wrongs, or acts evidence that are more stringent than the requirements of Federal Rule of Evidence 404(b). The procedural protections required by rules in Florida, Hawaii, Kansas, Kentucky, Michigan, Minnesota, Tennessee, and West Virginia are discussed below.

1. Florida

Florida Statute § 90.404 governs the admissibility of "similar fact evidence of other crimes, wrongs, or acts."[3] Subsection (d) of the provision requires the prosecution in a criminal case to provide pre-trial notice of similar fact evidence, as follows:

> (d) 1. When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), paragraph (b), or paragraph (c), *no fewer than 10 days before trial, the state shall furnish to the defendant or to the defendant's counsel a written statement of the acts or offenses it intends to offer, describing them with the particularity*

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acts by clear and convincing evidence; exclusion where unfair prejudice outweighs probative value (even if not substantially); record findings by the trial judge articulating the rationale for admitting the other acts evidence).

[2] Some state versions of Rule 404(b) depart from the federal model in other respects. For example, several states do not require pre-trial notice of Rule 404(b) evidence. Others contain exhaustive lists of proper purposes for admitting other act evidence and/or specify additional proper purposes not contained in the Federal Rule. A few states exclude evidence of crimes, wrongs, or other acts only where their "sole" purpose is to prove a person's propensity to engage in certain conduct. Finally, several states demand "clear and convincing" proof of a defendant's commission of a crime, wrong, or other act, setting a higher burden of proof than the preponderance standard mandated by Federal Rule of Evidence 104(b) and the Supreme Court's opinion in *Huddleston v. United States. See e.g.*, Tenn. R. Evid. 404(b); Neb. Stat. Ann. §27-404(3). Because these state variations are not implicated by the recent Circuit precedent and are not consistent with potential amendments the Committee has been discussing, this memorandum does not address these state variations.

[3] F.S.A. § 90.404(2)(a).

> *required of an indictment or information.* No notice is required for evidence of offenses used for impeachment or on rebuttal.[4]

Some Florida cases reject pre-trial notice of "similar fact" evidence pursuant to this provision due to the prosecution's failure to describe the rationale for admitting such evidence.[5] Others have suggested that the notice need not detail the chain of inferences supporting admissibility of similar fact evidence.[6] Other Florida courts have focused on the detail with which the notice describes the specific similar facts that the prosecution intends to offer, rejecting notice where there is inadequate factual particularity.[7] Still, Florida courts permit less specific notice where it is clear that the defense obtained the requisite information prior to trial.[8]

Strict compliance with the 10-day rule is not required and Florida courts excuse timing defects in the notice in cases where the defendant suffered no prejudice.[9] Only very rarely do defects in the requisite notice result in reversals of convictions in Florida.[10]

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[4] F.S.A. § 90.404(2)(d) (emphasis added). Paragraph "(a)" referenced in the notice provision is the standard provision permitting evidence of other crimes, wrongs, or acts to be used for proper non-character purposes. Subsections "(b)" and "(c)" referenced in the notice provision refer to other acts evidence offered in sex offense and child molestation cases, which are also covered by the same Florida statute.

[5] *See* State v. Zenobia, 614 So.2d 1139 (Fla. 5th Dist. Ct. App. 1995)("the state has failed utterly to suggest in its notice what particular aspect—i.e., motive, opportunity, intent, preparation, plan, knowledge, or lack of consent—it really seeks to prove by such evidence. Hence, we think the kind of notice used here should be grounds for the exclusion of the evidence, simply because of the insufficiency of the notice.").

[6] *See* Quinn v. State, 662 So.2d 947 (Fla. 5th Dist. Ct. App. 1995)(In furnishing notice of intent to offer evidence of other crimes, State need not state purpose of its use of the evidence or specific reasons or explanations of what jury might deduce from the evidence).

[7] *See* Sabine v. State, 58 So.3d 943 (Fla. 2d Dist. Ct. App. 2011)(where motion did not contain dates, locations, or details of the uncharged sexual conduct that it sought to introduce, it was not sufficiently particular to satisfy section 90.404's notice requirement); Garcia v. State, 521 So.2d 191 (Fla. 1st Dist. Ct. App. 1988)(State's service of notice of similar fact evidence was defective where notice did not describe the offenses State intended to offer with particularity, but error was harmless).

[8] Jaggers v. State, 588 So.2d 613 (Fla. 2d Dist. Ct. App. 1991)(state provided sufficient notice of intent to offer other crimes testimony in retrial on charge of sexual battery of a child, where notice directed defense counsel to transcripts from prior trial).

[9] Miller v. State, 632 So.2d 243 (Fla. 3d Dist. Ct. App. 1994)(trial court did not abuse its discretion in admitting evidence of prior criminal conduct by defendant even though less than ten days' notice had been given by state, where court conducted hearing *in limine* on issue and was told, without contradiction, that matters which were subject to state's belated notice had all been covered by parties during depositions of relevant witnesses and there was no suggestion that defendant had been prejudiced by late notice); Barbee v. State, 630 So.2d 655 (Fla. 5th Dist. App. 1994)(finding notice given nine days prior to trial sufficient in absence of prejudice to defense and rejecting defendant's argument that the statutory rule precludes judicial discretion to excuse tardy notice); State v. Paille, 601 So.2d 1321 (Fla. 2nd Dist. Ct. App. 1992) (holding that lack of notice was harmless where it was apparent that the defendant knew of the other crimes evidence, and the defendant knew of the State's intent to introduce the evidence at trial).

[10] *See* Gardner v. State, 821 So.2d 1220 (Fla. 2nd Dist. Ct. App. 2002) (State's error in failing to provide notice of its intent to introduce evidence of other crimes provided by defendant's out-of-court statement required reversal, as it was not clear that such failure did not prejudice defendant in preparation of his defense); Wightman v. State, 982 So.2d 74 (Fla. 2d Dist. Ct. App. 2008) ("Because Wightman was not given the pretrial notice and the other due process safeguards discussed in *McLean* were not employed, the State cannot invoke section 90.404(2)(b) to justify the admission of other-crime evidence in this case.").

2. Hawaii

Hawaii Rule of Evidence 404(b) contains a notice provision that was added in 1994, as follows:

> (b) Other crimes, wrongs, or acts. 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 where such evidence is probative of another fact that is of consequence to the determination of the action, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, modus operandi, or absence of mistake or accident.[11] *In criminal cases, the proponent of evidence to be offered under this subsection shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the date, location, and general nature of any such evidence it intends to introduce at trial.*[12]

The Hawaii notice provision differs from the existing federal rule in three ways: 1) it does not require an opponent of Rule 404(b) evidence to request notice; 2) it imposes a notice obligation on all proponents of other acts evidence in criminal cases, including on defendants; and 3) it demands more detailed notice of the date and location of the prior crime, wrong, or act.[13] The Hawaii Supreme Court has stated that the notice requirement is designed "to reduce surprise and promote early resolution of admissibility questions."[14]

The requirement that all proponents provide notice of Rule 404(b) evidence in criminal cases definitely has some teeth and has been used to exclude defense Rule 404(b) evidence. The Hawaii Supreme Court analyzed the constitutionality of the notice provision, as well as the trial court's decision to exclude defense Rule 404(b) evidence for lack of notice in *State v. Pond.*[15] In that case, the defendant was charged with physically abusing his live-in girlfriend and his principal defense at trial was self-defense. Specifically, the defendant claimed that the victim was drunk and attacked him on the night in question. On the first day of trial, the defense sought permission to introduce testimony from the defendant concerning an alleged incident approximately a week and half prior to the charged incident in which the victim also "smacked" the defendant, pursuant to Hawaii Evidence Rule 404(b). Although the defense lawyer argued that he had been unable to comply with the detailed pre-trial notice provision sooner because he could not pinpoint the date of the prior incident, the trial judge excluded the evidence based upon lack of reasonable notice.

On appeal following the defendant's conviction, the defense claimed that the exclusion of defense Rule 404(b) evidence for lack of notice violated his Sixth Amendment rights and that the trial judge abused his discretion in excluding the evidence based upon a lack of pre-trial notice. The Hawaii Supreme Court rejected the defendant's constitutional challenge to the notice

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[11] Unlike its federal counterpart, Hawaii Evidence Rule 404(b) specifically lists modus operandi as a proper purpose for other acts evidence.
[12] Hawaii R. Evid. 404(b).
[13] State v. Pond, 193 P.3d 368, 379 (Hawaii 2008).
[14] *Id*.
[15] State v. Pond, 193 P.3d 368 (Hawaii 2008).

provision, stating that: "The HRE Rule 404(b) notice requirement comports with this court's interest in promoting the orderly administration of justice and does not interfere with the defendant's constitutional rights."[16] The court further found that the trial judge did not abuse his discretion in excluding evidence of the prior altercation due to a lack of notice by the defense. The Hawaii Supreme Court noted that the defense was previously aware of the incident and still could not pinpoint the date even during trial. The court suggested that the defense should have provided at least "general notice" of the evidence prior to trial, even if it could not pinpoint the date as required by the Rule. For these reasons, the court found that the defense argument to excuse pre-trial notice for good cause was "disingenuous at best" and that the trial judge was free to reject it.[17]

The requirement of detailed notice of the "date" and "location" of other act evidence has been less stringently enforced. In *State v. Barrios*, the appellate court upheld the trial court's decision to admit the defendant's specific acts of drug use, notwithstanding very generic pre-trial notice by the prosecution, where the defendant failed to object to the lack of more detailed notice.[18] The court reasoned, as follows:

> Nor did the Circuit Court plainly err, or abuse its discretion, in determining that Barrios had reasonable notice under HRE Rule 404(b), of the drug evidence that the State intended to introduce at trial. First, as noted above, the Circuit Court instructed defense counsel to object at trial to any previously unknown evidence of drug use or drug paraphernalia. Defense counsel agreed to do so. No objections were made. The State filed a Notice of Intent to Rely on Potential Rules 404(b), 608, or 609.1 HRE Material, … which indicated an intent to introduce "[e]vidence of drug and alcohol use during the commission of the crimes." Although the drug use testimony described details concerning the acquisition of the drugs and the preparation for and methods of drug use that took place before, as well as during, the commission of the crimes, no objections were raised as to a lack of reasonable notice and we reject Barrios's argument that the alleged deficiencies in providing him more specific notice of such evidence warrant the vacating of his convictions.

In *State v. Kekona*, the Hawaii Court of Intermediate Appeals found that the trial court abused its discretion in excluding defense Rule 404(b) evidence, notwithstanding the defendant's failure to provide reasonable notice in advance of trial of the date, location, and general nature of

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[16] *Id*.; *See also* State v. So"o, No. 28023, 2008 WL 1922975 (Hawaii Ct. App. April 30, 2008) (Trial court, in prosecution for abuse of family or household member, did not violate defendant's right to confrontation by precluding defendant from asking victim during cross-examination about prior acts of violence or aggressive behavior by victim, where defendant failed to give reasonable notice of that evidence in advance of trial and failed to establish good cause for having failed to do so).

[17] The court vacated the conviction, however, based upon the trial court's refusal to allow cross-examination of the victim regarding her marijuana use on the night of the alleged attack due to lack of pre-trial notice. The Hawaii Supreme Court found that the defense was *not* required to give reasonable notice of intent to cross-examine the victim about her marijuana use on the night of the alleged attack because the defendant intended to show that her perception and testimony about the incident were not credible, and Hawaii Rule 404(b) did not apply to evidence introduced to impeach a witness's sensory or mental defect. *Id.*

[18] State v. Barrios, 383 P.3d 124 (Hawaii Ct. App. 2014), *sentence vacated on other grounds*, 389 P.3d 916 (Hawaii 2016).

the evidence.[19] The court noted that "the purpose of the notice required … is to reduce surprise and promote early resolution of admissibility questions." Where the state filed a motion *in limine* in advance of trial seeking to exclude the defense evidence of past abuse by the victim, "prosecutors apparently had notice" that the defendant intended to support his defense with the evidence of prior abuse.[20]

3. Kansas

The Kansas counterpart to Federal Rule 404(b) contains a notice provision that took effect in 2009 and is slightly different from the federal provision, as follows:

> (e) In a criminal action in which the prosecution intends to offer evidence under this rule, the prosecuting attorney shall disclose the evidence to the defendant, including statements of witnesses, at least 10 days before the scheduled date of trial or at such later time as the court may allow for good cause.[21]

Like the Federal Rule, this notice provision applies only to the prosecution in a criminal case. Unlike the Federal Rule that mandates only "reasonable notice of the general nature of any such evidence," the Kansas provision requires disclosure of "the evidence…, including statements of witnesses" and provides a time certain of at least 10 days prior to trial. Because the new notice provision was added in 2009, there are few cases interpreting it and I found no decisions analyzing the required disclosure of witness "statements" in connection with Rule 404(b). The cases that do exist predictably suggest that the pre-trial notice requirement has not led to reversals of criminal convictions.

The addition of a specific time limit in the notice provision does not eliminate needed flexibility in the admission of other acts evidence in Kansas. In *State v. Adkins*, the prosecution failed to provide the requisite notice within the 10-day time limit and the trial court granted the defense a continuance to ensure that there would be 10 days between the notice and the beginning of the trial.[22] Following his conviction, the defendant appealed, arguing that the untimely notice violated his rights under K.S.A. §60-455(e). In an unpublished opinion, the Kansas Court of Appeals held that the statute did not prohibit the grant of a continuance to satisfy the 10-day requirement and that the trial judge was well within his discretion in selecting the continuance as a remedy. Therefore, in addition to the option of finding "good cause" to excuse pre-trial notice under the statute, a trial judge may order a continuance of the trial to afford time for compliance.

The prosecution in *State v. Fulson* provided no pre-trial notice at all of its intent to introduce other acts evidence.[23] At trial, however, an officer called as a prosecution witness testified that the victim identified the defendant from "some photos of [the defendant] from past history." Following his conviction, the defendant argued that this testimony introduced evidence

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[19] State v. Kekona, 209 P.3d 1234, 1255 (Hawaii Ct. App. 2009).
[20] *Id.*
[21] Kan. Stat. Ann. §60-455(e).
[22] State v. Adkins, 264 P.3d 1060 (Table) (Kan. Ct. App. 2011).
[23] State v. Fulson, 326 P.3d 1090 (Table) (Kan. Ct. App. 2014).

of his past misdeeds to the jury without any pre-trial notice. The appellate court rejected the defense argument, finding that the prosecution did not violate the notice provision because it had no intention of introducing any information about the defendant's prior misdeeds that may have been suggested inadvertently to the jury through this testimony.[24]

In *State v. Ulmer*, the defendant was convicted of assault and argued that admission of his prior threat against the victim was erroneous.[25] Even assuming that the prior threat was proper evidence of the defendant's intent and motive in connection with the charged assault, the defendant claimed that he was not given notice that the threat would be admitted at least 10 days before the trial. The court found any error in failing to give the statutorily required notice harmless in light of the overwhelming evidence of guilt.

Defense counsel frequently fail to preserve objections to prosecutorial pre-trial notice, thus waiving any meaningful appellate review. In *State v. Massengale*, for example, the prosecution provided no pre-trial notice of evidence arguably constituting other acts evidence.[26] The appellate court rejected the defense challenge to pre-trial notice, finding that defense counsel was clearly well aware of the relevance of the other acts evidence based upon pre-trial proceedings and that the defense failure to object to any error in the admission of other acts evidence at trial also waived any error on this basis.[27]

4. Kentucky

Kentucky Evidence Rule 404(c) requires notice of Rule 404(b) evidence to be given, as follows:

> (c) Notice requirement. In a criminal case, if the prosecution intends to introduce evidence pursuant to subdivision (b) of this rule as a part of its case in chief, it shall give reasonable pretrial notice to the defendant of its intention to offer such evidence. Upon failure of the prosecution to give such notice the court may exclude the evidence offered under subdivision (b) or for good cause shown may excuse the failure to give such notice and grant the defendant a continuance or such other remedy as is necessary to avoid unfair prejudice caused by such failure.

The Kentucky notice provision is distinct from its federal counterpart in three respects: 1) it does not require a defense request for notice; 2) it requires reasonable pre-trial notice of other acts evidence to be offered by the prosecution during its case-in-chief only; and 3) it expressly

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[24] *Id*.
[25] State v. Ulmer, 386 P.3d 927 (Table) (Kan. Ct. App. 2016).
[26] State v. Massengale, 317 P.3d 149 (Table) (Kan. Ct. App. 2014).
[27] *See also* State v. Herndon, 379 P.3d 403 (Kan. Ct. App. 2016)(Defendant argues that the prosecutor introduced evidence in his opening statement which was not disclosed at least 10 days before trial, however, the court held that these statements were not testimony or evidence, and further, the issue was not objected to and therefore not preserved); State v. Yeager, 359 P.3d 1071 (Table) (Kan. Ct. App. 2015)(Yeager argues on appeal that he was not given 10-days' notice regarding the admission of evidence of prior sexual acts, however, he did not object to this at trial and the issue was not preserved); State v. Mondonedo, 270 P.3d 1231 (Table) (Kan. Ct. App. 2012)(Defendant attempts to object based on the State's failure to disclose the evidence 10 days prior, however, the issue was not preserved).

provides for the remedy of a continuance in the case of a good cause exception to this pre-trial notice obligation.[28] "The intent of KRE 404(c) is to provide the accused with an opportunity to challenge the admissibility of this evidence through a motion *in limine* and to deal with the reliability and prejudice problems at trial."[29]

One of the earliest Kentucky cases regarding notice is *Gray v. Commonwealth,* a sexual assault prosecution.[30] The appellate court found that the trial court had abused its discretion in allowing testimony from three witnesses about uncharged acts of abuse by the defendant because the prejudicial effect of those uncharged acts substantially outweighed any probative value. The court also emphasized the importance of pre-trial notice of such evidence, noting that the prosecution had informed the defense of its intent to call the witnesses on the morning of the first day of trial. The court stated:

> the present case vividly demonstrates that the integrity of the trial is jeopardized when previously unknown witnesses appear at the eleventh hour with evidence of uncharged collateral crimes" …[e]ven in cases where evidence of prior uncharged criminal activity between the defendant and third persons is admissible, fundamental fairness dictates, and we hold, that the defendant is entitled to be informed of the names of the non-complaining witnesses and the nature of their allegations so far in advance of trial as to permit a reasonable time for investigation and preparation.[31]

The appellate court reversed the defendant's conviction in *Daniel v. Commonwealth* due to inadequate pre-trial notice of testimony by the victim's cousin that the defendant allegedly abused her as well.[32] Although the State argued that a police report turned over to the defense listed the cousin as a witness who had been interviewed, the reviewing court found that inadequate to satisfy the notice requirement. The court found that a police report alone, made available to defendant through discovery, indicating that the state spoke to all children present as to whether they witnessed improper sexual activity did not provide reasonable pretrial notice of the victim's cousin as a potential witness to the defendant's other bad acts.[33]

Notwithstanding strong language supporting a robust notice requirement in cases like these, reversal for lack of adequate pre-trial notice is extremely rare. Kentucky courts frequently reject defense arguments regarding the prosecution's failure to provide formal notice of other acts evidence where it is apparent that the defense had "actual notice" of the evidence and an opportunity to challenge it.[34] Appellate courts in Kentucky also forgive short notice.[35] Kentucky

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[28] The Rule also expressly acknowledges the trial court's ability to exclude other acts evidence for lack of notice. From a stylistic perspective, the Kentucky Rule differs in placing notice obligations in a separate subsection (c) of its version of Rule 404.

[29] *Bowling v. Commonwealth*, 942 S.W.2d 293, 300 (Ky.1997) (*quoting* Robert G. Lawson, *The Kentucky Evidence Law Handbook,* § 2.25 (3rd Ed.1993)), *overruled on other grounds*, McQueen v. Commonwealth, 339 S.W.3d 441 (Ky. 2011).

[30] 843 S.W.2d 895, 897 (Ky. 1992).

[31] *Id.*

[32] 905 S.W.2d 76 (Ky. 1995).

[33] *Id.*

[34] *See Tamme v. Commonwealth*, 973 S.W.2d 13 (Ky. 1998) (defense had sufficient "actual notice" to file motion in limine and thus suffered no prejudice from lack of pre-trial notice); *Bowling v. Commonwealth*, 942 S.W.2d 293

courts have found notice that describes other acts generically reasonable as well.[36] Similar to other jurisdictions, Kentucky courts also find errors with respect to pre-trial notice harmless.[37]

5. Michigan

Michigan Rule of Evidence 404(b)(2) contains a notice provision that requires the prosecution to articulate its rationale for offering other acts evidence, as follows:

> (b) Other crimes, wrongs, or acts.
> (2) The prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial 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.

(Ky. 1997) (defendant suffered no prejudice from any deficiency in prosecutor's notice of intent to use other crimes evidence, where defendant had actual notice and moved in limine to exclude such evidence), *overruled on other grounds*, McQueen v. Commonwealth, 339 S.W.3d 441 (Ky. 2011); Burgher v. Commonwealth, 2009 WL 2707177 (Ky. 2009) (Defendant received actual notice reasonably sufficient to satisfy requirement where defendant received a copy of police report containing defendant's threats in discovery, and although receiving the police report in discovery would not be sufficient of itself, defendant's motion in limine to suppress the statements at issue showed he had actual notice as well as the opportunity to challenge the admissibility of the evidence.); Matthews v. Commonwealth, 163 S.W.3d 11 (Ky. 2005) (Pre-trial proceedings made it clear that defense was aware that prosecution's theory of the case depended on other act and of intent to use other act evidence in prosecution.).

[35] *See* Hoff v. Commonwealth, 2011 WL 6820227 (Ky. 2011) (although defendant received notice only three days before trial, the present counts and others involving defendant's alleged rape of daughter were to be tried together until five days before trial, prosecutor notified defense of the evidence by telephone immediately after learning of it, and defendant was able to make motion in limine to exclude the evidence that was granted in part.); Dant v. Commonwealth, 258 S.W.3d 12 (Ky. 2008) (Defendant received adequate notice of the state's intent to introduce other-acts evidence at murder trial, even though defendant received notice only a few days before trial began; defendant was nonetheless able to file a motion in limine in which he challenged both adequacy of notice and substantive issue of whether other-acts evidence was admissible, and defendant was able to challenge admissibility of other-acts evidence again at trial.); Hughes v. Commonwealth, 2008 WL 3890165 (Ky. 2008) (Commonwealth provided defendant with reasonable notice of its intent to present the testimony of witness concerning defendant's uncharged criminal acts, even though defendant received the notice five days before trial); Dillman v. Commonwealth, 257 S.W.3d 126 (Ky.App. 2008) (Commonwealth disclosing its possession of evidence after hearing defense's opening statement did not violate notice requirements for introducing character evidence and evidence of other crimes; Commonwealth disclosed evidence at earliest feasible time in which it believed evidence was relevant).

[36] *See* Ernst v. Commonwealth, 160 S.W.3d 744 (Ky. 2005) (evidence that defendant's history of "theft related offenses" might be introduced sufficient to survive plain error review, even though it failed to specify that the Commonwealth might introduce evidence relating to his theft of money from purses of murder victim and her sister).

[37] *See* Johnson v. Commonwealth, 2016 WL 6125737 (Ky. 2016) (Commonwealth's error in failing to give advance notice to defendant of its intent to use prior bad acts evidence reflecting upon defendant's possessiveness and jealousy concerning victim was harmless).

To facilitate this mandate, the Rule provides that the defense "shall be required to state the theory" of defense, if necessary, subject to the constitutional privilege against self-incrimination.[38]

The 1995 amendment that added the requirement that the prosecution specify its rationale for admitting the evidence was born of a 1993 decision by the Michigan Supreme Court.[39] In *People v. VanderVliet*, the court carefully articulated the process by which a trial court should assess admissibility of Rule 404(b) evidence and announced a pre-trial notice obligation for the prosecution in criminal cases:

> To assist the judiciary in this extraordinarily difficult context and to promote the public interest in reliable fact finding, we intend to adopt a modification of Rule 404(b). We require the prosecution to give pretrial notice of its intent to introduce other acts evidence at trial, and authorize the trial judge, consistent with the law in ten other states, to require the defendant to articulate his theory or theories of defense."[40]

The court explained that: "A notice requirement promotes reliable decision-making, prevents unfair surprise, and offers the defense the opportunity to marshal arguments regarding both relevancy and unfair prejudice."[41] The court outlined a flexible approach to other acts evidence to allow trial courts to assess admissibility armed with all necessary information, as follows:

> Where pretrial procedures, including requests for offers of proof, do not furnish a record basis to reliably determine the relevance and admissibility of other acts evidence, the trial court should employ its authority to control the order of proofs, require the prosecution to present its case in chief, and delay ruling on the proffered other acts evidence until after the examination and cross-examination of prosecution witnesses. If the court still remains uncertain of an appropriate ruling at the conclusion of the prosecutor's other proofs, it should permit the use of other acts evidence on rebuttal, or allow the prosecution to reopen its proofs after the defense rests, if it is persuaded in light of all the evidence presented at trial, that the other acts evidence is necessary to allow the jury to properly understand the issues.[42]

Potential difficulties in policing the notice with rationale requirement can be seen in *People v. Sabin*.[43] In that case, a defendant's previous acts of sexual assault against a step-daughter were admitted by the trial court in his prosecution for the rape of his own daughter. The prosecution recited several of the Rule 404(b) purposes in support of admissibility at trial,

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[38] *See* People v. VanderVliet, 508 N.W.2d 114, 133 (Mich. 1993) ("no judge can be expected to correctly assess the evidentiary issue unless and until the court is presented with a concrete theory of defense that allows the court to determine relevancy. Without such a concrete presentation, a defendant's general posture, as here, requires the trial judge to assume the relevancy of other acts proffered under noncharacter theories of admissibility."), *amended opinion* 520 N.W.2d 338 (Mich. 1994).
[39] Michigan Editor's notes to Michigan R. Evid. 404.
[40] People v. VanderVliet, 508 N.W.2d 114, 133 (Mich. 1993), *amended opinion* 520 N.W.2d 338 (Mich. 1994).
[41] *Id*. at n. 51.
[42] *Id.* at 133.
[43] People v. Sabin, 614 N.W.2d 888 (Mich. 2000).

including motive, intent, absence of mistake and the credibility of the victim.[44] The trial court ultimately instructed the jury that the prior assault could be used to show common plan, scheme or system.[45] Following the defendant's conviction, the Michigan Court of Appeals reversed, finding no proper purpose for the prior assault evidence and significant unfair prejudice to the defendant. The Michigan Supreme Court reinstated the conviction, holding that the prior assault was admissible to show the defendant's common plan, scheme, or system. The dissent disagreed that the prior assault evidence had been properly admitted, but also took issue with the appellate court's reliance on a proper purpose never "articulated" by the prosecution either in a pre-trial notice or at trial itself. The dissent argued that the articulation requirement in the notice would become meaningless if a prosecutor or the court could reach for previously unarticulated proper purposes for the first time on appeal. This conflict between the Justices illustrates the concern that a specific prosecutorial or judicial "articulation" requirement could confine reviewing courts to the purposes identified and analyzed below.

Michigan cases often find defects in pre-trial notice harmless. For example, in *People v. Jackson*, the prosecution was permitted to introduce testimony from a witness about uncharged sexual relationships she had with the defendant under a *res gestae* theory in a prosecution involving sexual misconduct.[46] The court rejected the lower court's application of a *res gestae* exception to Rule 404(b) and found the prior acts covered by the Rule. The court nonetheless excused the failure to afford the required pre-trial notice of Rule 404(b) evidence as harmless:

> [T]he lack of proper pretrial notice did not result in the admission of substantively improper other-acts evidence. Thus, although the defendant was not afforded his due 'opportunity to marshal arguments' against its admission before it was introduced at trial, he has not shown that any such arguments would have been availing, or would have affected the scope of testimony ultimately presented to the jury. Furthermore, while the defendant suffered 'unfair surprise' from the unexpected introduction of this testimony at trial, he was admittedly aware of [the witness's] general version of events before trial, including her and [another alleged victim's] prior relationships with the defendant, and he has not demonstrated how he would have approached trial or presented his defense differently had he known in advance that [the witness] would be permitted to testify as she did.[47]

In finding harmless error from lack of pre-trial notice, the court also addressed the prosecutor's argument that a witness statement providing that the witness "was sexually assaulted in the past" and has spoken with "a former church member" who also had been "sexually assaulted by our pastor" was sufficient to satisfy the notice obligation. The court held that the witness statement was inadequate to satisfy the notice requirement of Rule 404(b)(2) because "neither her witness statement nor the fact of her endorsement suggested, let alone provided reasonable notice of, the

[44] *Id*.
[45] Michigan does not have a counterpart to Fed. R. Evid. 414 and thus, this evidence was analyzed solely under Michigan's version of Rule 404(b).
[46] People v. Jackson, 498 Mich. 246 (2015).
[47] *Id.* at 270.

prosecution's intent to have Price testify to her and Newsome's prior relationships with the defendant, or what the rationale for admitting that other-acts evidence might be."[48]

In *People v. Hawkins*, the Michigan Court of Appeals also forgave the prosecutor's failure to provide the pre-trial notice required by the Rule.[49] The court in *Hawkins* explained that the notice requirement was designed:

> (1) to force the prosecutor to identify and seek admission only of prior bad acts evidence that passes the relevancy threshold, (2) to ensure that the defendant has an opportunity to object to and defend against this sort of evidence, and (3) to facilitate a thoughtful ruling by the trial court that either admits or excludes this evidence and is grounded in an adequate record.[50]

Notwithstanding these important purposes, the court found a prosecutorial failure to follow the notice requirement harmless: "[b]ecause this evidence was admissible, notice to [the defendant] would not have had any effect on whether the trial court should have admitted it at trial, regardless of the record or arguments that could have been developed and articulated following notice."[51] In addition, the court noted that the defendant "never suggested how he would have reacted differently to this evidence had the prosecutor given notice," and that the court could not find "that this lack of notice had any effect whatsoever."[52]

Interestingly, the Michigan Supreme Court has proposed an amendment to this notice provision that would clarify that: "This notice must be provided in writing 14 days before trial or orally in open court on the record."[53] The proposal is currently in the notice and comment stage and a public hearing will be held on September 20, 2017.[54]

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[48] *Id*.
[49] People v. Hawkins, 628 N.W.2d 105 (Mich. Ct. App. 2001).
[50] *Id.* at. 113.
[51] *Id*.
[52] *Id*. at 114.
[53] *See* http://courts.mi.gov/Courts/MichiganSupremeCourt/rules/court-rules-admin-matters/pages/michigan-rules-of-evidence.aspx. This proposal to amend the notice procedure follows a Michigan Court of Appeals decision stating that "[a]ccordingly, we hold that if the record does not demonstrate compliance by the prosecution with the mandatory notice requirement of MRE 404(b)(2), upon objection by the defense, the trial court must exclude the evidence absent a showing of "good cause" for the failure to provide the notice." *See* People v. Johnson, 866 N.W.2d 883, 890 (Mich. Ct. App. 2015). The Michigan Supreme Court thereafter vacated the portion of the opinion discussing the notice obligation, but otherwise dismissed the appeal due to agreement that any errors were harmless in light of overwhelming evidence against the defendant. People v. Johnson, 864 N.W.2d 147 (Mich. 2015). Proposals to clarify the notice obligation in Michigan Rule 404(b) followed.
[54] A brief review of the comments suggests that prosecutors and defense attorneys generally support the time limitation (with a good cause exception retained), but disagree over the utility of "oral" notifications "on the record," with defense counsel preferring written notice and prosecutors in favor of the flexibility that oral notice provides. At least one comment has highlighted the drafting ambiguity with respect to the applicability of the 14 day rule to oral notifications and has suggested revision to clarify that the time limit applies equally to written and oral notice.

6. Minnesota

Minnesota's version of Rule 404(b) imposes stringent notice and articulation requirements on the prosecution, as follows:

> (b) Other crimes, wrongs, or acts. Evidence of another crime, wrong, or act 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, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless 1) *the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove*; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant.[55] Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by rule 412.

Minnesota Rule of Criminal Procedure 7.02 sets forth the specific requirements for prosecutorial notice of Rule 404(b) evidence, as follows:

> Subd. 1. Notice of Other Crime, Wrong, or Act. The *prosecutor must notify the defendant or defense counsel in writing of any crime, wrong, or act that may be offered at the trial under Minnesota Rule of Evidence 404(b)* No notice is required for any crime, wrong, or act:
> (a) previously prosecuted,
> (b) offered to rebut the defendant's character evidence, or
> (c) arising out of the same occurrence or episode as the charged offense.[56]
>
> Subd. 2. Notice of a Specific Instance of Conduct. The prosecutor must notify the defendant or defense counsel in writing of the intent to cross-examine the defendant or a defense witness under Minnesota Rule of Evidence 608(b) about a specific instance of conduct.
>
> Subd. 3. Contents of Notice. *The notice required by subdivisions 1 and 2 must contain a description of each crime, wrong, act, or specific instance of conduct with sufficient particularity to enable the defendant to prepare for trial.*

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[55] Minnesota is also one of the states that combines several procedural and substantive restrictions, modifying the traditional Rule 403 balancing in defendant's favor by not requiring prejudice to outweigh probative value "substantially." Modified balancing tests, including Minnesota's, are discussed in the next section, *infra*.

[56] The Minnesota Rule expressly deals with the "inextricably intertwined" issue as it relates to notice with this "arising out of" standard.

Subd. 4. Timing.
(a) In felony and gross misdemeanor cases, the notice must be given at or before the Omnibus Hearing under Rule 11, or as soon after that hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor.
(b) In misdemeanor cases, the notice must be given at or before a pretrial conference under Rule 12, if held, or as soon after the hearing as the other crime, wrong, act, or specific instance of conduct becomes known to the prosecutor. If no pretrial conference occurs, the notice must be given at least 7 days before trial or as soon as the prosecutor learns of the other crime, wrong, act, or specific instance of conduct.

These notice requirements originated in *State v. Spreigel*, where the court addressed the severe prejudice to a criminal defendant forced to defend against unanticipated allegations and held that:

> although [other acts] evidence is otherwise admissible under some exception to the general exclusionary rule, it shall not hereafter be received unless within a reasonable time before trial the state furnishes defendant in writing a statement of the offenses it intends to show he has committed, described with the particularly required of an indictment or information, subject, however, to the following exceptions: (a) offenses which are part of the immediate episode for which defendant is being tried; (b) offenses for which defendant has previously been prosecuted; and (c) offenses which are introduced to rebut defendant's evidence of good character.[57]

Shortly thereafter, the Minnesota Supreme Court also emphasized the need for the prosecutor to articulate the proper purpose for other act evidence.[58] The Minnesota Rule also has been interpreted to impose precise articulation requirements on the trial judge admitting other acts evidence.[59] Notwithstanding these more stringent notice and articulation requirements, appellate review of the admission of other acts evidence in Minnesota looks very similar to the appellate review of other acts evidence under Federal Rule 404(b). Much of the focus of the analysis is spent on the appellate court's assessment of the proper purpose for the evidence.

[57] State v. Spreigel, 139 N.W.2d 167, 173 (Minn. 1965). In subsequent cases, Minnesota courts have held that notice is not required for evidence used to establish a "relationship" between parties or for previously prosecuted offenses because there would be no unfair surprise to a defendant from such evidence. *See* State v. Enger, 539 N.W.2d 259 (Minn. 1995) (evidence establishing a relationship between the defendant and victim not subject to *Spreigel* requirements) and State v. Feehan, 412 N.W. 2d 309 (Minn. Ct. App. 1987) (where notice is designed to prevent surprise, it is not necessary for previously prosecuted offenses of which defendant is well aware). But, "[b]eyond the *Spreigl* notice requirement, when a defendant demands disclosure of state's evidence and other relevant material pursuant to Minn.R.Crim.P. 9.01, the state must disclose evidence of other crimes not included in the *Spreigl* notice requirement. For example, the state must disclose other crimes for which defendant was previously prosecuted." State v. Bolte, 530 N.W.2d 191 (Minn. 1995).

[58] State v. Billstrom, 149 N.W. 2d 281 (Minn. 1967).

[59] Angus v. State, 695 N.W.2d 109, 120 (Minn.2005)(One of the requirements for admitting *Spreigl* evidence is that the district court "must identify the precise disputed fact to which the *Spreigl* evidence would be relevant."); *See also* State v. Farden,773 N.W.2d 303, 317 (Minn. 2009)(stating that "[t]o properly assess the relevancy and probative value of the evidence, the district court must first "'identify the precise disputed fact to which the *Spreigl* evidence would be relevant'" and evaluating only the purposes identified by the trial court).

Cases often examine a litany of potential proper purposes.[60] Little attention is paid to the prosecutor's notice, the prosecutor's precise articulation of the purpose for which evidence was offered, or the trial judge's specific record reasoning for admissibility in cases where there appears to be a proper purpose on review.[61] Only very rarely does an appellate court base reversal on a failure of pre-trial notice.[62]

7. Tennessee

The Tennessee Supreme Court characterizes the Tennessee version of Rule 404(b) as a "rule of exclusion" due to the significant prejudice suffered by criminal defendants against whom other act evidence is admitted.[63] To facilitate this approach to other acts evidence, Tennessee Rule 404(b) imposes procedural requirements, including a mandatory hearing outside the presence of the jury and specific record findings by the trial court prior to admission of other acts evidence, as follows:

> (b) Other Crimes, Wrongs, or Acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity with the character trait. It may, however, be admissible

[60] *See e.g.*, State v. Washington-Davis, 867 N.W.2d 222 (Minn. Ct. App. 2015) ("We see no error in the admission of this evidence because it tended to show appellant's intent, knowledge, absence of mistake or accident, and common scheme or plan.").

[61] *See* State v. Whelan, 189 N.W.2d 170 (Minn. 1971) (improper reference to other offenses perpetrated by defendant against victim without pre-trial notice harmless); State v. Schweppe, 237 N.W.2d 609 (Minn. 1975) (where evidence of defendant's homosexual relationship with victim was properly admissible to show motive and where defense counsel was clearly aware that such evidence would be offered at trial, there was no unfair surprise and arguable failure to provide pre-trial notice was not prejudicial); State v. Bolte, 530 N.W.2d 191, 199 (Minn. 1995) (reaffirming the importance of and the need for full compliance with notice requirements, but approving "substantial compliance" with the notice requirements due to a lack of prejudice to the defendant in a case where the defendant was aware of the relevance of the prior offense and the prosecution gave notice during trial prior to proffering the evidence); State v. Rossberg, 851 N.W.2d 609, 615 (Minn. 2014) (finding that trial court erred in failing to identify the "precise disputed fact" to which prior act evidence was relevant, but that articulation error was harmless where prior act was not unduly prejudicial and where there was overwhelming evidence of defendant's guilt); Wanglie v. State, 398 N.W.2d 54, 57–58 (Minn.App.1986) (holding that mention in complaint of other incidents, defense's access to statements and other documents concerning the other incidents, and familiarity of defense counsel with them supported admission of Spreigl evidence); State v. Barsness, 2014 WL 5419726 (Minn. Ct. App. October 27, 2014) (failure to provide requisite notice of testimony regarding prior criminal act was plain error, but harmless); State v. Washington-Davis, 867 N.W.2d 222 (Minn. Ct. App. 2015) (rejecting challenge to state's articulation of purpose with cursory analysis: "state clearly indicated what the evidence was offered to prove, both in its pretrial motion and during multiple pretrial arguments before the district court.").

[62] *See* State v. Coonrod, 652 N.W.2d 715, 720 (Minn. Ct. App. 2002) (finding prejudicial failure to provide pre-trial notice of evidence that defendant was collecting photos of "teen-age girls" on the Internet and using the Internet to ask a 15–year–old girl other than the victim for a date: "The state provided no notice of any intent to present evidence of the computer file folders, or any other Spreigl evidence. The state did disclose as a possible witness J.L., the subject of one of the computer file folders, but did not identify her as a Spreigl witness. Although defense counsel admitted receiving police reports referring to the computer file folders, the complaint merely mentioned the search of Coonrod's computer, without reciting any evidence found in that search to indicate the state might be using it to prove the offense. Thus, we cannot conclude that there was substantial compliance with the notice requirement.").

[63] State v. Rounsaville, 701 S.W.2d 817, 820 (Tenn. 1985).

for other purposes.[64] The conditions which must be satisfied before allowing such evidence are:
(1) The court upon request must hold a hearing outside the jury's presence;
(2) The court must determine that a material issue exists other than conduct conforming with a character trait and must upon request state on the record the material issue, the ruling, and the reasons for admitting the evidence;
(3) The court must find proof of the other crime, wrong, or act to be clear and convincing; and[65]
(4) The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.[66]

Because it relies upon the procedural requirements of a mandatory hearing and record findings, the Tennessee provision does not mandate pre-trial notice. A 1991 Tennessee Advisory Commission Comment describes the history of the procedural requirements:

> The Commission drafted Part (b) in accord with the Supreme Court's pronouncements in *State v. Parton*, 694 S.W.2d 299 (Tenn.1985). There the Court established precise procedures to emphasize that evidence of other crimes should usually be excluded. In the exceptional case where another crime is arguably relevant to an issue other than the accused's character--issues such as identity (including motive and common scheme or plan), intent, or rebuttal of accident or mistake--the trial judge must first excuse the jury. Then the judge must decide what material issue other than character forms a proper basis for relevancy. If the objecting party requests, the trial judge must state on the record the issue, the ruling, and the reason for ruling the evidence admissible. Finally, the judge must always weigh in the balance probative value and unfair prejudice. If the danger of unfair prejudice outweighs the probative value, the court should exclude the evidence even though it bears on a material issue aside from character. Finally, according to *Parton*, the trial judge must find that the evidence is "clear and convincing" that the defendant committed another crime.[67]

The Tennessee courts have recognized that these requirements not only protect criminal defendants from prejudicial evidence, they also promote efficiency by requiring other acts issues to be resolved outside of trial without lengthening the trial itself and risking unnecessary distraction from the events at issue.[68] A trial court that substantially complies with the procedural requirements in the Rule is

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[64] Tennessee's version of the Rule contains no illustrative list of proper purposes for such evidence.
[65] Tennessee is also a state that departs from the *Huddleston* view that a defendant's commission of other crimes, wrongs, or acts should be treated as a matter of conditional relevance pursuant to Rule 104(b). Instead Tennessee demands that the trial judge find proof of the other act by clear and convincing evidence.
[66] Tennessee is also a state that removes the modifier "substantially" from the traditional Rule 403 balancing test applicable to other acts evidence and directs that the trial judge "must" exclude evidence failing this test. The impact of that change is discussed, *infra*, in the section on modified balancing tests.
[67] Advisory Commission Comment to Tenn. R. Evid. 404.
[68] State v. Bigbee, 885 S.W.2d 797, 806 (Tenn. 1994)("Not only does the admission of irrelevant bad acts evidence have a high potential for prejudice, the testimony required to establish, as well as rebut, the prior bad act can substantially lengthen a trial, as this case demonstrates. Rule 404(b) should be followed closely to avoid prejudicing the rights of the accused and to maintain the focus of the trial."); *But see* State v. Gilley, 173 S.W.3d 1 (Tenn. 2005) (noting that trial court may need to revisit any pre-trial rulings in light of actual evidence admitted at trial).

entitled to significant deference, whereas a trial court that does not will receive no deference on appeal.[69] A failure to comply substantially with the procedures mandated by the Rule is not necessarily fatal to admissibility, however. Tennessee appellate courts uphold admission of other acts evidence even in cases where the trial court failed to follow the mandatory requirements.[70]

8. West Virginia

Prior to 2014, West Virginia Evidence Rule 404(b) was identical to its federal counterpart, requiring notice of Rule 404(b) evidence only by the prosecution in a criminal case and only upon request by the defendant. In 2014, the Rule was amended to broaden the notice provision.[71] West Virginia Evidence Rule 404(b) currently reads:

> (b) Crimes, Wrongs, or Other Acts.
> (1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) *Permitted Uses; Notice Required.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *Any party seeking the admission of evidence pursuant to this subsection must:*
> *(A) provide reasonable notice of the general nature and the specific and precise purpose for which the evidence is being offered by the party at trial; and*
> *(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.*

The current provision differs from its federal counterpart in three ways: 1) it does not require an opponent to request pre-trial notice of other acts evidence; 2) it requires all proponents, including defendants, to provide pre-trial notice in all cases (the language of the notice provision is not confined to criminal cases); and 3) it requires notice of the "specific and precise purpose for which the evidence is being offered" at trial.[72] As a result of this amendment, the West Virginia Supreme Court of Appeals has held that a criminal defendant seeking to introduce Rule 404(b)

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[69] State v. Dotson, 450 S.W.2d 1, 76-77 (Tenn. 2014); *see also* State v. DuBose, 953 S.W.2d 649, 652 (Tenn. 1997) ("in view of the strict procedural requirements of Rule 404(b), the decision of the trial court should be afforded no deference unless there has been substantial compliance with the procedural requirements of the Rule.").

[70] State v. DuBose, 953 S.W.2d 649 (Tenn. 1997) (trial court failed to comply substantially with Rule 404(b) procedures by failing to place findings on the record during hearing; appellate court reviews admissibility based upon evidence presented at hearing and without deference to trial judge's determination but nonetheless upholds admissibility); State v. Sexton, 368 S.W.3d 371, 406 (Tenn. 2012)("the inadequacy of the proceeding, standing alone, would not serve as a basis for exclusion.").

[71] *See* State v. Zuccaro, 799 S.E.2d 559, n. 12 (S.Ct. App. W.V. 2017) (upholding exclusion of other acts evidence proffered by the defense in a murder prosecution).

[72] *See id.* (explaining that "modifications to the language included 'broad[ening]' the requirement of reasonable notice to every party, not just the state in a criminal prosecution, of the general nature of and the specific and precise purpose for which the evidence is being offered by the party at trial.").

evidence must now comply with the same notice and articulation requirements that the prosecution must follow.[73]

State v. McGinnis is the seminal West Virginia case on the proper procedures for admitting Rule 404(b) evidence and inspired the contemporary Rule.[74] In that murder prosecution, the court did not focus on pre-trial notice, but demanded precise articulation of the purpose for Rule 404(b) evidence by the prosecution and by the trial court during trial. The *McGinnis* court rejected a recitation of all permissible purposes for other acts evidence and demanded that "the prosecution is required to identify the specific purpose for which the evidence is being offered and the jury must be instructed to limit its consideration of the evidence to only that purpose."[75] The court found this safeguard necessary "necessary to prevent prosecutorial abuse and overreaching."[76] The court also chastised the trial judge for failure to articulate a Rule 403 balancing analysis on the record: "when admitting evidence under Rule 404(b), the record must clearly reveal the analysis the trial court used to comply with the mandates of Rule 403."[77] The notice provisions were added to the West Virginia Rule thereafter, requiring precise articulation prior to trial to facilitate this detailed analysis.

The West Virginia cases mandate very precise articulation of purpose by the proponent and precise record findings by the trial court during an *in camera* hearing to support admissibility of Rule 404(b) evidence and lower courts are sometimes reversed for failure to police these requirements carefully.[78] West Virginia courts sometimes relax those requirements, however. In *State v. Zacks*, the trial judge conducted an *in camera* hearing as required by *McGinnis* prior to allowing testimony concerning the defendant's other acts.[79] On appeal of his conviction, the defendant claimed that the trial court had not identified precisely the relevance of his other acts or performed a Rule 403 balancing test supporting admissibility on the record. Although even appellate counsel for the State conceded that the trial court's *in camera* findings did "not live up to appellate counsel's expectations," the appellate court found them sufficient to support the relevance and probative effect of

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[73] *Id*. (rejecting defendant's argument to apply relaxed standards to other acts evidence offered by a criminal defendant and finding no constitutional violation as a result).

[74] State v. McGinnis, 455 S.E.2d 516 (S.Ct. App. W.V. 1994).

[75] *Id*. at 523. The McGinnis court also held that that the admissibility of Rule 404(b) evidence must be determined as a preliminary matter by the trial judge after an *in camera* hearing pursuant to Rule 104(a) by a preponderance of the evidence and not as a matter of conditional relevance under Rule 104(b). Id. at 527.

[76] *Id*. at 524. (finding that "[t]he burden is squarely on the prosecution to identify, with particularity, the specific purpose for which the evidence is being offered.").

[77] *Id.*

[78] *See* State v. MacFarland,721 S.E.2d 62, 73 (S.Ct. App. W.V. 2011)(concluding that the circuit court's failure to conduct the balancing test required by Rule 403 on the record was erroneous because "If the factors used by the circuit court in conducting the Rule 403 balancing test do not appear on the record, this Court is unable to effectively review the circuit court's decision to admit the evidence in question."); State v. Jonathon B, 737 S.E.2d 257, 266 (S.Ct. App. W.V. 2012)(finding that the circuit court abused its discretion by allowing other acts evidence to be admitted without holding a *McGinnis* hearing to fully consider all of the evidentiary requirements with regard to the pornographic file names on the defendant's computer); Stafford v. Rocky Hollow Coal Co., 482 S.E.2d 210, 217 (S.Ct. App. W.V. 1996)("It is obvious that the trial court abused its discretion when it failed to comply with the gate-keeping requirement for the admissibility of prior bad acts.").

[79] State v. Zacks, 513 S.E.2d 911 (S.Ct. App. W.V. 1998).

the other acts evidence and affirmed. Notwithstanding case law suggesting the need for "precise" articulation of the Rule 404(b) analysis, therefore, West Virginia appellate courts may excuse general findings favoring admissibility in some cases.[80]

State v. Graham addressed the sufficiency of pre-trial notice more directly.[81] In that case, the defendant challenged the content of the Rule 404(b) pre-trial notice provided by the prosecution. The appellate court found the notice sufficient where "[t]he text of the notice specifically contain[ed] the style, the date, and the case number of the defendant's prior conviction… [and] also state[d] that the purpose of the evidence [was] to prove the defendant's lustful disposition toward children."[82]

West Virginia courts also excuse the pre-trial notice requirement altogether in appropriate circumstances and the good cause exception to the pre-trial notice requirement has been utilized to permit use of Rule 404(b) evidence not anticipated by the prosecution prior to trial. In *State v. Mongold*, the prosecution stated before trial that it did not anticipate using any Rule 404(b) evidence, but was permitted to prove past acts of child abuse by the defendant during its rebuttal case.[83] The prosecution argued that it was unaware of the need for any other acts evidence until after the presentation of the defense and the trial court found good cause to excuse pre-trial notice. The appellate court found that the trial court did not abuse its discretion in finding good cause where "Mr. Mongold put on apparently unanticipated extensive evidence regarding his good relationship with children, and evidence, including expert testimony, suggesting that Hannah's death could have been caused accidentally while playing the game of 'airplane.'"[84]

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[80] *Id.* at n. 3 ("While the circuit court did not comply with the technical mandate of *McGinnis*, we have previously supported the admission of bad acts evidence under Rule 404(b) in cases where the circuit court's actions, though not "ideal," were adequate to show it has lived up to the spirit of *McGinnis."*).

[81] State v. Graham, 541 S.E.2d 341 (S. Ct. App. W.V. 2000).

[82] *Id*. Although the content of the notice was not challenged in the attempted murder prosecution in *State v. Lewis*, the opinion set forth the detailed notice given in that case, which provides some indication of the type of notice given at the trial level in West Virginia:

> The proposed 404(b) evidence shows that the Defendant was convicted of Domestic Battery on or about October 13th 2011. This incident occurred only nine months prior to the brutal attack on Ms. Thomas. According to Trooper See's complaint, on February 15th 2011, the Defendant accused Ms. Thomas (who was his wife at the time) of being with a boyfriend. He then attacked her in their apartment. He started strangling her and said that "he was going to kill her." At one point in the struggle he pulled out a knife and put it to her chest, and later cut her on her hand. * * *
> This evidence clearly shows that the Defendant had a motive, jealousy, to commit the crime at hand. It further shows that the Defendant actually did intend to kill Ms. Thomas. Indeed, the Indictment charges the Defendant with Attempted Murder, and the State must prove that the Defendant actually intended to kill Ms. [Thomas] and not just maliciously wound her. The Defendant's statement that "he was going to kill her" is very good evidence on that point. Lastly, it shows that the Defendant had a common scheme or plan to use a knife to kill Ms. Thomas. The Defendant used a knife in both the February and November attacks.

State v. Lewis, 797 S.E.2d 605, 609 (S.Ct. App. W.V. 2017).

[83] State v. Mongold, 647 S.E.2d 539 (S.Ct. App. WV. 2007).

[84] *Id*. at 548; *see also* State v. Graham, 541 S.E.2d 341 (S. Ct. App. W.V. 2000)(prosecutorial disclosure of Rule 404(b) evidence outside the original time frame mandated by the circuit court was not untimely because the defendant still received notice of the State's intent to use the evidence approximately three months and fourteen days prior to trial).

B. Protective Balancing Tests

In *Huddleston v. United States*, the Supreme Court emphasized the importance of a Rule 403 balancing in connection with the admission of other acts evidence pursuant to Federal Rule of Evidence 404(b).[85] The standard Rule 403 balance permits the exclusion of relevant evidence whenever its probative value is "substantially outweighed" by a danger of "unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."[86] Of course, the risk of unfair propensity prejudice is the most salient in connection with the admission of a criminal defendant's uncharged misdeeds through Rule 404(b). Although a Rule 403 balancing may suffice to exclude such evidence, the test favors admissibility by requiring that probative value be "substantially outweighed" by such prejudice. Some states have counterparts to Rule 404(b) that modify the traditional Rule 403 balance to offer criminal defendants greater protection and to err in favor of exclusion of other acts evidence in close cases.

1. Excluding Other Acts Evidence When Unfair Prejudice "Outweighs" Proper Probative Value

A few states have made a modest alteration to the standard Rule 403 balance by eliminating the modifier "substantially" from the balancing test applicable to Rule 404(b) evidence. State analogues to Federal Rule of Evidence 404(b) in Massachusetts, Minnesota, and Tennessee modify the Rule 403 balancing test traditionally applicable to other acts evidence in this way.[87] In these jurisdictions, other acts evidence will be excluded whenever unfair prejudice outweighs probative value at all – even if the prejudice does not "substantially" outweigh probative value. The balancing test in these states still favors admission slightly by requiring that unfair prejudice outweigh probative value, but offers more protection that the standard weighing.

- Massachusetts

There are no Massachusetts Rules of Evidence. Instead, there is a "guide" from the Supreme Judicial Court Advisory Committee on Massachusetts Evidence law as it exists today.[88] Massachusetts Guide to Evidence Section 404(b) alters the balancing applicable to other acts evidence as follows:

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[85]Huddleston v. United States, 485 U.S. 681 (1988).
[86] Fed. R. Evid. 403.
[87] *See* Mass. Guide to Evid. Section 404(b)(" However, evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk."); Minn. R. Evid. 404(b) (admitting other acts evidence only if "the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant."); Tenn. R. Evid. 404(b)("The court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.").
[88] *See* Mass. Guide to Evid. Section 102 ("The sections contained in this Guide summarize the law of evidence applied in proceedings in the courts of the Commonwealth of Massachusetts as set forth in the Massachusetts General Laws, common law, and rules of court, and as required by the Constitutions of the United States and Massachusetts.").

> (b) Crimes, Wrongs, or Other Acts.
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. However, *evidence of other bad acts is inadmissible where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk*. Evidence of such an act is not admissible in a criminal case against a defendant who was prosecuted for that act and acquitted.[89]

This more protective balancing test for other acts evidence offered against criminal defendants was announced definitively in *Commonwealth v. Crayton* in 2014.[90] In that prosecution for possession of child pornography, the trial judge admitted several pornographic sketches of underage girls found in the defendant's jail cell some ten months after the charged incident to show the defendant's "knowledge" and "state of mind," even though the only real issue in dispute was the defendant's identity as the perpetrator. On appeal, the Supreme Judicial Court of Massachusetts noted some disagreement in the Massachusetts case law regarding the appropriate standard for weighing other acts evidence, with some courts applying a traditional Rule 403 balancing test and others suggesting a higher standard. The court concluded that "because 'other bad acts' evidence is 'inherently prejudicial,' it makes sense to impose a more exacting standard on its admissibility than the standard applicable to other evidence."[91] Therefore, the court held that other acts evidence would be excluded "where its probative value is outweighed by the risk of unfair prejudice to the defendant, even if not substantially outweighed by that risk."[92]

Applying this standard, the appellate court found that admission of the other acts was erroneous because the jury was instructed "to consider the hand-drawn sketches only as to issues that were not in dispute" and because "the drawings had only a general similarity to the child pornography found on the computer." Therefore, "the risk was enormous that the jury would use the drawings for the forbidden purpose of identifying the defendant as the person who viewed the child pornography on computer no. two based on his bad character and propensity to possess child pornography."[93]

The addition of this more protective balancing test has not prevented prosecutorial reliance on other acts evidence in appropriate cases and Massachusetts courts continue to uphold the admission of prior bad acts against criminal defendants for proper purposes.[94] Nor has the

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[89] Massachusetts is one of the jurisdictions that alters the *Huddleston* rule of conditional relevance for proof of other acts by a criminal defendant, at least with respect to acquitted acts.
[90] Commonwealth v. Crayton, 21 N.E.3d 157, n. 27 (Supreme Judicial Court of Massachusetts 2014).
[91] *Id.*
[92] *Id.*
[93] *Id*. at 177.
[94] *See* Commonwealth v. Miller, 56 N.E.3d 168 (Supreme Judicial Court of Massachusetts 2016) (evidence of domestic violence committed by defendant against his girlfriend, which led to confrontation between defendant and murder victim, properly admitted to show "contentious nature" of relationship between defendant and victim, which provided motive for killing); Commonwealth v. Forte, 14 N.E.3d 900 (Supreme Judicial Court of Massachusetts

more protective balancing test prevented entirely questionable reliance on other act evidence by the prosecution in Massachusetts cases. In *Commonwealth v. Mazariego*, the defendant was charged with the murder of prostitute.[95] He admitted being present at the scene of the crime, having sexual relations with the victim, and failing to pay her. Importantly, he claimed that his accomplice, who was also present, was the one who killed her. The trial judge admitted the defendant's "history of bringing prostitutes to the same location" and the appellate court affirmed, stating that prior relations with prostitutes were relevant to show intent, similarity in location of past encounters, absence of mistake, and the defendant's level of involvement in planning the crime.[96] At least one Massachusetts court has noted, however, that the more protective balancing test could be outcome determinative in some cases.[97]

- Minnesota

Minnesota Evidence Rule 404(b) also contains a more protective balancing test for criminal cases, as follows:

> (b) Other crimes, wrongs, or acts. Evidence of another crime, wrong, or act 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, plan, knowledge, identity, or absence of mistake or accident. In a criminal prosecution, such evidence shall not be admitted unless 1) the prosecutor gives notice of its intent to admit the evidence consistent with the rules of criminal procedure; 2) the prosecutor clearly indicates what the evidence will be offered to prove; 3) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; 4) the evidence is relevant to the prosecutor's case; and 5) *the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant*. Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by rule 412.[98]

Much like the Massachusetts cases, Minnesota Supreme Court cases were inconsistent in articulating the balancing test applicable to Rule 404(b) evidence.[99] In 2006, Minnesota Evidence Rule 404(b) was amended to clarify that other acts evidence should be excluded in criminal cases whenever probative value is "outweighed" by unfair prejudice, even if not

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2014) (instances of defendant's aggressive conduct in 16 hours preceding murder of homeless man admissible to illustrate angry state of mind); Commonwealth v. McGee, 4 N.E. 3d 256 (Supreme Judicial Court of Massachusetts 2014) (photograph of defendant holding a firearm that could have been the one used in the crime was more probative as to the means of committing the crime than it was prejudicial propensity evidence).

[95] Commonwealth v. Mazariego, 47 N.E.3d 420 (Supreme Judicial Court of Massachusetts 2016).

[96] *Id*.

[97] *See* Commonwealth v. Christie, 89 Mass. App. Ct. 665, 667, n.2 (2016) ("Had the judge had the benefit of the [more protective balancing test] he may, of course, have concluded that the challenged evidence was not admissible.").

[98] Minnesota Rule 404(b) also contains heightened notice and articulation standards as discussed in the previous section. Minnesota is also one of the states that demands "clear and convincing" proof of crimes, wrongs, or other acts.

[99] Minn. R. Evid. 404(b), Advisory Committee Comment to 2006 amendment.

“substantially” outweighed by such prejudice.[100] The Rule was amended to reflect the Minnesota Supreme Court’s “longstanding view that because of the great potential for misuse of this evidence, the trial judge should exclude the evidence in the close case.”[101] The Advisory Committee for the Minnesota Evidence Rules noted that “[a] slight balance in favor of unfair prejudice requires exclusion” pursuant to this modified balancing test.[102]

This more protective balancing test leads to careful weighing of probative value and unfair prejudice in Minnesota and leads to the exclusion of other acts evidence in some cases.[103] That said, the Minnesota courts still find other acts evidence sufficiently probative to overcome this protective test in many cases.[104]

- Tennessee

In addition to the many procedural protections incorporated into Tennessee’s counterpart to Rule 404(b) discussed above, Tennessee Rule of Evidence 404(b)(4) also alters the traditional Rule 403 balancing test with respect to evidence of other crimes, wrongs, or acts. This standard eliminates the modifier “substantially” in the traditional Rule 403 standard and provides that a “court must exclude the evidence if its probative value is outweighed by the danger of unfair prejudice.”[105] The Tennessee courts have explained that this alteration in the required balancing

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[100] *Id.*

[101] *Id.*

[102] “We have repeatedly stated that if the issue of admissibility of other-crime evidence is, in the trial court's view unclear, the trial court should give the benefit of the doubt to the defendant and exclude the evidence.” State v. Spreigl, 139 N.W.2d 167, 172 (Minn. 1965).

[103] *See* State v. Fardan, 773 N.W.2d 303 (Minn. 2009)(evidence of another robbery committed with same firearm on same night as charged felony murder was admissible under Rule 404(b) to show intent and lack of accident in charged shooting where defense argued lack of intent, but distinct sexual assaults committed on same night without firearm were more prejudicial than probative and should have been excluded); State v. Ness, 707 N.W.2d 676, 686 (Minn. 2006)(finding acts of sexual abuse 35 years prior to charged offense too dissimilar and remote to be probative as to whether current victim was mistaken and that any value was outweighed by prejudice where the government had little need for the evidence); Angus v. State, 695 N.W.2d 109, 120 (Minn.2005) (providing “guidance” for retrial after post-conviction relief and finding that prosecution had insufficient “need” for prior bad act evidence to justify prejudice to defendant; dissent forcefully arguing that prior bad act evidence was necessary to combat defense theory that defendant was an innocent bystander).

[104] *See e.g.*, State v. Welle, 870 N.W.2d 360 (Minn. 2015) (reversing court of appeals and affirming trial court’s admission of two prior assaults in which defendant punched a victim in the head and falsely claimed self- defense to rebut defendant’s claim of self-defense in instant murder/manslaughter prosecution: “Welle's pattern of shifting blame and falsely asserting self-defense is relevant to one or more of the elements of Welle's self-defense claim.”); State v. Campbell, 861 N.W.2d 95, 101 (Minn. 2015) (finding any alleged error in admitting evidence of previous shots fired incident harmless, but noting that “[i]f it is unclear whether the …[404(b)] evidence is admissible, the benefit of the doubt should be given to the defendant and the evidence should be excluded.”); State v. Burrell, 772 N.W.2d 459, 465 (Minn. 2009) (“If it is ‘a close call’ whether the evidence should be admitted, the trial court should exclude it” and upholding admissibility of pattern of drive by shootings in murder prosecution for later drive-by shooting that killed bystander notwithstanding significant potential for unfair prejudice because trial was a bench trial) (citation omitted); State v. Washington-Davis, 867 N.W.2d 222 (Minn. Ct. App. 2015) (rejecting appellant’s challenge to testimony by alleged victims of prostitution scheme about defendant’s conduct before date of charged conspiracy “because it tended to show appellant's intent, knowledge, absence of mistake or accident, and common scheme or plan.”).

[105] Tenn. R. Evid. 404(b)(4).

is designed to facilitate Tennessee's "restrictive approach" to evidence of other crimes, wrongs, or acts:

> However, the test in Rule 404(b) for balancing probative value against prejudicial effect differs from that established in Rule 403. To be excluded under Rule 403, the danger of unfair prejudice must "substantially outweigh" the probative value. Under Rule 404(b), however, the danger of unfair prejudice must simply "outweigh" the probative value. The restrictive approach of Rule 404(b) recognizes that evidence of other crimes, wrongs or acts carries a significant danger of unfair prejudice.[106]

This balance should result in the exclusion of other acts evidence whenever "the unfair prejudice outweighs the probative value or is dangerously close to tipping the scales."[107] The combination of this more protective balancing test with the other procedural protections required by the Tennessee Rule serves to generate careful consideration of other acts evidence, as well as routine findings of error in the admission of such evidence.[108] Tennessee's version of Rule 404(b) is thus treated as a rule of "exclusion" as a result of the numerous procedural and substantive protections it contains. Although the Tennessee Rule also demands a hearing outside the presence of the jury, the Tennessee Supreme Court has recognized that pre-trial rulings balancing probative value against unfair prejudice may need to be reconsidered during trial once the court can fairly evaluate other evidence presented at trial.[109]

2. Excluding Other Acts Evidence in Criminal Cases Unless Probative Value "Outweighs" Unfair Prejudice

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[106] State v. DuBose, 953 S.W.2d 649, 654 (Tenn. 1997)(citing *Tennessee Law of Evidence*, § 404.7 at 172).

[107] *See* State v. Luellen, 867 S.W.2d 736, 741 (Tenn. Ct. App. 1992).

[108] *See* State v. Sexton, 368 S.W.3d 371, 403 (Tenn. 2012) ("contrary to the requirements for admission under Rule 404(b), the unfair prejudicial effect of the alleged sex abuse outweighed the probative value as to motive."); State v. Gilliland, 22 S.W.3d 266, 270 (Tenn. 2000) (trial court abused discretion in admitting evidence of prior shooting in felony murder trial because probative value was outweighed by unfair prejudice, but error was harmless due to overwhelming proper evidence of defendant's guilt); State v. McCary, 922 S.W.2d 511 (Tenn. 1996)(explaining Tennessee's restrictive approach and reversing sexual assault convictions due to trial court's error in allowing testimony concerning identical uncharged assaults); State v. Bordis, 905 S.W.2d 214 (Tenn. 1995)(explaining restrictive approach to other acts evidence and reversing murder conviction based upon starvation death of three-month old child due to prosecution proof of defendant's lifestyle that produced intentional neglect, including visits to gay bars, drinking, illicit sexual conduct, and prior arrests); State v. Rounsaville, 701 S.W.2d. 817 (Tenn. 1985) (reversing forgery conviction based upon admission of testimony from bank teller that defendant had attempted unsuccessfully to pass a forged instrument on another occasion); State v. Fleece, 925 S.W.2d 558 (Tenn. Crim. App. 1995) (reversing DUI conviction where negligible probative value of defendant's restricted license at the time of the offense was outweighed by the prejudicial suggestion that defendant had a prior DUI conviction); State v. Luellen, 867 S.W.2d 736, 741 (Tenn. Ct. App. 1992) (reversing convictions for possession with intent to distribute cocaine due to introduction of three prior acts of drug possession. Court found prior offenses admitted for the proper purpose of proving defendant's knowledge and intent, which were contested, but found that the evidence failed the balancing test where the probative value of the other acts evidence was diminished by other evidence of knowledge and intent, thus making prejudice outweigh probative value).

[109] *See* State v. Gilley, 173 S.W.3d 1, 6 (Tenn. 2005) ("the existence of a material issue at trial and the balancing of the probative value and unfair prejudice—require consideration of the evidence presented at trial. Thus, trial courts must be cognizant that if pretrial evidentiary rulings are made, they may need to be reconsidered or revised based on the evidence presented at trial.").

Two states have gone one step further and have adopted a balancing test that favors exclusion of other acts evidence by requiring the proper probative value of such evidence to "outweigh" any unfair prejudice. In Pennsylvania and Virginia, therefore, the appropriate probative value of a criminal defendant's uncharged acts must be stronger than the unfair propensity inferences likely to be drawn from the evidence. Because this balancing sets exclusion as the default when both sides of the scale are equally weighted, it offers more protection against improper use of other acts evidence.

- Pennsylvania

The Pennsylvania Evidence Rules were adopted in 1998, enshrining Pennsylvania common law evidentiary principles in a code.[110] Pennsylvania Rule of Evidence 404(b) is very similar to its federal counterpart with one major difference.[111] Pennsylvania Rule 404(b)(2) demands that other acts evidence presented in a criminal case clear a higher hurdle than that required in federal cases, providing for more stringent balancing, as follows:

> (b) Crimes, Wrongs or Other Acts.
> (1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) Permitted Uses. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *In a criminal case this evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.*

Therefore, the Pennsylvania Rule favors exclusion of other acts evidence in criminal cases unless legitimate probative value eclipses any risk of prejudice to the defendant.

This rule of "exclusion" notwithstanding, the Pennsylvania cases reveal a steady flow of other acts evidence admitted against criminal defendants. Such evidence is routinely admitted to show common plan, intent or modus operandi.[112] And the Pennsylvania cases reveal that

[110] Commonwealth v. Horvath, 781 A.2d 1243 (Pa. Super. 2001).
[111] In addition to providing for more protective balancing in criminal cases of other acts evidence, Pennsylvania Rule 404(b) does not require criminal defendants to request notice of other acts evidence and imposes a general obligation on the prosecution to provide reasonable notice in advance of trial (unless excused for good cause) of the "general nature of any such evidence the prosecutor intends to offer at trial." PA. R. EVID. 404(b)(3).
[112] *See e.g.,* Commonwealth v. Hicks, 156 A.3d 1114 (Pa. 2017)(evidence of defendant's prior assaults on other women constituted admissible other crimes evidence); Commonwealth v. Johnson, 160 A.3d 127, 145 (Pa. 2017) (rejecting trial court's application of "identity" purpose for proving defendant's prior drug partnership, but affirming admission of act where it was necessary to prove charged offense of murder in the course of a heroin robbery); Commonwealth v. Arrington, 86 A.3d 831 (Pa. 2014) (probative value of evidence of defendant's prior crimes committed against three other girlfriends to show common scheme to control girlfriends through violence and intimidation, outweighed prejudicial effect to defendant from admission of this evidence); Commonwealth v. Boczkowski 846 A.2d 75 (Pa. 2004) (affirming admission of evidence regarding murder of wife prior to victim of charged murder to show absence of mistake or accident).

other acts evidence can survive the more protective balancing test even in the absence of "active contest" by the defendant.[113]

Although the Pennsylvania opinions generally do not emphasize the more restrictive balancing test, it has been utilized to exclude other acts evidence against Pennsylvania defendants in some cases. In *Commonwealth v. Santiago*, the prosecution in a murder case was permitted to introduce evidence that the defendant moved up a scheduled trip and left the country shortly after the alleged murder in an effort to show flight and consciousness of guilt.[114] In addition, the government sought to prove that the defendant failed to inform his parole officer of the change in his plans, suggesting that he was in such a hurry to flee that he was willing to violate the terms of his parole.[115] The trial court refused to allow such other acts evidence and the appellate court upheld that ruling, relying on the protective balancing test in Pennsylvania Rule 404(b)(2). Specifically, the court found that the probative value of the defendant's parole violation in demonstrating consciousness of guilt was insufficient to outweigh the likely prejudice that would result from the jury learning that the defendant was already "on parole."[116] Therefore, even though the government's proffered purpose in offering this other act evidence did not depend upon a propensity inference about the defendant's criminal tendencies for its value, it could not survive heightened balancing.[117]

- Virginia

Virginia's evidence rules have long been a product of its common law. In 2012, however, the Virginia Supreme Court enacted a body of evidence rules designed to bring coherence to the Virginia law of evidence.[118] Although the Virginia Rules bear a close resemblance to the Federal Rules of Evidence in many respects, they include some important distinctions.[119] One place where the Virginia Rules depart slightly from federal practice is with respect to admissibility of other acts evidence. The Virginia Rule applies a more rigorous balancing standard to such evidence, as follows:

> Virginia Supreme Court Rule 2:404
> (b) Other Crimes, Wrongs, or Acts. Except as provided in Rule 2:413 or by statute, evidence of other crimes, wrongs, or acts is generally not admissible to prove the character trait of a person in order to show that the person acted in conformity therewith. *However, if the legitimate probative value of such proof outweighs its incidental prejudice, such evidence is admissible if it tends to prove any relevant fact pertaining to the offense charged*, such as

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113 *See* Commonwealth v. Boczkowski 846 A2d 75 (Pa. 2004) ("the defendant does not have to actually forward a formal defense of accident, or even present an argument along those lines, before the Commonwealth may have a practical need to exclude the theory of accidental death").
114 Commonwealth v. Santiago, 822 A.2d 716, 728 (Pa. Super. 2003).
115 *Id*.
116 *Id.*
117 *Id.*; *see also* Commonwealth v. Horvath, 781 A.2d 1243 (Pa. Super. 2001) (conduct underlying previous convictions based upon the events that formed the basis for charged offense was admissible, but fact of "conviction" arising out of that conduct was more prejudicial than probative and could not be admitted).
118 Jeffrey Bellin, The Virginia and Federal Rules of Evidence: A Concise Comparison with Commentary (2015).
119 *Id*.

where it is relevant to show motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, accident, or if they are part of a common scheme or plan.

The common law of Virginia from which this Rule was recently adapted reflects a cautious approach to other acts evidence. The Virginia courts analyze common plan and scheme evidence narrowly, insist upon truly idiosyncratic evidence to show identity, and regulate the slippery purpose of intent with care.[120] For example, *Donahue v. Commonwealth* was a prosecution for possession with intent to distribute marijuana and PCP.[121] At trial, the defendant argued that the marijuana and PCP found in her apartment belonged to her husband and that she was not involved in its distribution. Over her objection, and much like many federal district courts, the Virginia trial court admitted her prior conviction for distribution of PCP to establish her "intent" to distribute drugs on the charged occasion. The Virginia Supreme Court reversed her conviction, however, finding the admission of her previous drug sale erroneous where its probative value depended on her propensity to sell drugs and did not outweigh its prejudice to her.[122] Although decisions to exclude other acts evidence like *Donahue* rarely rest exclusively on the heightened balancing test, that test reflects the overall tenor of the cautious approach to other acts evidence in Virginia.

C. Active Contest Requirement

Some recent federal opinions have suggested that other acts evidence should not be admitted against a criminal defendant unless that defendant "actively contests" an issue to which the other acts evidence is probative. Although opinions in many states discuss the importance of assessing trial disputes in considering the admissibility of other acts evidence, New Jersey Rule of Evidence 404(b) expressly requires a "dispute" regarding issues proved by other acts evidence, as follows:

> (b) Other Crimes, Wrongs, or Acts. Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident *when such matters are relevant to a material issue in dispute.*[123]

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[120] *See e.g.*, Walker v. Commonwealth, 770 S.E.2d 197 (Va. 2015) (analogizing Rule 2:404(b) to rules for joinder of crimes and finding a series of four drug sales involving identical participants in same neighborhood over a two week period *not* part of a "common scheme or plan"); Pryor v. Commonwealth, 661 S.E.2d 820 (Va. 2008)(erroneous to allow videotape of later drug transaction to go to jury room to prove identity in connection with earlier drug sale; even assuming the later transaction was somehow relevant to corroborate defendant's visits to the location, its probative value could not overcome prejudice to defendant); Scates v. Commonwealth, 553 S.E.2d 756, 763 (Va. 2001) (reversing conviction for burglary with unforced entry where prosecution introduced testimony that the defendant used credit cards to break into "homes"; there was no use of a credit card in the charged offense and the testimony prejudiced the defendant by suggesting multiple other offenses).
[121] Donahue v. Commonwealth, 300 S.E.2d 768 (Va. 1983).
[122] *Id.*
[123] N.J. Evid. R. 404(b) (emphasis added).

The Editor's comments to the Rule explain that this language was added to New Jersey's version of Rule 404(b) to emphasize that ordinarily other crimes evidence is admissible only to prove "some other fact in issue," and not a general disposition to commit crimes or other wrongs.[124]

New Jersey courts characterize Rule 404(b) as one of "exclusion" and have noted that the approach to such evidence in the federal courts is more "permissive" than the New Jersey approach.[125] The New Jersey Supreme Court has set out a four-part test that a proponent of such evidence must satisfy:

> 1. The evidence of the other crime must be admissible as relevant to a material issue;
> 2. It must be similar in kind and reasonably close in time to the offense charged;
> 3. The evidence of the other crime must be clear and convincing; and
> 4. The probative value of the evidence must not be outweighed by its apparent prejudice.[126]

The New Jersey Supreme Court has emphasized that the material issue "must be genuinely disputed" under the first prong of the analysis[127] and has explained what it means for a material issue to be in dispute:

> In determining whether 404(b) evidence bears on a material issue, the Court should consider whether the matter was projected by the defense as arguable before trial, raised by the defense at trial, or was one that the defense refused to concede. Further, the other-crimes evidence must be necessary for the proof of the disputed element. Indeed, in assessing the fourth prong, courts should consider whether the matter can be proved adequately by other evidence.[128]

The New Jersey appellate courts, therefore, routinely examine the arguments presented at trial to determine whether admitted uncharged acts evidence helped to resolve issues genuinely in dispute. Many New Jersey opinions find a sufficient trial dispute by the defense to satisfy the first requirement of the test.[129] In several cases, however, the New Jersey Supreme Court has

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[124] Editor's Comments to N.J. Evid. Rule 404.

[125] State v. Cofield, 605 A.2d 230, 233 (N.J. 1992).

[126] *Id.* Although this formulation suggests more protective balancing akin to that required in Massachusetts, Minnesota, and Tennessee, New Jersey courts have not clearly articulated an intent to enhance the balancing standard and make inconsistent references to the balancing standard.

[127] *Id.* at 235.

[128] State v. P.S., 997 A.2d 163, 180 (N.J. 2010) (discussing New Jersey's restrictive approach to other acts evidence and reversing sexual assault conviction based upon trial court's erroneous decision to permit evidence of very different sexual assault against a different victim) (citing State v. Stevens, 558 A.2d 833 (1989) and State v. Marrero, 691 A.2d 293 (1997)).

[129] State v. Garrison, 155 A.3d 996, 1003-04 (N.J. 2017) (notwithstanding defendant's argument that his state of mind was "not genuinely contested" because he maintained that no sexual assault occurred, trial court properly admitted evidence of uncharged strip poker game with child victim in another state in sexual assault prosecution where defendant actively argued at trial that the child victim was the "aggressor" and that any inappropriate actions originated with her); State v. Lykes, 933 A.2d 1274 (N.J. 2007) (trial court did not err in permitting prosecution to cross-examine defendant concerning prior uncharged handling of cocaine where "defendant steadfastly urged that the sole issue in the case was whether he knew that the vials contained cocaine"); State v. G.S., 678 A.2d 1092 (N.J. 1996)(evidence of prior sexual abuse of child in Monmouth County was relevant to dispute regarding whether the

reversed convictions due to the admission of uncharged bad acts not necessary to resolve any disputed issue at trial.[130] That said, the court has not always required a defendant to "actively" dispute a particular element to support admissibility of uncharged misconduct. In *State v. Stevens*, a police officer was charged with an unlawful search of a female motorist for purposes of sexual gratification.[131] Over a defense objection, the prosecution was permitted to introduce evidence of prior uncharged instances in which the officer searched or sexually assaulted a female using his authority as a public officer in order to demonstrate the defendant's "intent." The New Jersey Supreme Court affirmed, notwithstanding the defendant's failure to argue mistake or to actively dispute his intent:

> Despite defendant's denial that the searches occurred, the State was required to prove both their occurrence and defendant's unlawful purpose in conducting the searches. Thus, defendant's unlawful purpose was a genuine issue in the case. Defendant's denial that the searches occurred did not relieve the State of its burden to prove that his purpose was to gratify his sexual desires, and not merely to discharge his official duties.[132]

Analysis in *State v. G.V.*, however, suggested that the New Jersey Supreme Court was more concerned about "active contest" than it was about the prosecution's reliance on propensity inferences.[133] In that case, the court found that the trial court erred in allowing testimony from the older sister of the victim in a sexual assault prosecution that she too was assaulted by the defendant because there was no dispute about "intent" or "mistake":

> [I]n a case involving a horrendous course of patent sexual depravity which continued for years, there was no defense that atrocious acts were simply misinterpreted expressions of fatherly affection … Nor could it be fairly said that if the defendant committed the acts in question, there was a material factual dispute with regard to whether he was seeking

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sexual contacts with same child in Sussex County were "inadvertent, accidental or unplanned" and to explain child's delay in reporting abuse where defendant challenged her credibility on that basis); State v. Oliver, 627 *A*.2d 144 (N.J. 1993) (permitting evidence of uncharged assaults on women at defendant's home when others were present downstairs to prove feasibility of occurrence in instant case; defense suggested that assault would not be possible without other occupants of house overhearing it); State v. Parker, 2007 WL 1425486 (N.J. App. 2007) (affirming admission of distinctive physical abuse of girlfriend in prosecution for manslaughter of child where the question of whether defendant inflicted injuries on the child inadvertently, while disciplining him, was material to the issues in dispute); State v. Cusick, 530 *A*.2d 806 (N.J. App. 1986) (holding other sexual assaults admissible at trial to prove lack of mistake where defendant argued sexual contact with victim was inadvertent).

130 *See* State v. J.M., 137 A.3d 490 (N.J. 2016) (in prosecution of massage therapist for sexually assaulting a customer, error to allow previous customer's testimony about a similar sexual assault; "Defendant does not argue that the alleged sexual assault of E.S. was consensual or accidental; rather, he maintains that the sexual assault never occurred. As such, A.W.'s testimony is inadmissible to establish motive, intent, or absence of mistake because defendant's state of mind is not a "genuinely contested" issue in this case."); Carlucci v. State, 85 A.3d 965, 976 (N.J. 2014) (reversing conviction because defendant's statements to officer revealing that she had been in trouble for crack cocaine in the past should not have been admitted under Rule 404(b) where the defendant did not dispute her knowledge of cocaine at trial or the fact that confiscated baggies field tested positive for cocaine); State v. G.V., 744 *A*.2d 137 (N.J. 2000)(trial court erred in allowing testimony from older sister of victim in sexual assault prosecution that she too was assaulted by the defendant where there was no dispute about "intent" or "mistake").

131 State v. Stevens, 558 A.2d 833 (N.J. 1989).

132 *Id*.

133 State v. G.V., 744 A.2d 137 (N.J. 2000).

> sexual gratification. Neither absence of intent or accident or inadvertence or motive were genuinely at issue as to the main crime of sexual assault.[134]

The court went on to advise that the older sister's testimony would be admissible during the retrial of the case if the defendant specifically raised a "vendetta defense," accusing the victim of fabricating allegations due to her anger over her parents' divorce. The dissent disagreed that such a dispute raised by the defense would justify admission of the prior offense, arguing that the assault on the victim's older sister would undermine the victim's vendetta or bias only by suggesting the defendant's propensity to commit unlawful sexual assaults on his children.[135] The express requirement of a "material issue in dispute" has resulted in detailed analysis of trial disputes in evaluating admissibility of other acts evidence in New Jersey.

D. Inextricably Intertwined Provisions

As the Committee has previously seen, several federal courts have sought to restrict the admission of uncharged misconduct evidence by limiting or eliminating the use of the vague "inextricably intertwined" doctrine to circumvent Rule 404(b) analysis.[136] Although some states similarly have attempted to restrict this doctrine through judicial opinions, a few states have incorporated language into their evidence rules designed to distinguish "other" acts requiring Rule 404(b) analysis from related or inextricably intertwined acts that need not survive such scrutiny.[137]

1. Kentucky

Kentucky Rule 404(b)(2) expressly provides for the admissibility of inextricably intertwined acts, as follows:

> (b) Other crimes, wrongs, or acts. 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:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or

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[134] *Id*.
[135] *Id*.
[136] *See* United States v. Green, 617 F.3d 233, 246-47 (3d Cir. 2010); United States v. Gorman, 613 F.3d 711, 719 (7th Cir. 2010); United States v. Bowie, 232 F.3d 923, 927 (D.C. Cir. 2000).
[137] Michigan has rejected a "*res gestae*" or inextricably intertwined exception to its Rule 404(b) through case law, as have several federal circuits. *See* People *v.* Jackson, 869 N.W.2d 253, 274 (Mich. 2015) ("As the plain language of the rule makes clear, MRE 404(b) applies to evidence of "crimes, wrongs, or acts" other than the "conduct at issue in the case" that may give rise to a character-to-conduct inference."). Many states, however, recognize something akin to the doctrine in their case law. For example, Minnesota allows admission of "immediate episode evidence" outside the strictures of its Rule 404(b) counterpart: "Immediate-episode evidence is admissible 'where two or more offenses are linked together in point of time or circumstances so that one cannot be fully shown without proving the other, or where evidence of other crimes constitutes part of the [events at issue].'" State v. Washington-Davis, 867 N.W.2d 222 (Minn. Ct. App. 2015) (quoting State v. Riddley, 776 N.W.2d 419, 425 (Minn. 2009)) (admitting evidence of violence and financial control over defendant's victims in prostitution scheme).

(2) *If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party*.

According to the Kentucky Supreme Court, "[t]he key to understanding this exception is the word inextricably. The exception relates only to evidence that must come in because it is so interwoven with the evidence of the crime charged that its introduction is unavoidable."[138] This admonition notwithstanding, the Kentucky courts frequently admit uncharged acts of criminal defendants through the inextricably intertwined provision, noting that KRE 404(b)(2) is "intended to be flexible enough to permit the prosecution to present a complete, unfragmented, unartificial picture of the crime committed by the defendant, including necessary context, background and perspective."[139] The Kentucky Supreme Court has relied heavily on the federal precedent admitting inextricably intertwined acts outside the strictures of Rule 404(b) to justify

[138] Major v. Commonwealth, 177 S.W.3d 700, 707 (Ky. 2005) (quoting Funk v. Commonwealth, 842 S.W.2d 476, 480 (Ky.1993)).

[139] Norton v. Commonwealth, 890 S.W.2d 632, 638 (Ky.App.1994) (citations omitted) (In trial for trafficking in LSD, admission of portions of audiotape concerning proposed sale of marijuana did not violate rule against admission of evidence of other crimes, wrongs, or acts; negotiations regarding marijuana were inextricably intertwined with negotiations regarding LSD because "[i]n this instance, separation of the evidence as contemplated by Norton, if not impossible in the first place, would have seriously and adversely affected the Commonwealth's ability to present the case to the jury"); *see also* Keene v. Commonwealth, 2016 WL 7665438 (Ky. 2016) (defendant's uncharged assaultive behavior was inextricably intertwined with the evidence of rape because it explained inconsistency in victim's statements highlighted by defense); Johnson v. Commonwealth, 2014 WL 4160215 (Ky. 2014) (collateral crimes evidence of defendant's conviction for trafficking in marijuana was admissible in case where defendant stood accused of manufacturing methamphetamine because it arose from the police search of a hotel room prior to the discovery of the methamphetamine manufacturing laboratory at his residence and was inextricably intertwined with instant case); Kerr v. Commonwealth, 400 S.W.3d 250 (Ky. 2013) (trial court did not abuse its discretion in admitting evidence that police had two arrest warrants for defendant that were unrelated to charged drug trafficking offenses because they were inextricably intertwined with police surveillance of defendant's hotel room, which led to defendant being charged with drug trafficking offenses; "KRE 404(b)(2) allows the Commonwealth to present a complete, unfragmented picture of the crime and investigation[,]" including a "picture of the circumstances surrounding how the crime was discovered"); Clark v. Commonwealth, 267 S.W.3d 668 (Ky. 2008) (trial court did not err in permitting mother of minor victims in sexual offense prosecution to testify that she did not immediately confront defendant upon discovering the abuse because he had physically assaulted her in the past and she was afraid of him; the setting and context of the events surrounding the mother's discovery of the sexual abuse, and her reasons for not contemporaneously confronting the defendant about it, were germane to the overall sequence of events surrounding the crimes and to the events which led to them being reported to authorities and were inextricably intertwined with other evidence critical to the case); Mackin v. Commonwealth, 2008 WL 4291605 (Ky. 2008) (pornographic books found in defendant's home were inextricably intertwined with other evidence in rape prosecution where the defendant allegedly used the books as a vehicle to assuage the victim's concerns about incest and as a springboard to further their sexual relationship); Major v. Commonwealth, 177 S.W.3d 700, 707 (Ky. 2005) (evidence that murder defendant was incarcerated at the time of his telephone confession to his father was admissible in murder prosecution as being "inextricably intertwined" with other evidence essential to the case; defendant's incarceration provided the setting and context within which police investigation took place and within which defendant called his father and confessed); Furnish v. Commonwealth, 95 S.W.3d 34, 46 (Ky. 2002) (defendant's use of crack cocaine following murder showed that he used victim's ATM card to obtain money to purchase the drugs; clearly, such evidence is intertwined with the evidence pertaining to the other charges). *See also* Price v. Commonwealth, 31 S.W.3d 885 (Ky. 2000) (upholding trial court's decision to try murder and rape charges jointly where evidence of the defendant's prior and subsequent sexual abuse of his step-daughter was so inextricably connected with the issues concerning his motive and intent to kill his wife that the evidence would have been admissible even in a separate trial for murder).

this approach.[140] In only a few cases have Kentucky courts rejected reliance on the inextricably intertwined provision and found error in the admission of uncharged acts admitted on that basis.[141] The codification of the inextricably intertwined "exception" to the prohibition on other acts evidence, therefore, appears to have increased reliance on the doctrine in Kentucky.

2. Louisiana

Louisiana Rule 404(B) also expressly permits "integral" uncharged acts to be admitted through the Louisiana provision governing other crimes, wrongs, or acts, as follows:

> B. Other crimes, wrongs or acts.
>
> (1) Except as provided in Article 412, evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, of the nature of any such evidence it intends to introduce at trial for such purposes, *or when it relates to conduct that constitutes an integral part of the act or transaction that is the subject of the present proceeding.*[142]

The Louisiana Supreme Court has explained that the additional basis for admitting uncharged acts was codified to replace the doctrine of *res gestae* that formerly governed admissibility of uncharged acts connected with the charged offense:

> [U]nder La. C.E. art. 404(B)(1) evidence of other crimes, wrongs or acts may be introduced when it relates to conduct, formerly referred to as *res gestae*, that 'constitutes an integral part of the act or transaction that is the subject of the present proceeding.' *Res gestae* events constituting other crimes are deemed admissible because they are so nearly connected to the charged offense that the state could not accurately present its case without reference to them. A close proximity in time and location is required between the charged offense and the other crimes evidence 'to insure that "the purpose served by admission of other crimes evidence is not to depict defendant as a bad man, but rather to

[140] *See* Kerr v. Commonwealth, 400 S.W.3d 250 (Ky. 2013) (quoting federal cases and treatises supporting admissibility of inextricably intertwined acts).

[141] *See* Gonzalez v. Commonwealth, No. 2011-SC-00466, 2013 WL 1188020 (Ky. 2013) (defendant's inflammatory threats against police officer, who was not involved in investigating charged murder, during interview were not inextricably intertwined with proof of shooting and could have been redacted; error harmless); Major v. Commonwealth, 177 S.W.3d 700, 707 (Ky. 2005) (reversing defendant's conviction for murder of his wife, due, in part, to testimony of his daughter as to her later sexual abuse; though terrible, it had no relevance to the issues involved in the murder; nor could it be said to be "inextricably intertwined" with the other evidence).

[142] La. C.E. art. 404(B)(1)(emphasis added). Pretrial notice by the prosecution of its intention to use evidence forming part of the res gestae is not required. State v. Catchings, 440 So.2d 153 (La. App. 1983); State v. Jackson, 450 So.2d 621 (La. 1984).

complete the story of the crime on trial by proving its immediate context of happenings near in time and place.[143]

Notwithstanding this language that suggests a cautious approach to the doctrine, the court has also characterized the doctrine in Louisiana as a "broad" one that covers "not only spontaneous utterances and declarations made before or after the commission of the crime, but also testimony of witnesses and police officers pertaining to what they heard or observed during or after the commission of the crime if a continuous chain of events is evident under the circumstances."[144] In *State v. Taylor*, the court found that the integral acts doctrine applied to allow evidence of a seven state crime spree, involving armed robbery and the shooting of a police officer, that followed the charged murder of a car salesman. Although the court acknowledged that there was not close proximity in time and location between the charged murder and the subsequent uncharged crime spree, the court found that defendant's argument that he lacked the requisite intent to support his first degree murder charge required the prosecution to complete the story and demonstrate the full context in which the charged murder took place.[145]

In the earlier case of *State v. Colomb*, the Louisiana Supreme Court reinstated a conviction reversed by the Louisiana Court of Appeals, finding that the appellate court had applied an "unduly restrictive" approach to integral acts evidence.[146] In that case, the trial court in a felon-in-possession prosecution permitted evidence regarding drugs possessed by the defendant at the time he was apprehended in a van in possession of the weapon. The appellate court reversed, holding that the evidence of drug possession did not relate to conduct forming an integral part of the charged offense, but that, even assuming defendant's drug possession constituted part of the *res gestae* or an integral component of his firearms possession, it could discern "no relevant reason, other than prejudice for its admission into evidence."[147] The Louisiana Supreme Court disagreed because the defendant claimed at trial that the van and the gun belonged to his wife, that he had borrowed the vehicle to run some morning errands, and that he had not realized she had placed the weapon in the glove compartment of the vehicle until he braked suddenly at the order of the officers. As a result of the defendant's argument that he lacked dominion and control or knowledge of the weapon, the court held that evidence of the defendant's marijuana possession at the time of his arrest allowed jurors to draw necessary inferences based upon the defendant's contemporaneous conduct and reinstated the conviction.[148]

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[143] State v. Taylor, 838 So.2d 729, 741 (2003) (quoting State v. Colomb, 747 So.2d 1074, 1076 (La. 1999)).
[144] *Id.*
[145] *Id*. at 743 (the evidence of defendant's uncharged crime spree "placed the killing of the victim in its proper context, *i.e.*, as the starting point of grand scheme to rob the bank in Lamoni, Iowa, and then to make a run for the Mexican border, as if the entire episode were an out-take from defendant's favorite movie, Natural Born Killers.").
[146] State v. Colomb, 747 So.2d 1074, 1076 (La. 1999).
[147] *Id*. at 1075.
[148] *Id*. at 1077. The court also noted, without resolving, a conflict in the Louisiana cases concerning the applicability of the Rule 403 balancing test to integral acts evidence. *Id*.; *see also* State v. Edwards, 406 So.2d 1331, 1350–1351 (La.1981)(affirming trial court's admission of testimony as part of the *res gestae* in defendant's trial for murder that on the same night, the defendant suggested they "go make a hit;" that defendant stole wine from a grocery store; that they followed another woman to a college campus after the murder in an attempt to snatch her purse; and that they went to a convenience store looking for still another "hustle" until the appearance of a police officer terminated the night's activities); State v. Brewington, 601 So.2d 656 (La. 1992)(reinstating murder conviction after appellate court

Although many of the uncharged acts admitted through the Louisiana "integral acts" provision would likely fit within permissible purposes identified by the Rule, such as knowledge, intent, motive, common plan or scheme, some might not.[149]

3. Texas

Texas Evidence Rule 404(b) exempts evidence of "extraneous acts" from its notice requirement where those acts arise "in the same transaction" as the charged offense, as follows:

> (b) Crimes, Wrongs, or Other Acts.
> (1) *Prohibited Uses*. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.
> (2) *Permitted Uses; Notice in Criminal Case*. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. *On timely request by a defendant in a criminal case, the prosecutor must provide reasonable notice before trial that the prosecution intends to introduce such evidence--other than that arising in the same transaction--in its case-in-chief.*

In addition to being exempt from the Texas notice obligation, "same transaction" evidence is frequently admitted in criminal cases in Texas outside the limits of Rule 404(b). The "same transaction" doctrine is described by the Texas courts in this manner:

> extraneous offense evidence may also be admissible as same-transaction contextual evidence, where "several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction. In that situation, 'the jury is entitled to know all [the] relevant surrounding facts and circumstances of the charged offense; an offense is not tried in a vacuum. Evidence admitted under the same transaction exception is considered general evidence to be used for all purposes and does

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reversed due to admission of "other bad acts" evidence; trial court did not err in allowing evidence that the accused possessed crack cocaine and a .357 caliber pistol (not used in the shooting) less than two hours before the victim's death because the evidence, "formed an inseparable part of the state's substantial circumstantial evidence linking him to the shooting," and because evidence of cocaine possession was "an integral part of the act or transaction that was the subject of the present proceeding."); State v. Argo, 476 So.2d 409, 412 (La. App. 1985) (evidence of assault and car thefts committed during seven or eight hours before attempted murder of police officer was admissible as *res gestae* when crimes were so closely related and intertwined that the state could not have presented complete story of the charged offense without them).

[149] *See* State v. Sharp, 810 So.2d 1179, 1196 (La. App. 2002) (arson of unoccupied residence hours before shooting and at a different location was admissible in homicide prosecution as integral part of events leading up to killing); State v. Bilbo, 719 So.2d 1134, 1139 (La. App. 1998) (La. App. 1998) (in defendant's prosecution for kidnaping and rape of Louisiana woman, evidence that defendant had stolen a car from a Florida car dealership six days earlier by threatening car salesman and had driven the stolen car to California and was involved in an accident in Louisiana just before kidnaping victim who stopped to see if she could assist defendant and his companions with car trouble, was admissible conduct constituting an "integral part" of the charged kidnaping); State v. Camp, 580 So.2d 957, 960 (La.App. 5th Cir.1991)(in prosecution for simple burglary, reference to knife taken from defendant after his apprehension was admissible as "integral part" of burglary; even though carrying concealed weapon was not element of that offense).

> not require a limiting instruction. "[S]ame-transaction contextual evidence is admissible only when the [charged] offense would make little or no sense without also bringing in [the same-transaction contextual] evidence." In other words, same-transaction contextual evidence is admissible only "where such evidence is *necessary* to the jury's understanding of the instant offense." [150]

Occasionally, extraneous acts evidence offered under a "same transaction" theory is rejected.[151] Texas courts frequently admit other bad acts evidence under this doctrine without requiring notice or limiting instructions, however.[152]

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[150] Beltran v. State, 2017 WL 943437 (Tex. App. 2017) (quotations omitted).

[151] Rogers v. State, 853 S.W.2d 29, 34 (Tex. Crim. App. 1993)(evidence of the defendant's possession of marijuana was not admissible same transaction evidence in a case where defendant was prosecuted for two burglaries and for possession of methamphetamine; evidence of marijuana possession at the time of arrest was not *necessary* to the jury's understanding).

[152] *See* Moreno v. State, 721 S.W.2d 295, 301(Tex. Crim. App. 1986) (in defendant's prosecution for murder of state trooper during traffic stop, permissible to introduce evidence that the defendant killed his brother and sister-in-law one-half hour prior to charged murder of trooper; "[i]t is well settled that where one offense or transaction is one continuous episode, or another offense or transaction is a part of the case on trial or blended or closely interwoven therewith, proof of all the facts is proper.")(quoting Mitchell v. State, 650 S.W.2d 801, 811 (Tex.Cr.App.1983)); Prible v. State, 175 S.W.3d 724, 731-32 (Tex. Crim. App. 2005)(although defendant was charged only with causing the deaths of two adults, the trial court properly permitted the State to introduce evidence that their three children also died from smoke inhalation caused by a fire defendant set to conceal evidence; "the murders of Steve and Nilda and the deaths, by smoke inhalation, of their three children were so connected that they formed an indivisible criminal transaction."); Devoe v. State, 354 S.W.3d 457, 470 (Tex. Crim. App. 2011)(where defendant was charged with murders of two teenage girls, evidence of his murder of three others, assault of another, theft of a weapon and multiple car thefts was all admissible same transaction evidence where the charged murders took place during a three-day crime spree and the defendant did not rest between incidents; the trial court was within its discretion in concluding that "[t]he evidence is so intermingled between all of the events that occurred it would just—it would be impossible to do so without leaving a hole, leaving a gaping hole in the State's case."); Beltran v. State, 2017 WL 943437 (Tex. App. 2017) (evidence that defendant was dealing drugs was admissible same-transaction evidence in prosecution for sexual assault of a minor where evidence was offered to show that victim's mother allowed defendant to sexually assault victim in exchange for cocaine; "[e]xtraneous offense evidence may also be admissible as same-transaction contextual evidence, where several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction.").