

Federal Rule of Evidence 404(b)



Stephen Haedicke
Law Office of Stephen Haedicke, LLC
New Orleans, LA

- “Uncontroversial at the time of adoption, Rule 404(b) has become the most cited evidentiary rule on appeal.” *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013).



Federal Rule of Evidence 404

- **(a) Character Evidence.**
- **(1) Prohibited Uses.** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.



FRE 404(a):

- **(2) Exceptions for a Defendant or Victim in a Criminal Case.** The following exceptions apply in a criminal case:
 - **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
 - **(B)** subject to the limitations in [Rule 412](#), a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
 - **(i)** offer evidence to rebut it; and
 - **(ii)** offer evidence of the defendant's same trait; and
 - **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.
- **(3) Exceptions for a Witness.** Evidence of a witness's character may be admitted under [Rules 607](#), [608](#), and [609](#).



FRE 404(b)

- **(b) Other Crimes, Wrongs, or Acts.**
 - **(1) Prohibited Uses.** Evidence of any other crime, wrong, or 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.
 - **(3) Notice in a Criminal Case.** In a criminal case, the prosecutor must:
 - **(A)** provide reasonable notice of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it;
 - **(B)** articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
 - **(C)** do so in writing before trial--or in any form during trial if the court, for good cause, excuses lack of pretrial notice.



What is FRE 404(b) Evidence?

- Extrinsic vs. Intrinsic Evidence:
 - **Intrinsic** means that the evidence concerns events that are part of the *res gestae* or otherwise part of the story of the current case.
 - **Extrinsic** means everything else
- 404(b) applies only to evidence that is **extrinsic** to the case in question.



Intrinsic v. Extrinsic Evidence

- What counts as Intrinsic Evidence is determined based on the facts and issues in the particular case, including the plaintiff or defendant's case theory or defenses.
- Evidence can be Intrinsic as to one Defendant but Extrinsic as to another, based on the claims brought against each Defendant.
- This distinction should be kept in mind when drafting complaints.



Case Example: Intrinsic v. Extrinsic

- In a case involving a truck that rear-ended another vehicle, the Plaintiffs discover that the truck driver made several false entries in his logbook. Two of these entries occurred in the week before the accident. The others were from several years prior. Does 404(b) apply to this evidence?
- **Answer: Yes and No.**
- As to the claim against the trucking company (the driver's employer), all of the evidence is **intrinsic** to the plaintiff's claim that the company was negligent in its entrustment, supervision, and training of the driver.
- As to the truck driver, the evidence regarding falsifications in the week before the accident is **intrinsic** to the plaintiff's case theory that fatigue led to the accident, as the falsifications covered up that the driver was working too many hours.
- But, as to the driver, the evidence regarding older logbook falsifications is **extrinsic** and therefore subject to the Rule 404(b) analysis, that is, it will be excluded unless the proponent shows a proper purpose.
- Source: *Osborne v. State Farm Mutual Automobile Ins. Co.*, 07-cv-002 (W.D. Kt. April 20, 2009), 2009 WL 1046008



Intrinsic v. Extrinsic: Particular Claims

- Other Acts evidence is often admitted as intrinsic evidence for certain legal claims. For example:
 - Negligent Hiring, Supervision, or Retention
 - Hostile Work Environment
 - *Monell* Pattern and Practice Claims in civil rights actions
 - Actual Malice in defamation cases
 - Damages and punitive damages



Case Example: Intrinsic Evidence

- A plaintiff in a wrongful death suit testifies that his deceased mother “taught me mostly everything I know. Everything she knew she tried to instill in me.” The plaintiff portrays his mother as a very positive role model for himself and others.
- In response to this testimony, the defense seeks to introduce evidence of the deceased’s police record, time in prison, and drug addiction, but the District Court disallows it, citing FRE 404(b)
- The Seventh Circuit reverses, holding that it was error to consider the proffered evidence to be subject to Rule 404(b). The defense was not offering the evidence to prove character and conformity therewith. Instead, the evidence was directly related to the damages the plaintiff sought, specifically, whether the deceased was the type of role model the plaintiff had portrayed on direct examination.
- *See Cobige v. City of Chicago, Ill.*, 651 F.3d 780 (7th Cir. 2011).



Rule 404(b) In Action

- Rule 404(b)(1) prohibits introduction of extrinsic evidence when the intent is to prove character and that the defendant acted in conformity with that character on a particular occasion.
- Rule 404(b)(2) permits introduction of extrinsic evidence for all other purposes, subject only to Rule 401 (relevance) and Rule 403 (unfair prejudice, confusion, etc.)
- **Rule 404(b) is a “rule of inclusion”, ie., it permits a lot of uses of extrinsic act evidence, while prohibiting only one use– to prove character and conformity therewith**
- **Important Note: Rule 404(b)(2) applies to both pre- and post-incident acts. Not just for “prior” bad acts!**



Rule 404(b) In Action

- Permitted uses include, **but are not limited to**, proving:
 - motive
 - opportunity
 - intent
 - preparation
 - plan
 - knowledge
 - identity
 - absence of mistake
 - or lack of accident



Rule 404(b): Standards for Admissibility of Other Acts Evidence

In *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court articulated a four-part test for determining the admissibility of other acts evidence under FRE 404(b):

- (1) The evidence must be offered for a **proper purpose** under Rule 404(b)
- (2) The evidence must be **relevant** under Rule 401;
- (3) The **probative value** of the evidence must not be substantially outweighed by its potential for unfair prejudice under Rule 403; and
- (4) The district court, upon request, must **instruct the jury** pursuant to Rule 105 to consider the evidence only for the purpose for which it is admitted.



Rule 404(b) and the Doctrine of Chances

- The “Doctrine of Chances” is the idea that a person is unlikely to have been coincidentally and innocently involved in similar events repeatedly
 - It is also the title of the first book on probability theory, by Abraham de Moivre, published in 1718
- Doctrine of chances was famously employed in English law in 1915, in the case of *Rex v. Smith*, which was also known as the Brides in the Bath Murders.
- George Joseph Smith sentenced to death for the murder of Victim #3, which murder was proved through evidence that two of Smith’s prior wives had also supposedly drowned in their baths in similar circumstances.
- *See also US v. Henthorn*, 864 F.3d 1241 (10th Cir. 2017)



- “The man who wins the lottery once is envied; the one who wins it twice is investigated.” *United States v. York*, 933 F.2d 1343, 1350 (7th Cir. 1991)



Rule 404(b) and the Doctrine of Chances

- The Doctrine of Chances can be used to explain how extrinsic evidence is being used for a permissible purpose, rather than as character evidence.
- For example:
 - What are the chances the defendant did not know something?
 - What are the chances that a particular occurrence wasn't planned?
 - What are the chances that a particular incident was an accident?



FRE 404(b): Particular Cases

- Evidence that employer had suffered prior adverse verdict in women's pay discrimination action was admissible in female applicant's Title VII action for sex discrimination to rebut employer's contention that it chose not to hire applicant only because of administrative concerns. [Vance v. Union Planters Corp., C.A.5 \(Miss.\) 2000, 209 F.3d 438.](#)



FRE 404(b): Particular Cases

- Female detainee, who allegedly was raped by corrections officer and others, was entitled to some discovery respecting non-sexual misconduct by officer during course of his employment at detention center, notwithstanding contentions of officer and center's private operator that information in documents was private or not at issue in detainee's civil action. Evidence that officer repeatedly breached employment policies and procedures could be relevant to detainee's claim against operator for its alleged policy, custom, or practice of conscious disregard to rights of female detainees and to demonstrate that officer acted with requisite intent to support award of punitive damages against him, and evidence that officer engaged in misconduct could be admissible under other acts rule to show, inter alia, motive or opportunity. [Martinez v. Cornell Corrections of Texas, Inc., D.N.M.2005, 229 F.R.D. 211](#)



FRE 404(b): Particular Cases

- Admission of prior bad acts evidence of previous excessive noise problems in retail tenant's other stores permitted, in action by landlord and other tenant against retail tenant for breach of implied covenant of good faith and fair dealing, under Vermont law, in connection with retail tenant's playing of loud music. Evidence was probative of tenant's intent, plan, motive, and pattern of behavior following execution of lease agreement, and was relevant to prove that tenant intentionally breached implied covenant of good faith and fair dealing, as it tended to show that retail tenant knew that its music had disruptive effect and continued to play it at excessive levels despite that knowledge. [Howard Opera House Associates v. Urban Outfitters, Inc., C.A.2 \(Vt.\) 2003, 322 F.3d 125](#)



FRE 404(b): Particular Cases

- Architectural firm, alleging home builder's infringement of its copyrighted design plan, was entitled to discover information about another plan that builder had also allegedly stolen; information potentially showed that builder had engaged in plan, pattern, or practice of copying designs, and thus might undercut builder's “coincidence” defense and be relevant to issue of willfulness. [Frank Betz Associates, Inc. v. Jim Walter Homes, Inc., D.S.C.2005, 226 F.R.D. 533](#)



Sample Pattern Jury Instruction (5th Cir.)

- **2.10 Similar Acts**

Evidence that an act was done at one time or on one occasion is not any evidence or proof whatsoever that the act was done in this case.

Then how may you consider evidence of similar acts?

You may consider evidence of similar acts for the limited purpose of showing [name]’s [motive], [opportunity], [intent], [knowledge], [plan], [identity], or [absence of mistake or accident], which is at issue in this case.

Such evidence may not be considered for any other purpose whatsoever. You may not use the evidence to consider or reflect [name]’s character.



Rule 403: Sometimes the Rule 404(b) Evidence Is Just Too Good

- Admission of Rule 404(b) evidence is always subject to a Rule 403 analysis
- *Wells v. City of New Orleans*, EDLA # 07-9488
 - The claim in *Wells* was that defendant New Orleans Police Officers had choked a man to death while attempting to arrest him
 - One of the defendant officers had been federally indicted for allegedly participating in the shooting of civilians on the Danziger Bridge after Hurricane Katrina. The shooting occurred approximately fifteen months before the decedent's death in *Wells*.
 - The defendant had been indicted by Louisiana state authorities for the shooting prior to the death in *Wells*, but those charges were dismissed.
 - The defendant was ultimately convicted and sentenced to federal prison for his role in the Bridge shootings
 - Although there were cogent arguments that the Bridge shooting evidence was intrinsic to claims against City, and also permissible under Rule 404(b) against individual defendant, Judge in *Wells* excluded all evidence of the Bridge shooting incident under Rule 403

