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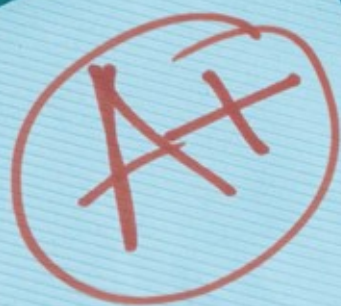
*A Checklist Approach to
Solving Evidence Problems*

Acing Evidence

Third Edition

Aviva Orenstein

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Solving Evidence Problems

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Aviva Orenstein
Professor of Law & Val Nolan Fellow
Indiana University Maurer School of Law

Series Editor
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“Take nothing on its looks; take everything on evidence. There is no better rule.” —Charles Dickens, Great Expectations

For Sylvia Orenstein, a loving mother, dedicated appellate public defender, and indomitable spirit whose acts of loving-kindness enrich everyone who knows her

Acknowledgments

Special thanks and deep appreciation go to Ben Adams, Indiana University Maurer Class of 2020, for his excellent research and terrific edits on this third edition. I continue to feel thankful to those who worked on earlier editions: Alexandra Black, Jocelyn Bowie, Mary Beth Boyer, Laura Buchanan, Hannah de Keijzer, Elliot Edwards, Ryan Kelly, Sylvia Orenstein, and Caroline Wong. I am also indebted to my coauthors of *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials*, Roger Park, Steven Goldstein, Dale Nance, and the late David Leonard, who taught me much about evidence. Finally, I am grateful for students' kind reception of *Acing Evidence*. Thanks especially to my students at Indiana University Maurer School of Law for helping me improve this study guide and making evidence law so much fun to teach.

Introduction

Studying evidence rewards both detail-oriented and creative types. To understand evidence law, you need to master intricate and occasionally counterintuitive rules. Then you must put together everything you have learned to analyze a single piece of evidence that may present multiple questions regarding admissibility. The chapters in this book are arranged to replicate the order in which a lawyer would consider a piece of evidence, starting with relevance and ending with questions for appeal. Such an analysis requires a methodical approach. A checklist will help you organize the order of inquiry and ensure that you did not omit an important step. Checklists are essential tools in many disciplines. They “provide a kind of cognitive net,”¹ helping pilots work systematically and making surgeons less likely to leave a sponge inside a patient. By routinizing the inquiry, checklists allow you to organize your approach, navigate the rules, notice patterns, and identify what might be unique about a challenging question.

Evidence checklists provide advocates with the structural foundation to build creative arguments. Once the technical aspects of evidence have been parsed and organized using your checklist, you will be able to make creative arguments, crafting compelling theories about relevance, prejudice, and evidence policy.

Acing Evidence prepares you for your evidence exam by reviewing key concepts and walking you through a checklist that assists you in applying the Federal Rules of Evidence to a fact pattern or problem. Examples in the text and sample problems at the end of every chapter illustrate how to apply the various checklists. In addition to the checklists at the end of individual chapters, this book provides a Meta Checklist that traces the entire process of admitting or excluding a piece of evidence.

Acing Evidence can also help you prepare for the evidence portion of the multi-state bar exam. Later in your professional career, the checklists can assist you in drafting summary judgment motions (where the evidence is restricted to what is admissible), arguing motions in limine, preparing for trial, arguing a point of evidence at trial, and formulating an effective appeal.

Although this book occasionally refers to common-law principles, it centers on the Federal Rules of Evidence, which the vast majority of states have adopted as their template, though, significantly, not California and New York. Even the states that model their evidence rules on the federal standards may choose not to adopt a particular rule or may use language identical to the federal rule but apply their own interpretation. Therefore, be sure to check for state variations if you are using this book to navigate evidence in state court.

Finally, it is important to note that the evidence rules do not apply in every situation. Some administrative law courts operate with relaxed evidence rules, and the Federal Rules of Evidence do not apply to sentencing.

I hope you find *Acing Evidence* useful. I welcome any suggestions. If you choose to delve more deeply into an issue or need to find case law support for evidence arguments, I recommend that you consult the one-volume hornbook, Park, Leonard, Orenstein Goldberg & Nance, *Evidence Law: A Student's Guide to the Law of Evidence as Applied in American Trials* (4th edition).

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¹ Atul Gawande, *The Checklist Manifesto: How to Get Things Right* 48 (2009).

Note on the Third Edition

This edition corrects some errors in the second edition, adds more examples, and reflects recent amendments and proposed changes to the Federal Rules of Evidence.

Note on the Use of the Third- Person Singular

Out of respect for the increasing awareness of language's power to include or exclude members of our society, I have attempted to avoid gendered pronouns when referring to unnamed individuals. Although use of the "singular they" remains controversial among grammarians, I occasionally will use "they" to refer to an individual.

About the Author

Aviva Orenstein, Professor of Law and Val Nolan Fellow, teaches Evidence, Children and the Law, and Civil Procedure at Indiana University Maurer School of Law. She has recently served as the Leonard D. Fromm Associate Dean for Students. After graduating Cornell Law School, Professor Orenstein clerked for the late Edward R. Becker of the U.S. Court of Appeals for the Third Circuit. Her academic writing addresses the nexus of evidence and culture, with a focus on gender. Professor Orenstein volunteers as a pro bono attorney in family law cases, particularly those involving guardianship, domestic violence, and abuse and neglect of children. She has three wonderful adult sons, David, Michael, and Benjamin Greenberg, who were not abused (and hardly neglected) in the writing of this book. Her greatest joy, which is temporarily on hold as the world weathers the COVID-19 pandemic, is spending time with her two grandsons, Jacob and Neel. Orenstein's debut novel, *Fat Chance*, which is much more fun to read than *Acing Evidence*, came out in February 2016.

Table of Contents

[ACKNOWLEDGMENTS](#)

[INTRODUCTION](#)

[NOTE ON THE THIRD EDITION](#)

[NOTE ON THE USE OF THE THIRD-PERSON SINGULAR](#)

[ABOUT THE AUTHOR](#)

[Chapter 1. Relevance](#)

[§ 1.1 Logical Relevance: An Easy-to-Meet Standard](#)

[§ 1.2 When Is Relevant Evidence Inadmissible?](#)

[§ 1.3 Fed. R. Evid. 403: The Most Important Evidence Rule](#)

[§ 1.4 Understanding the Rule 403 Dangers](#)

[§ 1.5 *Old Chief v. United States*](#)

[§ 1.6 Motions In Limine](#)

[§ 1.7 Limiting Instructions](#)

[Relevance Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 2. Character](#)

[§ 2.1 General Rule](#)

[§ 2.2 Reasons for the Ban on Character Evidence](#)

[§ 2.3 Exceptions to the General Ban on Propensity
Evidence](#)

[§ 2.4 Character of the Accused in a Criminal Case](#)

[§ 2.5 Character of the Victim in a Criminal Case](#)

[§ 2.6 Rape Shield](#)

[§ 2.7 Propensity of the Accused to Commit Sex Crimes](#)

[§ 2.8 Exception for Character of Witnesses for Honesty or
Dishonesty](#)

[§ 2.9 Exception for Impeachment by Evidence of Criminal Conviction](#)

[§ 2.10 When Character Is an Essential Element](#)

[§ 2.11 Evidence Used for a Non-Character Purpose](#)

[§ 2.12 Habit](#)

[Character Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

Chapter 3. Other Relevance Rules

[§ 3.1 Introduction](#)

[§ 3.2 Subsequent Remedial Measures Rule](#)

[§ 3.3 Offers to Compromise \(Settlement Negotiations and Agreements\)](#)

[§ 3.4 Evidence of Payment of Medical and Similar Expenses](#)

[§ 3.5 Plea Bargains/Nolo Contendere and Statements Made in Plea Bargaining](#)

[§ 3.6 Evidence of Liability Insurance](#)

[Other Relevance Rules Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

Chapter 4. Impeachment and Rehabilitation of Witnesses

[§ 4.1 Introduction to Impeachment of Witnesses](#)

[§ 4.2 Impeachment for Bias](#)

[§ 4.3 Impeachment with Evidence of Impairment: Defects in Perception or Cognition](#)

[§ 4.4 Impeachment Showing the Untruthful Character of a Witness](#)

[§ 4.5 Impeachment of a Witness with Evidence of Prior Convictions](#)

[§ 4.6 Crimes Punishable for More than One Year That Do Not Involve False Statement or Dishonesty](#)

[§ 4.7 Impeachment by Contradiction](#)

[§ 4.8 Impeachment by Prior Inconsistent Statement](#)

[§ 4.9 Improper Witness Rehabilitation](#)

[Impeachment Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 5. Definition of Hearsay](#)

[§ 5.1 What Qualifies as a Statement?](#)

[§ 5.2 When Is a Statement Hearsay?](#)

[§ 5.3 Who Is the Declarant?](#)

[§ 5.4 What Does “Out-of-Court” Mean?](#)

[§ 5.5 When Is a Statement Being Used for the Truth of the Matter Asserted?](#)

[§ 5.6 What Are the Reasons for the Hearsay Rule?](#)

[§ 5.7 Out-of-Court Statements That Do Not Fit the Hearsay Definition](#)

[Hearsay Definition Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 6. Prior Statements by Witnesses; Statements by Party-Opponents](#)

[§ 6.1 Introduction to the Doublespeak of Rule 801\(d\) “Not Hearsay” Exemptions](#)

[§ 6.2 Prior Statements of Witnesses Generally](#)

[§ 6.3 Prior Inconsistent Statements](#)

[§ 6.4 Prior Consistent Statements](#)

[§ 6.5 Prior Statements of Identification](#)

[§ 6.6 Statements of a Party-Opponent](#)

[§ 6.7 Silence as a Statement](#)

[§ 6.8 Statements of Agents and Employees](#)

[§ 6.9 Co-Conspirator Statements](#)

[§ 6.10 “Bootstrapping”](#)

[Prior Statements Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 7. Hearsay Exceptions](#)

[§ 7.1 What Is the Effect of a Hearsay Statement That Fits Within an Exception?](#)

[§ 7.2 Distinction Between Fed. R. Evid. 803 and Fed. R. Evid. 804](#)

[§ 7.3 Policy of Hearsay Exceptions](#)

[§ 7.4 Requirement of Personal Knowledge](#)

[§ 7.5 The Present Sense Impression](#)

[§ 7.6 The Excited Utterance](#)

[§ 7.7 Direct Evidence of Declarant’s Present State of Mind or Physical Condition](#)

[§ 7.8 Statements for Medical Diagnosis or Treatment](#)

[§ 7.9 Past Recollection Recorded](#)

[§ 7.10 Refreshing Memory](#)

[§ 7.11 Business Records](#)

[§ 7.12 Public Records](#)

[§ 7.13 Police Records as Business Records](#)

[§ 7.14 Learned Treatise](#)

[§ 7.15 Ancient Documents](#)

[§ 7.16 Defining Unavailability](#)

[§ 7.17 Former Testimony](#)

[§ 7.18 Dying Declarations](#)

[§ 7.19 Statements Against Interest](#)

[§ 7.20 Forfeiture by Wrongdoing](#)

[§ 7.21 The Residual Exception to the Hearsay Rule](#)

[§ 7.22 Hearsay Within Hearsay](#)

[Hearsay Exceptions Checklist](#)

Illustrative Problems
Points to Remember

Chapter 8. Confrontation

§ 8.1 Introduction to the Confrontation Clause

§ 8.2 Comparing Hearsay and Confrontation

§ 8.3 *Crawford v. Washington*

§ 8.4 Exploring What Is a Testimonial Statement:
Ongoing Emergencies and Primary Purposes

§ 8.5 Forfeiture by Wrongdoing: *Giles*

§ 8.6 Dying Declarations

§ 8.7 Lab Reports and Confrontation: *Melendez-Diaz*,
Bullcoming, and *Williams*

§ 8.8 Methods of Confrontation

Confrontation Checklist

Illustrative Problems

Points to Remember

Chapter 9. Competence

§ 9.1 Who Is a Competent Witness?

§ 9.2 The Federal Rules of Evidence Presume
Competence

§ 9.3 How Are Witness Deficits Handled?

§ 9.4 What Happens in Diversity Cases?

§ 9.5 Lay or Expert Testimony by an Attorney or Judge in
the Case

§ 9.6 Juror Testimony

Competence Checklist

Illustrative Problem

Points to Remember

Chapter 10. Privileges

§ 10.1 What Is a Privilege?

§ 10.2 Policy of Privileges

§ 10.3 Which Privilege Law Applies in Federal Court?

[§ 10.4 The Lawyer-Client Privilege](#)

[§ 10.5 The Limited Protection for a Lawyer's Work Product and Other Matters Prepared in Anticipation of Litigation](#)

[§ 10.6 Disclosure by Mistake](#)

[§ 10.7 Physician-Patient Privilege](#)

[§ 10.8 Psychotherapist-Patient Privilege](#)

[§ 10.9 Marital Privileges](#)

[§ 10.10 The Privilege Against Self-Incrimination](#)

[§ 10.11 Other Privileges](#)

[Privileges Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 11. Opinion Evidence and Expert Testimony](#)

[§ 11.1 Lay Opinion](#)

[§ 11.2 The *Frye* "General Acceptance" Standard for Scientific Testimony and the *Daubert* Test](#)

[§ 11.3 Overview of Expert Testimony](#)

[§ 11.4 The Trial Judge as Gatekeeper](#)

[§ 11.5 The Basis of Opinion Testimony by Experts](#)

[§ 11.6 Opinions on the Ultimate Issue at Trial](#)

[§ 11.7 Legal Conclusions](#)

[Opinions and Experts Checklist](#)

[Illustrative Problem](#)

[Points to Remember](#)

[Chapter 12. Judicial Notice](#)

[§ 12.1 Role of Judicial Notice](#)

[§ 12.2 Adjudicative Versus Legislative Facts](#)

[§ 12.3 When Should a Court Take Judicial Notice of an Adjudicative Fact?](#)

[§ 12.4 How Should Judicial Notice Be Raised?](#)

[§ 12.5 Timing of Judicial Notice; Opportunity to Be Heard](#)

[§ 12.6 Ability to Contest](#)

[§ 12.7 Effect on the Jury](#)

[§ 12.8 Judicial Notice and the Internet](#)

[Judicial Notice Checklist](#)

[Illustrative Problem](#)

[Points to Remember](#)

Chapter 13. Burdens and Presumptions

[§ 13.1 Burdens](#)

[§ 13.2 Presumptions in Civil Cases](#)

[§ 13.3 Presumptions in Diversity Cases](#)

[Presumptions Checklist](#)

[Illustrative Problem](#)

[Points to Remember](#)

Chapter 14. Authentication

[§ 14.1 General Principle of Authentication](#)

[§ 14.2 Self-Authentication](#)

[§ 14.3 How to Authenticate Non-Self-Authenticating Items](#)

[§ 14.4 Chain of Custody](#)

[§ 14.5 Demonstrative Exhibits](#)

[§ 14.6 Photograph](#)

[Authentication Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

Chapter 15. The Best Evidence Rule

[§ 15.1 Overview of the Best Evidence Rule](#)

[§ 15.2 To What Types of Items Does the Best Evidence Rule Apply?](#)

[§ 15.3 When Is the Proponent Trying to “Prove the Contents” of a Writing, Photograph, or Recording?](#)

[§ 15.4 When Do the Rules Insist on an Original \(as Opposed to a Mechanically Duplicated Copy\)?](#)

[§ 15.5 When Non-Production Is Allowed](#)

[§ 15.6 Preference for Certified Copies of Public Documents](#)

[Best Evidence Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 16. Evidence on Appeal](#)

[§ 16.1 Appealing the Trial Court's Mistakes in Admitting or Excluding Evidence](#)

[§ 16.2 "Harmless Error"](#)

[§ 16.3 The Importance of Timely Objection](#)

[§ 16.4 Offer of Proof](#)

[§ 16.5 Providing the Correct Reason](#)

[§ 16.6 Plain Error](#)

[§ 16.7 Standards of Review on Appeal](#)

[Evidence on Appeal Checklist](#)

[Illustrative Problems](#)

[Points to Remember](#)

[Chapter 17. Notes on Exam Preparation](#)

[Chapter 18. Meta Checklist](#)

[Master Checklist](#)

[TABLE OF RULES](#)

Acing
Evidence
Third Edition

CHAPTER 1

Relevance

§ 1.1 Logical Relevance: An Easy-to-Meet Standard

[[Fed. R. Evid. 401](#)]

Relevance is a core concept of evidence. It is the first of many questions one asks about a piece of evidence to determine its admissibility. [Fed. R. Evid. 401](#), which addresses logical relevance, defines relevant evidence as evidence that has *any* tendency to make a material fact (a “fact of consequence”) more or less likely. Thus, [Rule 401](#) is a very loose and porous standard—lots of evidence will be deemed relevant, and only in a few areas will there be a serious debate as to the logical relevance of the evidence that a party wishes to introduce.

The common law divided logical relevance into two distinct categories:

- (1) *Materiality*, which is to say whether the evidence logically relates to a point in the case. Evidence is immaterial when it is offered to prove a fact that is not in issue; and
- (2) *Relevance*, which is to say whether the logical inferences actually make sense. Evidence is irrelevant if it cannot logically establish the fact that the proponent asserts it will prove.

[Fed. R. Evid. 401](#) does not distinguish between materiality and relevance, and instead combines them into one rule.

The mere fact that an issue is not in controversy (and a party is willing to stipulate to it) does not mean, under the low standard of [Fed. R. Evid. 401](#), that the evidence is irrelevant. However, sometimes a fact will simply not be relevant.

EXAMPLE

Plaintiff sues the Johnny-Be-Good Company in product liability for negligent design of an infant child car seat.

Evidence that the workers on the assembly line were regularly drunk and high would not be relevant (under the old common law, we would say it was not material). Such evidence would be relevant in an action for negligence, but has no tendency to make the fact of consequence, product design, more or less likely.

§ 1.2 When Is Relevant Evidence Inadmissible?

[Fed. R. Evid. 402]

Fed. R. Evid. 402 provides that all relevant evidence is admissible *unless* some other provision—that is, a constitutional provision, statute, or rule—excludes the evidence. Consequently, Fed. R. Evid. 402 creates a large pile of relevant evidence that is deemed admissible unless it is excluded some other way, most typically by some other evidence rule. When analyzing an evidence problem, one must decide whether relevant evidence is somehow otherwise inadmissible. Because of this design, most evidence rules are rules of exclusion.

§ 1.3 Fed. R. Evid. 403: The Most Important Evidence Rule

[Fed. R. Evid. 403]

Where Rule 401 is concerned with *logical* relevance, Fed. R. Evid. 403 governs *practical* relevance. It would be overwhelming, unfair, and impractical to admit all logically relevant evidence. Therefore, Rule 403 further limits the amount of admissible evidence by screening evidence for practical relevance. Even if evidence passes the admission-happy relevance test of Rule 401, the trial court may nevertheless exclude evidence that is unfairly prejudicial, confusing, distracting, or simply not worth the bother. As illustrated below, Rule 403 excludes relevant evidence only if the probative value of the evidence is *substantially* outweighed by the dangers of unfair prejudice, confusion of issues, distraction, or waste of time. Although many Federal Rules of Evidence exclude specific types of evidence, Rule 403, which applies to both civil and criminal cases, is a more general and pervasive rule. Its balancing test allows an attorney to argue that the court should exercise its discretion to exclude otherwise admissible evidence. Thus, the scope of Rule 403 is much

broad than the other rules; it may be applied to *any* piece of evidence.

To understand [Fed. R. Evid. 403](#), imagine a set of balance scales, where the left side is probative value and the right side is one of the Rule 403 “dangers” (unfair prejudice, confusion, distraction, or waste of time).



If the probative value and “dangers” are equal, the trial judge should admit the evidence.	If the “dangers” somewhat outweigh the probative value, the trial judge should admit the evidence.	If the probative value is slight, but the “dangers” are also slight, the trial judge should admit the evidence.	If the probative value is great and the “dangers” are also great, the trial judge should admit the evidence.	Only if the “dangers” substantially outweigh the probative value should the trial judge exclude the evidence.
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Reduced to a formula, the rule provides that a trial judge should exclude the evidence only if:

$$[\text{Dangers}] \quad \text{substantially} \quad > \quad [\text{Probative Value}]$$

It is insufficient for the court to find that one of the enumerated dangers simply exists or somehow outweighs the probative value of the evidence. To exclude the evidence, the danger must *substantially* outweigh the probative value. Thus, the greater the probative value of the evidence, the more difficult it will be to exclude the evidence under [Fed. R. Evid. 403](#). The converse is also true: if the probative value of the evidence is slight, the degree of danger necessary to satisfy the [Rule 403](#) standard can be less.

In conducting the Rule 403 balance, the district court will also weigh the effect of giving the jury a limiting instruction under [Fed. R. Evid. 105](#).¹ A limiting instruction restricts the evidence to its

permissible use and warns about the impropriety of using the evidence for a prohibited purpose.

§ 1.4 Understanding the Rule 403 Dangers

The primary aim of [Fed. R. Evid. 403](#) is to minimize jurors' consideration of marginally relevant but emotionally powerful facts. Rule 403 grants the trial judge wide discretion to exclude evidence on grounds that it will prejudice, confuse, or mislead the jury. The trial judge operates with tremendous discretion because any ruling under [Fed. R. Evid. 403](#) must be contextualized within the other evidence of the case, and the trial judge is in the best position to make that decision. However, trial judges should not use [Fed. R. Evid. 403](#) to exclude evidence based on their personal assessments of persuasiveness or witnesses' credibility.

Four Rule 403 “dangers” can render otherwise relevant evidence inadmissible:

- “Unfair prejudice” means an appeal, often an emotional one, that invites the fact-finder to dislike a party, punish someone for an action not at issue in the case, or decide on a basis prohibited by another rule;
- “Confusion” means that the evidence, while logically relevant, may cause the jury to misunderstand key issues or facts in the case;
- “Distraction” means that the evidence, while logically relevant, may misdirect the finder of fact, shifting the focus to an immaterial issue or a prohibited line of reasoning; and
- “Waste of time” refers to tangential matters and cumulative evidence that add nothing new and use up precious court time and resources.

[Fed. R. Evid. 403](#) also serves a vital function in determining what to do with evidence that is admissible for one purpose but is inadmissible for another. It provides a mechanism for exclusion if the danger that the jury will misuse the evidence substantially outweighs the probative value of the evidence's permissible use.

Some other rules, such as Rape Shield ([Fed. R. Evid. 412](#)) and Impeachment by Evidence of a Criminal Conviction ([Fed. R. Evid. 609](#)), use language deceptively similar to that in [Fed. R. Evid. 403](#). Watch out; these other rules function very differently.

§ 1.5 *Old Chief v. United States*

In [*Old Chief v. United States*, 519 U.S. 172 \(1997\)](#), the Accused was charged with being a felon in possession of a firearm, assault with a deadly weapon, and using a firearm in connection with a crime. He had previously been convicted of assault causing serious bodily injury, placing him within the scope of a federal statute prohibiting some felons from possessing firearms. The Court held that the trial court abused its discretion in admitting the details of the Accused's prior crime, given that the Accused was willing to stipulate to the fact of his felony status. Though logically relevant under Rule 401, admission of the facts relating to his prior felony failed [Rule 403](#) because of the unfair prejudice.

The Court explained that in assessing the probative value of a piece of evidence, the judge should consider available substitutes for that evidence. Given the Accused's willingness to stipulate to his status as a felon, the specific nature of his prior crime had low probative value. On the other hand, the unfair prejudice of having the jury learn about the details of his prior crime was substantial, creating the risk that the jury would convict based on their beliefs about the Accused's propensity to assault or their desire to prevent him from committing future crimes, regardless of his guilt in the present case.

Acknowledging that "a syllogism is not a story," the Court conceded in dicta that the prosecution is entitled to tell a colorful story with descriptive richness. The Court also noted that in some cases the absence of proof can cause the jury to draw unfair inferences unfavorable to the prosecution. Nevertheless, the Court held that these principles did not apply in *Old Chief*, because proof of felony status was not probative for any other point and left no gap in the narrative.

As a practical matter, the requirement that the prosecution must accept an accused's stipulation has been limited to cases like *Old Chief* where the stipulation relates to status and the underlying facts of the former conviction have no relevance. By contrast, when evidence is admitted to show intent, motive, plan, etc.,² the underlying facts of the prior bad act may indeed increase relevance and the prosecutor may not be required to accept the stipulation.

§ 1.6 *Motions In Limine*

Any party may make a motion in limine, which requests the court to make an evidentiary ruling before trial. Although sometimes the rulings are preliminary and may be revisited by

the judge at trial, parties will often structure their trial strategy based on the court's rulings. Sometimes, based on a court's ruling in limine, an accused will choose to take a guilty plea or a party will choose to settle.

§ 1.7 Limiting Instructions

[[Fed. R. Evid. 105](#)]

If an out-of-court statement is admissible for one purpose but not for another, under [Fed. R. Evid. 105](#) the objecting party is entitled to a limiting instruction telling the jury the proper purpose and the forbidden purpose.

If the danger that the jury will misuse the statement substantially outweighs the probative value of the statement when used for its limited purpose, then the trial judge may exclude the statement altogether under [Rule 403](#).

Sometimes an out-of-court statement can be redacted to remove inadmissible portions or to avoid the danger that the jury will use the statement for an impermissible purpose. For example, the patient's account of who was at fault in an automobile accident can be removed from a hospital medical record, or references to the guilt of a co-defendant might be removed from a confession. The remaining portion of the statement would then be admissible.

As a practical matter, seasoned litigants often decline to ask for limiting instructions, believing that they sometimes draw attention to the questionable evidence and, ironically, remind the jury of the inadmissible purpose.³



RELEVANCE CHECKLIST



1. Does the evidence proffered have *any* tendency to make a material fact more or less likely? (Remember, this is an easy standard to satisfy. The argument does not have to be

7

ultimately persuasive on the point in question, it just has to have some small probative value.)

If yes: The evidence is relevant under [Fed. R. Evid. 401](#) and the judge should weigh the admissibility of the evidence under [Fed. R. Evid. 403](#). Go to Step 2.

If no: The evidence is not relevant under [Fed. R. Evid. 401](#) and should not be admitted.

2. In setting out the factors for the Rule 403 balance, determine how much probative value the piece of evidence has standing

alone. Go to Step 3.

3. Is there alternative evidence in the case that proves the proposition in question in a less prejudicial or distracting manner?

If yes: The probative value of the evidence is diminished by the availability of other evidence on the same point. Go to Step 4.

If no: The probative value of the evidence is arguably enhanced. Go to Step 4.

4. In setting out the factors for the Rule 403 balance, consider the unfair prejudice/confusion/distraction/waste of time that the evidence might generate. Go to Step 5.

5. Are the Rule 403 “dangers” diminished by a limiting instruction under [Fed. R. Evid. 105](#)?

If yes: Discount the unfair prejudice in conducting the Rule 403 balance. If the evidence is ultimately admitted, use a limiting instruction. Go to Step 6.

If no: Go to Step 6.

6. Conduct the Rule 403 balance: Does the unfair prejudice/confusion/distraction/waste of time *substantially* outweigh the probative value?

If yes: The evidence is excluded.

If no: The evidence is admissible subject to other rules (such as character and hearsay).

ILLUSTRATIVE PROBLEMS

■ PROBLEM 1.1 ■

Q: Agatha, an investment banker with a high six-figure salary, is accused of mail and wire fraud in connection with a scheme to bilk

elderly investors of their monthly social security benefits. To show why Agatha needed the money despite her large income, the Prosecutor wishes to introduce Agatha’s extravagant spending habits, including her purchase of expensive designer clothes and jewelry, her taste in high-end restaurants, and her indulgence in first-class world travel. Agatha objects that evidence of her high-spending lifestyle is irrelevant and unfairly prejudicial. How should the court rule?

A: Evidence of Agatha’s spending habits is logically relevant because it helps to explain why a woman with such a high income might still feel the need to amass more money. Therefore, evidence of Agatha’s extravagant lifestyle is relevant under [Fed.](#)

[R. Evid. 401](#) because it makes a fact of consequence—her motive to get more money—more likely.

Turning to practical relevance under [Fed. R. Evid. 403](#), however, the trial court will probably exercise its discretion to exclude at least some of the evidence. The probative value is slight because a jury generally will not require reasons or need to hear about specific expenditures to imagine why a person might want more money. Most people like money.

On the other side of the balance, the unfair prejudice is potentially high. The jury may simply dislike or be envious of Agatha because of her extravagant lifestyle. Her extravagant lifestyle may make her less sympathetic, particularly in contrast to the elderly pensioners whom she is accused of defrauding. The jury may adopt an “eat the rich” attitude. Also, the distraction caused by all the bling, furs, fancy meals, and jet-setting travel would substantially outweigh the probative value of the evidence. Therefore, the distraction and unfair prejudice of Agatha’s lifestyle would substantially outweigh the minimal probative value of the evidence of her high-flown lifestyle. To the extent Agatha made a direct argument, that as a wealthy woman, she had no need to defraud the elderly, her spending and expenses become more probative. Even so, using Rule 403 the judge should avoid waste of time and limit detailed and inflammatory evidence of her purchases and lifestyle.

■ PROBLEM 1.2 ■

Q: Dr. Sheppard is on trial for murdering his wife, who died of poison ingestion. Dr. Sheppard claims that his wife took her own life. The Prosecutor offers evidence that before her death, Mrs. Sheppard accused Dr. Sheppard of poisoning her. The prosecution claims that the statement, though inadmissible to prove the truth of what it

9

asserted (to prove that Dr. Sheppard actually poisoned her),⁴ should be admitted for the limited purpose of showing that Mrs. Sheppard possessed a “vital urge” and was not in a suicidal frame of mind.

A: In this case, we have a piece of evidence that is inadmissible for one purpose (the assertion that Dr. Sheppard was the poisoner) but admissible on another theory (to prove Mrs. Sheppard’s will to live and therefore contradict Dr. Sheppard’s defense). Certainly, the evidence is logically relevant under [Fed. R. Evid. 401](#) because it makes the fact of Mrs. Sheppard’s suicide less likely. However, the evidence will probably be excluded under a [Rule 403](#) balance. The probative value of Mrs. Sheppard’s state of mind is substantially outweighed by the unfair prejudice of the impermissible use of a powerful accusatory voice from the grave, condemning Dr. Sheppard as a murderer. Although, under

[Fed. R. Evid. 105](#), the judge could give the jury a limiting instruction directing the jurors to consider the evidence only to prove Mrs. Sheppard's state of mind, and not to prove that Dr. Sheppard poisoned her, the instruction would be ineffective. The highly emotional and evocative accusation by the dying woman would overwhelm the legitimate purpose of proving her state of mind, and the trial judge should use [Fed. R. Evid. 403](#) to exclude the evidence.

■ PROBLEM 1.3 ■

Q: Don is accused of driving carelessly and causing an accident. Is the fact that Don had a fight with his husband on the morning of the accident relevant to his liability for the car accident?

A: Under [Fed. R. Evid. 401](#), the fact that Don had a fight with his husband has some tendency to make a fact of consequence more likely. Don's argument at home may have increased his agitation or distraction. It therefore passes the test of logical relevance. However, Don's fight with his husband will probably not survive the Rule 403 balance. Although it is minimally probative of a fact at issue (indicating anger or distraction because of thoughts about domestic problems), the probative value is low because the chain of inference is attenuated. The trial court should use its discretion to exclude the evidence under [Fed. R. Evid. 403](#) because of the waste of time and possibly unfair prejudice that might result if the jury were to see Don as angry or unlikeable, or if the Plaintiff is trying to tap into any homophobic bias. The waste of time and the unfair prejudice would substantially outweigh the minimal probative value of evidence of his domestic dispute.

POINTS TO REMEMBER

- Relevance is the first question one must ask about any piece of evidence.
- Logical relevance, governed by [Fed. R. Evid. 401](#), is an easy standard to meet, requiring that the evidence has some tendency, no matter how small, to make a fact of consequence more or less likely.
- Sometimes a piece of evidence is not relevant because it does not address a fact of consequence. In the older parlance of the common law, it is not material. To figure out whether a fact is a fact of consequence, one must know the substantive law.
- Even when evidence is logically relevant, the trial judge may exclude it if the probative value of the evidence is substantially outweighed by unfair prejudice, confusion, distraction, or waste of time. This Rule 403 balancing test is pervasive throughout the evidence rules.

¹ See § 1.7.

² See § 2.11 (discussing [Fed. R. Evid. 404\(b\)\(2\)](#), use of other crimes, wrongs, or acts for non-propensity purposes).

³ See J. Alexander Tanford, *Thinking About Elephants: Admonitions, Empirical Research and Legal Policy*, 60 U.M.K.C. L. REV. 645 (1992).

⁴ This is a hearsay objection. See §§ 5.1–5.5.

CHAPTER 2

Character

§ 2.1 General Rule

[[Fed. R. Evid. 404\(a\)\(1\)](#); [Fed. R. Evid. 404\(b\)\(1\)](#)]

Evidence of character traits or predispositions is generally not admissible to show that people act according to their character on any particular occasion, [Fed. R. Evid. 404\(a\)\(1\)](#). Such evidence is called “propensity evidence” and is generally prohibited in both criminal and civil cases, though, as outlined below, there are some important exceptions.

EXAMPLE

Evidence that Charlene is generally a careless driver is not admissible to show that Charlene was therefore more likely to have caused the traffic accident at issue.

Similarly, specific crimes, wrongs, or acts cannot be admitted to show that a person tends to commit that type of behavior and therefore probably engaged in similar acts again, [Fed. R. Evid. 404\(b\)\(1\)](#).

EXAMPLE

Evidence that Audrey has a previous arrest for drunk driving is not admissible to show that she was probably intoxicated when she operated the heavy machinery that caused the accident at issue. Even multiple previous drunken incidents, including convictions, are not admissible to show Audrey’s propensity to drink.

§ 2.2 Reasons for the Ban on Character Evidence

Traditionally, Anglo-American law rejects character evidence, expressing a preference for judging people on their actions regarding the event in question, rather than on their personalities, tendencies, or past acts. Character evidence tends not to be particularly probative (at least that is what psychologists tell us). However,

despite its slight probative value, character evidence may disproportionately influence jurors, who tend to give it too much credence. Negative character traits can induce the trier-of-fact to dislike a party or witness, perhaps even to the point of (consciously or not) punishing the person for prior misconduct that is not charged in the present case. Finally, Americans have a basic belief in the possibility of improvement and self-reinvention, and therefore, as an acknowledgement of the idea that people can change, it makes sense to reject character evidence.

§ 2.3 Exceptions to the General Ban on Propensity Evidence

It is crucial to appreciate the scope of the general ban on character evidence; most character evidence is simply not admissible. However, there are five categories of exceptions:

- (1) Character of the accused in a criminal case, [Fed. R. Evid. 404\(a\)\(2\)\(A\)](#), 404(a)(2)(B)(ii);
- (2) Character of the victim in a criminal case, Fed. R. Evid. 404(a)(2)(B);
- (3) Character of the accused for sexual misconduct in a case charging a sex crime,¹ [Fed. R. Evid. 413–414](#);
- (4) Impeachment of a witness for truthfulness, which is available in both civil and criminal cases, [Fed. R. Evid. 608](#); and
- (5) Impeachment of a witness by evidence of the witness's criminal conviction, which is available in both civil and criminal cases, [Fed. R. Evid. 609](#).

Two important general principles govern character evidence introduced under the exceptions provided in [Fed. R. Evid. 404\(a\)\(2\)](#) (the first two exceptions above). First, except for homicide cases where the accused claims that the victim was the first aggressor, [Fed. R. Evid. 404\(a\)\(2\)\(C\)](#), any discussion of character evidence commences with the accused's strategic decision to introduce it. The accused is the party who gets the ball rolling. However, the accused need not take the stand to do so; the accused could initiate a discussion of character by calling a witness with personal knowledge regarding the accused's or the victim's pertinent character trait.

Generally, the prosecutor cannot introduce character evidence unless the accused does so first, and then the prosecutor can “rebut same.”

Second, evidence admitted through the Rule 404 exceptions must adhere to Rule 405, which governs *how* character evidence may be introduced. Only evidence of reputation and opinion may

be admitted on direct examination. However, specific instances may be inquired into on cross-examination.

§ 2.4 Character of the Accused in a Criminal Case

[[Fed. R. Evid. 404\(a\)\(2\)\(A\)](#), (C)]

Offered by the Accused

Accused persons may introduce a pertinent trait of their own character, [Fed. R. Evid. 404\(a\)\(2\)\(A\)](#), which they can do only via reputation or opinion evidence, [Fed. R. Evid. 405\(a\)](#); they may not introduce specific instances for this purpose.

EXAMPLE

Alice is accused of aggravated assault. At her criminal trial:

- Alice may testify herself or offer *opinion* evidence from others that she is a gentle person; and
- A witness called by Alice may testify that Alice has the *reputation* of being nonviolent; but
- A witness called by Alice may not testify that Alice failed to fight despite being provoked one night at a local bar. This last example is a prohibited *specific instance*.

Offered by the Prosecutor

If an accused has raised a pertinent issue of good character, the prosecutor may then rebut that evidence, [Fed. R. Evid. 404\(a\)\(2\)\(A\)](#). In rebutting the accused's character evidence, the prosecutor may offer testimony of reputation or opinion, but not specific instances, [Fed. R. Evid. 405\(a\)](#).

EXAMPLE

Once Alice, the Accused in an aggravated assault case, offers testimony that she is a gentle person, the Prosecutor may call a witness to testify that, in the witness's opinion, Alice tends to be violent.

14

Additionally, the Prosecutor also may introduce evidence of the Accused's character regarding the same trait that the Accused introduced about the Victim, Fed. R. Evid. 404(a)(2)(B)(ii).²

EXAMPLE

The Accused, Alice, calls a witness to testify to the Victim's reputation as a violent person. The Prosecutor may call a witness to testify that in the witness's opinion, *Alice* is violent, even if Alice never introduced testimony about her own character.

On Cross-Examination

If a party in a criminal case introduces pertinent character evidence, the opposing party may then question the witness regarding specific instances of the party's trait on cross-examination, [Fed. R. Evid. 405\(a\)](#). To do so, the cross-examiner must have a good-faith belief that the specific instance actually happened, and cannot introduce extrinsic evidence (that is to say, other witnesses or documents) to contradict the witness's testimony on cross-examination. That is, the cross-examiner may inquire about specific instances, but cannot refute the witness's answer. [Fed. R. Evid. 403](#).

EXAMPLE

After a witness for the Accused testifies that, in her opinion, Alice is very gentle, the Prosecutor may cross-examine concerning whether the witness is aware of a specific incident when the Accused was violent. The Prosecutor must have a good faith belief for asking the question. Additionally, the Prosecutor must accept the witness's answer and may not introduce extrinsic evidence of the specific incident to contradict the witness.

§ 2.5 Character of the Victim in a Criminal Case

[\[Fed. R. Evid. 404\(a\)\(2\)\(B\)\]](#)

Offered by the Accused

The accused may introduce a pertinent trait of the victim's character, [Fed. R. Evid. 404\(a\)\(2\)\(B\)](#), using reputation or opinion evidence, [Fed. R. Evid. 405\(a\)](#). This exception does not apply to rape victims, on the trait of sexual behavior or sexual history, [Fed. R. Evid. 412\(a\)](#).

EXAMPLE

The Accused, Alice, claims that she attacked the Victim, Victoria, because Victoria lunged at her with a knife. Alice may call a witness to testify to Victoria's reputation as a violent person. Alice may also call a witness to testify that in the witness's opinion, Victoria is very violent.

Offered by the Prosecutor

The prosecutor may rebut evidence of the victim's character, [Fed. R. Evid. 404\(a\)\(2\)\(B\)\(i\)](#). This rebuttal can take the form of reputation or opinion evidence, [Fed. R. Evid. 405\(a\)](#).

In homicide cases, where the accused's defense is that the victim was the first aggressor, the prosecutor may introduce evidence that the victim was peaceable, [Fed. R. Evid. 404\(a\)\(2\)\(C\)](#). This is the only time under Rule 404 that the prosecutor may initiate a discussion of the accused's propensity. Otherwise, the

decision rests with the accused whether to introduce propensity evidence.

EXAMPLE

The Accused, Alice, claims that the Victim, Victoria, threw the first punch. Evidence that Victoria started the fight is not character evidence—it is just a contested fact in the case. Nevertheless, such testimony in a homicide case, where Victoria is dead and unavailable to tell her side of the story, triggers the Prosecutor's ability to introduce character evidence about Victoria's peaceable tendencies.

On Cross-Examination

Specific instances may be inquired into on cross-examination regarding the character of the victim. The questioner must accept the witness's answer and cannot introduce extrinsic evidence to contradict the witness's testimony, [Fed. R. Evid. 405\(a\)](#).

§ 2.6 Rape Shield

[\[Fed. R. Evid. 412\]](#)

The Rape Shield rule prohibits the examination of the victim's promiscuous character or the victim's sexual proclivities, including what the victim was wearing at the time of the alleged assault, [Fed. R. Evid. 412](#). It restricts information about the victim's sexual history, behavior, and preferences in order to limit irrelevant inquiries that may embarrass or traumatize the victim. Rape Shield operates as an exception to [Fed. R. Evid. 404\(a\)\(2\)\(B\)](#), which generally allows the accused to raise a pertinent character trait of

16

the victim. Essentially, Rape Shield is an exception to an exception that reverts to the general rule prohibiting propensity evidence.

Although every jurisdiction has a Rape Shield rule, many state versions diverge significantly from the federal rule.

The Federal Rape Shield is not absolute, and allows some prior evidence of the victim's sexual conduct in a criminal trial.³ [Fed. R. Evid. 412](#) recognizes three exceptions:

- Evidence that a person other than the accused was the source of semen, injury, or other physical evidence, [Fed. R. Evid. 412\(b\)\(1\)\(A\)](#);
- Evidence of the victim's prior sexual relationship with the accused to prove consent, [Fed. R. Evid. 412\(b\)\(1\)\(B\)](#); and
- An ill-defined safety-net exclusion that provides for admitting evidence about the victim's sexual history and propensities where failure to admit such evidence

“would violate the constitutional rights of the defendant,” [Fed. R. Evid. 412\(b\)\(1\)\(C\)](#).

Rape Shield is intended to counteract the unfair prejudice that arises when the jury adopts sexist stereotypes and jumps to conclusions based on the victim’s sexual activities, dress, or sexual history. Rape Shield is also intended to facilitate rape prosecutions by making the trial itself less of an ordeal for the victim.

§ 2.7 Propensity of the Accused to Commit Sex Crimes

[[Fed. R. Evid. 413–414](#)]

In sex crime cases, under [Fed. R. Evid. 413](#) (which deals with sexual assault) and [Fed. R. Evid. 414](#) (which deals with child molestation), the prosecutor may introduce against the accused any prior, similar, wrongful sex act (whether convicted conduct or not) for any purpose, including propensity. The prosecutor may argue that the accused has a tendency to make sexual attacks and probably did so on the occasion in question. [Fed. R. Evid. 415](#) applies in civil cases in which there is a claim for relief based on a party’s alleged sexual assault or child molestation and is not discussed in this book.

17

Rules 413–414 contravene evidence law’s long history of banning propensity evidence. Unlike under the exceptions in Rule 404(a)(2), the prosecutor does not have to wait for the accused to initiate a discussion of character. In fact, the prosecutor may raise the evidence of the accused’s prior sexual misconduct in the prosecution’s case-in-chief. Only specific incidents are allowed—not opinion or reputation evidence. Evidence of the prior similar sexual misconduct must pass the *Huddleston* test,⁴ which requires that the trial judge determine that a jury could find that the other act actually occurred. The prosecutor must give advance notice of the sexual propensity evidence. There is no time limit regarding how long ago the prior similar sexual misconduct occurred.

EXAMPLE

Alfred, age 43, is charged with rape. Evidence that Alfred raped someone when he was 21 is probably admissible to show that Alfred tends to rape. This is true even if Alfred was never convicted of the alleged first rape.

Courts have resisted due-process challenges to [Fed. R. Evid. 413–414](#), holding that these rules are limited by [Fed. R. Evid. 403](#) and that the Rule 403 judicial balancing of probative value against unfair prejudice guarantees due process. As a practical matter, however, most prior sexual misconduct by the accused is admitted. Because propensity has been designated a permissible

purpose and because prior sex crimes are (mistakenly)⁵ considered highly probative, judges almost always admit the evidence.

Many states that have adopted the Federal Rules as their template for their evidence rules have rejected Rules 413–414.

§ 2.8 Exception for Character of Witnesses for Honesty or Dishonesty

[Fed. R. Evid. 608]

This form of impeachment involves an exception to the ban on propensity evidence for one trait: the character of honesty. It applies to all witnesses in criminal and civil cases who take the stand. This rule is discussed in the chapter on impeachment.⁶

18

§ 2.9 Exception for Impeachment by Evidence of Criminal Conviction

[Fed. R. Evid. 609]

This form of impeachment involves another exception to the ban on propensity evidence, this time for convicted conduct of witnesses who take the stand. The logic is that one who has broken the law is more likely to lie on the stand. Within a time limit of the preceding ten years, all convicted conduct concerning crimes involving dishonesty (such as identity, theft, fraud, perjury, tax evasion, embezzlement, etc.) is admissible to impeach any witness. Certain other convictions are also admissible to impeach witnesses, though the crimes must be felonies and must pass various balancing tests. Crimes older than ten years are very unlikely to be admitted. This rule is discussed more fully in the chapter on impeachment.⁷

§ 2.10 When Character Is an Essential Element

[Fed. R. Evid. 405(b)]

In extremely limited cases, character evidence is admissible because character forms an essential part of the charge, claim, or defense. In such cases, character is not being used circumstantially, but instead, character is itself an issue in the case. Fed. R. Evid. 405(b) covers those limited cases where character is actually in issue.

Examples include:

- Moral fitness to practice law;
- Truth as a defense in a libel action;

- Fitness of a parent in a custodial matter or in an action to terminate parental rights;
- The driving ability and driving history of a driver where the car owner is sued for negligent entrustment of the vehicle to the driver; and
- Mental capacity in a commitment hearing or guardianship.

In all these examples, the character traits are essential pieces of evidence that are directly, not merely circumstantially, relevant.

Students sometimes mistakenly over-apply [Fed. R. Evid. 405\(b\)](#). Rule 405(b) does not apply to cases where the evidence is being used

for a non-character purpose (see § 2.11 below); rather, it applies in the very rare cases where character is directly in issue.

EXAMPLE

Amy is accused of embezzling money from her employer. The Prosecutor cannot introduce evidence in the prosecution's case-in-chief concerning Amy's character for cheating and stealing because character is not an essential element of the claim against Amy. She would be just as guilty of the crime if she had an impeccable character up until the moment that she uncharacteristically acted on an impulse to embezzle. The character issue would not be necessary to the indictment because in charging the elements of embezzlement, the Prosecutor need not prove that Amy possesses the character of an embezzler. Therefore, character is not "in issue" and [Fed. R. Evid. 405\(b\)](#) does not apply. The only ways Amy's character can come up are: (1) if she raises her character herself under [Fed. R. Evid. 404\(a\)\(2\)\(A\)](#); (2) if Amy is a witness and her character for honesty is raised under [Fed. R. Evid. 608](#); or (3) if Amy is a witness and the court admits a prior crime under [Fed. R. Evid. 609](#).

§ 2.11 Evidence Used for a Non-Character Purpose

[\[Fed. R. Evid. 404\(b\)\(2\)\]](#)

Sometimes evidence that looks like impermissible character evidence can nevertheless be admitted because the evidence serves a different, legitimate purpose and is not being introduced as character evidence at all. In other words, the evidence is not being offered to prove propensity. [Fed. R. Evid. 404\(b\)\(2\)](#) provides that certain uncharged misconduct—other wrongs, crimes, or acts—may be admissible for "other purposes" beside propensity.

Rule 404(b)(2) does not provide an exhaustive list of “other purposes,” but does specifically mention:

- Motive;
- Intent;
- Preparation;
- Knowledge;
- Absence of mistake;
- Identity;
- Opportunity; and

20

- Common plan or scheme.

Often such non-propensity purposes overlap, and the evidence will fit into more than one of the above categories. Courts often add *modus operandi* to the non-exhaustive list of potential “other purposes.”

Prior crimes, wrongs or acts admitted under Fed. R. Evid. 404(b)(2) need only pass the *Huddleston* standard, under which a judge will admit the prior crime, wrong, or act if a jury could believe the act actually happened.⁸

[Fed. R. Evid. 404\(b\)\(2\)](#) is always moderated by [Fed. R. Evid. 403](#), which balances unfair prejudice, confusion, distraction, and waste of time against the probative value of the evidence.⁹ Even if the proponent of the evidence of the other crime, wrong, or act can show another purpose, the evidence is not admissible if, under Rule 403, the unfair prejudice, confusion, or distraction it generates substantially outweighs the probative value of that other purpose.

The prosecution may offer Rule 404(b)(2) evidence in its case-in-chief. Such evidence can be offered whether or not the accused chooses to testify. Starting in December of 2020, a prosecutor wishing to introduce evidence under [Fed. R. Evid. 404\(b\)\(2\)](#) must give notice to the accused and “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” and to disclose more than the “general nature” of the act.

Although Rule 404(b)(2) applies most often in criminal cases, it also applies to civil cases.

EXAMPLES

Amy is accused of embezzling money from her employer. Her defense is that she did not do it, and the elaborate scheme was too complex for her limited financial abilities. Evidence that Amy was arrested three years previously for executing a similar scheme is not admissible to show that

she tends to embezzle or has a propensity for cheating people. It is, however, admissible under [Fed. R. Evid. 404\(b\)](#) to show Amy's *knowledge* of such sophisticated schemes. Had Amy not raised the defense of lack of knowledge, then her previous arrest for embezzlement would still be logically relevant under [Fed. R. Evid. 401](#), but the probative value would be significantly lower. Additionally, the low

21

probative value would probably be substantially outweighed by the danger that the jury would use the evidence for an impermissible purpose and think that Amy just tends to steal people's money. However, even without Amy's lack-of-knowledge defense, a court might potentially find the evidence of the sophisticated knowledge important enough to pass the balance test of [Fed. R. Evid. 403](#) despite the potential unfair prejudice. Any determination by the court in such a close case would probably be affirmed on appeal, given the abuse-of-discretion standard of review.

* * *

Agatha is accused of murdering Vicky to silence her. Vicky was about to inform the police of Agatha's plot to kill Zenobia. If the Prosecutor mentions Agatha's plot to kill Zenobia to show that Agatha is a serial murderer and has no respect for human life, then that would be an impermissible propensity use of the uncharged misconduct evidence. However, if the Prosecutor, after providing the requested notice, introduces evidence of Agatha's plan to kill Zenobia to show Agatha's *motive* for killing Vicky, then that is "another purpose" under [Fed. R. Evid. 404\(b\)\(2\)](#) that could justify admission of Agatha's plan to kill Zenobia. Using [Fed. R. Evid. 403](#), the trial judge would weigh the unfair prejudice of the impermissible propensity purpose against the high probative value of the permitted purpose of demonstrating motive. The judge would probably conclude that the unfair prejudice of the use as character evidence does not substantially outweigh the probative value of the motive evidence and would admit the evidence.

* * *

Arnold posted an ad on craigslist seeking fathers who would allow Arnold to have sex with their underage daughters in exchange for payment. (This is based on a real case. Unfortunately, you cannot make these things up.) A police officer posing as "Don," a dad of a fourteen-year-old girl, engaged Arnold in an online discussion in which a deal was made for Arnold to have sex with Don's daughter. Arnold was charged with a federal crime of using the Internet to attempt to induce a minor to have sex. (This crime is not covered by Fed. R. Evid. 414.) Arnold claimed

that he merely posted the ad to confront child-abusers and not to actually have sex with underage girls. Uncharged evidence (that is to say, evidence that the Prosecutor would like to use against Arnold but that is not the subject of this

22

indictment) that Arnold solicited sex online from other underage girls would be evidence of intent negating Arnold's defense. The Prosecutor could therefore present a non-propensity purpose of *intent* that has high probative value. However, on the other side of the balance, the evidence of Arnold's soliciting sex directly from a minor is highly unfairly prejudicial. It leads directly to an impermissible propensity inference that Arnold is a child molester and it is also unfair because the uncharged misconduct is more egregious than the conduct charged, given that it involves direct discussion with a minor. It would be fair to worry that once jurors hear that Arnold contacted minors directly, they would not use the information merely to negate his intent with "Don," but instead just loathe him and wish to punish him for the uncharged misconduct, even if they were not certain he was guilty of the crime charged. Although there is a nontrivial argument that the evidence could be unfairly prejudicial, given Arnold's motive defense, it is highly probative and would probably pass the Rule 403 test.

§ 2.12 Habit

[Fed. R. Evid. 406]

Habit evidence is admissible to show that the witness acted in accordance with that habit on a particular instance, even if no eyewitnesses testify and there is no corroboration (two requirements of the common law that the Federal Rules of Evidence reject). Habit evidence consists of repeated, almost semiautomatic responses to the same stimulus. It tends to be non-dramatic and, in fact, boring. Therefore, habit evidence usually passes Fed. R. Evid. 403 because the unfair prejudice tends to be very low.

Be careful about using the notion of habit colloquially and of over-applying the concept.

Examples of Habit:

A person always takes the stairs rather than the elevator.

* * *

A person always takes the outgoing mail to send on the way to lunch.

Examples That Are Not Habit:

A person is in the “habit” of getting drunk on football weekends.

23

* * *

A person has the unfortunate “habit” of seducing married men.

These last two examples of evidence that do not qualify as habit are certainly not boring or low prejudice. Furthermore, such conduct, though perhaps distressing and regular, is not semi-automatic.



CHARACTER CHECKLIST



1. Is the evidence propensity evidence? That is to say, is it being used circumstantially to show that a person behaved in conformity with a general character trait or with past conduct?
If yes: This is traditional character evidence and unless it fits into an exception or has another legitimate non-character use, it will be excluded. Go to Step 2.
If no: The evidence is not traditional character evidence and may be admissible because:
 - It is being used for another (non-character) purpose under Rule 404(b)(2). Often evidence is susceptible to both an impermissible propensity use and another, legitimate purpose. The trial judge should conduct a [Fed. R. Evid. 403](#) balance to see if the probative value of the other purpose is substantially outweighed by the dangers of unfair prejudice, distraction, or confusion caused by an inappropriate character use.
 - It is one of the very rare occasions, occurring almost exclusively in civil cases, when character is “in issue” and specific-incident evidence of character is admissible under [Fed. R. Evid. 405\(b\)](#). The evidence is admitted not for circumstantial evidence of character but as direct evidence of character because the trait or character is an essential element of the claim, crime, or defense.
 - It is habit evidence under [Fed. R. Evid. 406](#).
2. If you deem the evidence propensity evidence, next determine whether various exceptions apply. Does the propensity evidence relate to a witness’s character for truthfulness or credibility?

If yes: The propensity of witnesses (in both civil and criminal cases) to be honest may be admissible under Fed. R. Evid. 608. Additionally, the witness's general credibility and willingness to abide by social norms can be raised via impeachment for convictions for certain crimes under Fed. R. Evid. 609. Continue to Step 3.

If no: Go to Step 3.

3. Is this a homicide case where the accused contends that the victim was the first aggressor?

If yes: The prosecutor may introduce reputation and opinion evidence of victim's character for peaceableness.

If no: Continue to other exceptions for criminal cases. Go to Step 4.

4. Is this a criminal sexual assault or child molestation case?

If yes: All relevant prior bad acts of the accused are admissible under [Fed. R. Evid. 413–414](#). There is no time limit on the remoteness of the prior offense, and the prior act need not be convicted conduct; the prior bad acts must meet the *Huddleston* standard, which provides that a reasonable juror could find that the prior event occurred. The check on admission of this evidence is [Fed. R. Evid. 403](#). In conducting the Rule 403 balance, note that propensity use of a prior bad act is by definition not “unfair prejudice.”

If no: Go to Step 5.

5. Is this a pertinent character trait of the accused offered by the accused?

If yes: It may be proved by reputation or opinion evidence by the accused or by a character witness for the accused. The prosecutor may then:

- Rebut the accused's character evidence with contrary reputation and opinion evidence regarding the same character trait; or
- Cross-examine the witnesses for the accused (including the accused) regarding specific instances of pertinent behavior. However, the prosecutor must have a good faith belief that the specific instances occurred and may not introduce extrinsic evidence to contradict the witness's answer.

If no: Go to Step 6.

6. Is this a pertinent character trait of the victim offered by the accused?

If yes: Go to Step 7.

If no: The propensity evidence is not admissible.

7. Is this evidence of sexual disposition or sexual history, including the victim's dress?

If yes: Go to Step 8.

If no: It may be proved by reputation or opinion evidence by the accused or by a character witness for the accused. The prosecutor may then:

- Offer pertinent character evidence about the victim to rebut the evidence offered by the accused about the victim;
- Offer character evidence on the same trait about the accused; or
- Cross-examine the witnesses for the accused (including the accused) regarding specific instances of pertinent behavior. However, the prosecutor must have a good faith belief that the specific instances occurred and may not introduce extrinsic evidence to contradict the witness's answer.

8. Does it fall under one of the following exceptions for Rape Shield?

- Evidence that a person other than the accused was the source of semen, injury, or physical evidence, [Fed. R. Evid. 412\(b\)\(1\)\(A\)](#);
- Evidence of the victim's prior sexual relationship with the accused to prove consent, [Fed. R. Evid. 412\(b\)\(1\)\(B\)](#); or
- An ill-defined safety-net exclusion that provides for admitting evidence about the victim's sexual history and propensities where failure to admit such evidence "would violate the constitutional rights of the defendant," [Fed. R. Evid. 412\(b\)\(1\)\(C\)](#).

If yes: The character evidence is admissible.

If no: The character evidence is not admissible.

ILLUSTRATIVE PROBLEMS

■ PROBLEM 2.1 ■

Q: Peter is suing Donald for tortious battery arising out of a fistfight at Bunny's Restaurant. Will evidence of Peter's two previous fights at Bunny's be admissible if they did not result in convictions?

A: In this civil case, previous specific instances of fights at Bunny's are not admissible to show Peter's propensity to fight. As

a general rule, evidence of propensity is inadmissible in civil cases, except for certain types of impeachment. Even if Peter took the stand, Peter could be impeached only for his character for dishonesty or his previous criminal conduct, not for his violent tendencies. (Note: If this were a criminal case against Donald, Donald would be able to raise Peter's pertinent tendency towards violence under [Fed. R. Evid. 404\(a\)\(2\)\(B\)](#), but there is no such exception in civil cases.) Furthermore, character is not "in issue" in the sense of Rule 405(b) because it does not form an essential element of the tort or of a defense. Unless there was some question about the identity of the person who hurt Peter and the Defendant had a "signature crime" that was unique enough to indicate his identity, the other two incidents would not be admissible under Rule 404(b)(2). Finally, even if one might say colloquially that Peter is in the habit of starting brawls at Bunny's, such behavior is not semi-automatic and regular, and therefore would not qualify as habit under [Fed. R. Evid. 406](#). The ban on propensity is intended to focus the trier-of-fact on the facts in the case and not on the personalities or tendencies of the individuals involved.

■ PROBLEM 2.2 ■

Q: Carl and Siggy were heatedly discussing the nature of human creativity and the fight became physical. Siggy is charged with criminal assault and battery. Which of the following will be admissible?

Q1: The Prosecutor calls Joseph Campbell as a witness in the state's case-in-chief. Campbell testifies: "My personal dealings with Siggy have led me to believe that he is dangerous and has homicidal tendencies."

A1: This is impermissible character evidence. Only the Accused may initiate discussion of the Accused's character under these facts, and the prosecution can then rebut same, [Fed. R. Evid. 404\(a\)\(2\)\(A\)](#). The Prosecutor is calling Campbell in the case-in-chief, which means that the Accused has not yet had a chance to call witnesses.

27

Q2: In his case-in-chief, Siggy, the Accused, calls Anna, who testifies: "In my opinion, Carl is a belligerent bully who is absolutely intolerant of people with other views. Carl is violent and capable of hurting someone."

A2: This evidence, offered by the Accused about a pertinent character trait of the Victim and presented in the form of opinion testimony, is admissible under Fed. R. Evid. 404(a)(2)(B) and 405(a).

Q3: If the Judge admits Anna's testimony that Carl is violent, should the Prosecutor be permitted to offer reputation evidence that Carl is peace-loving?

A3: Yes, the Prosecutor may rebut the negative character evidence about the Victim, [Fed. R. Evid. 404\(a\)\(2\)\(B\)\(i\)](#) and 405(a).

Q4: If the Judge admits Anna's reputation evidence that Carl is violent, should the Prosecutor be permitted to offer evidence that Siggy is also violent?

A4: Yes, the Prosecutor may counter the negative character evidence about the Victim with the same negative character evidence about the Accused, [Fed. R. Evid. 404\(a\)\(2\)\(B\)\(ii\)](#). Such evidence may take the form of reputation or opinion evidence, [Fed. R. Evid. 405\(a\)](#).

Q5: Assume that instead of calling Anna to describe the character of Carl, Siggy calls an eyewitness who claims that Carl struck the first blow. Could the Prosecutor then introduce evidence that Carl was, by disposition, peaceable?

A5: No. Siggy's evidence is not character evidence, but direct factual evidence concerning the incident, and does not trigger the Prosecutor's ability to rebut with character evidence.

Q6: Assume that Carl died shortly after the fight and Siggy is charged with homicide instead of assault and battery. Siggy calls an eyewitness who states that Carl struck the first blow. Could the Prosecutor then introduce evidence that Carl was, by disposition, peaceable?

A6: If Carl dies and this becomes a homicide case, and Siggy persists in portraying Carl as the first aggressor, then the Prosecutor may introduce reputation or opinion evidence that Carl was of peaceable disposition, [Fed. R. Evid. 404\(a\)\(2\)\(C\)](#). This is the one example under Rule 404 where the Prosecutor can initiate character evidence.

28

Q7: During the Accused's case-in-chief, Siggy calls Rabbi Debra Orenstein to the stand as a character witness. May the Rabbi discuss Siggy's reputation as a renowned surgeon?

A7: The Rabbi may testify about any pertinent trait, so the question is whether Siggy's renown as a surgeon would be pertinent to this case. Perhaps counsel for Siggy could argue that surgeons might tend to be very protective of their hands and unlikely to throw the first punch in a fight. This is questionable, but if it is admitted, it will be under [Fed. R. Evid. 404\(a\)\(2\)\(A\)](#).

Q8: May Siggy call the Rabbi to testify about Siggy's failure to fight when provoked at the "I'm OK, You're OK" annual picnic?

A8: No, the Rabbi, in her direct testimony, is restricted to reputation and opinion evidence. She may not testify about specific instances on direct, [Fed. R. Evid. 405\(a\)](#).

Q9: If the court allows some or all of Rabbi Orenstein's character testimony, can the Prosecutor call Joseph Campbell during the state's case-in-rebuttal to testify that Siggy once pulled Campbell's hair at a conference on rediscovering the inner child?

A9: No, Campbell is limited to reputation and opinion evidence. He cannot testify about a specific instance in his direct testimony.

Q10: During the Accused's case-in-chief, Rabbi Orenstein testifies that Siggy is a "peaceable, non-violent fellow." On cross-examination, may the Prosecution ask the Rabbi if she is familiar with a previous violent altercation involving Siggy?

A10: Yes, specific instances may be inquired upon in cross-examination, [Fed. R. Evid. 405\(a\)](#). The Prosecutor, however, is stuck with the witness's answer and may not introduce extrinsic evidence to contradict the Rabbi.

POINTS TO REMEMBER

- Character evidence offered for propensity purposes is generally not admissible.
 - When propensity evidence is admissible, it concerns:
 - Prior sex offenses by an accused in sexual assault or child molestation cases (civil and criminal);
 - A pertinent trait of the accused offered by the accused (criminal only);
- 29
- A pertinent trait of the victim offered by the accused, excluding sexual behavior and sexual character of a rape victim (criminal only);
 - A prosecutor's evidence rebutting the accused's character evidence (criminal only);
 - The character of witnesses for honesty or dishonesty, used to impeach (civil and criminal); and
 - Prior convictions of witnesses that reflect on their credibility, used to impeach (civil and criminal).
- If character evidence is admissible, it may be presented in the following manner:
 - *For sex crimes:* Evidence of specific past instances is allowed.
 - *For exceptions in criminal cases under [Fed. R. Evid. 404\(a\)](#):*
 - Opinion;
 - Reputation; and

- On cross, the opposing party may inquire into specific instances, but must accept the answer and may not dispute the witness's answer with extrinsic evidence.
- *In the rare cases where character is an essential element of a charge, claim, or defense*, each of these forms of evidence is allowed:
 - Opinion;
 - Reputation; and
 - Specific instances
- *For a witness's character for honesty*:
 - Opinion;
 - Reputation; and
 - On cross, the opposing party may inquire into specific instances, but must accept the answer and may not dispute the witness's answer with extrinsic evidence.
- *For prior convictions*: If the evidence is about a witness's prior conviction, that evidence may be proved by a public record of the conviction or testimony of the witness.
- Habit evidence—routinized, semi-automatic behavior—is distinct from character evidence. Habit evidence tends to be boring and uncontroversial.

30

- Evidence of past wrongs, crimes, or acts may be admitted for other, non-propensity purposes, such as identity, motive, or absence of mistake, [Fed. R. Evid. 404\(b\)\(2\)](#). Admission of such evidence:
 - Must pass the *Huddleston* test, which requires that the court finds by a preponderance of the evidence that the jury could believe that the crime, wrong, or act occurred;
 - Must pass the Rule 403 balancing test; and
 - Must, in criminal cases, have been the subject of notice by the prosecutor to the accused.

¹ This book discusses only [Fed. R. Evid. 413–414](#), the rules for sexual propensity in criminal cases. [Fed. R. Evid. 415](#), the analogous civil rule, which is used most often in sexual harassment cases, provides another exception to the general character ban for propensity to engage in sexual misconduct. Rule 415 is not covered in this book.

² See § 2.5 (Character of the Victim in a Criminal Case).

³ In 1994, the Rape Shield rule was extended to civil cases. It excludes evidence of sexual behavior and propensity otherwise admissible in civil cases unless the probative value of that evidence “substantially outweighs the danger of harm to any victim and of unfair prejudice to any party,” [Fed. R. Evid. 412\(b\)\(2\)](#). The issue mainly arises in