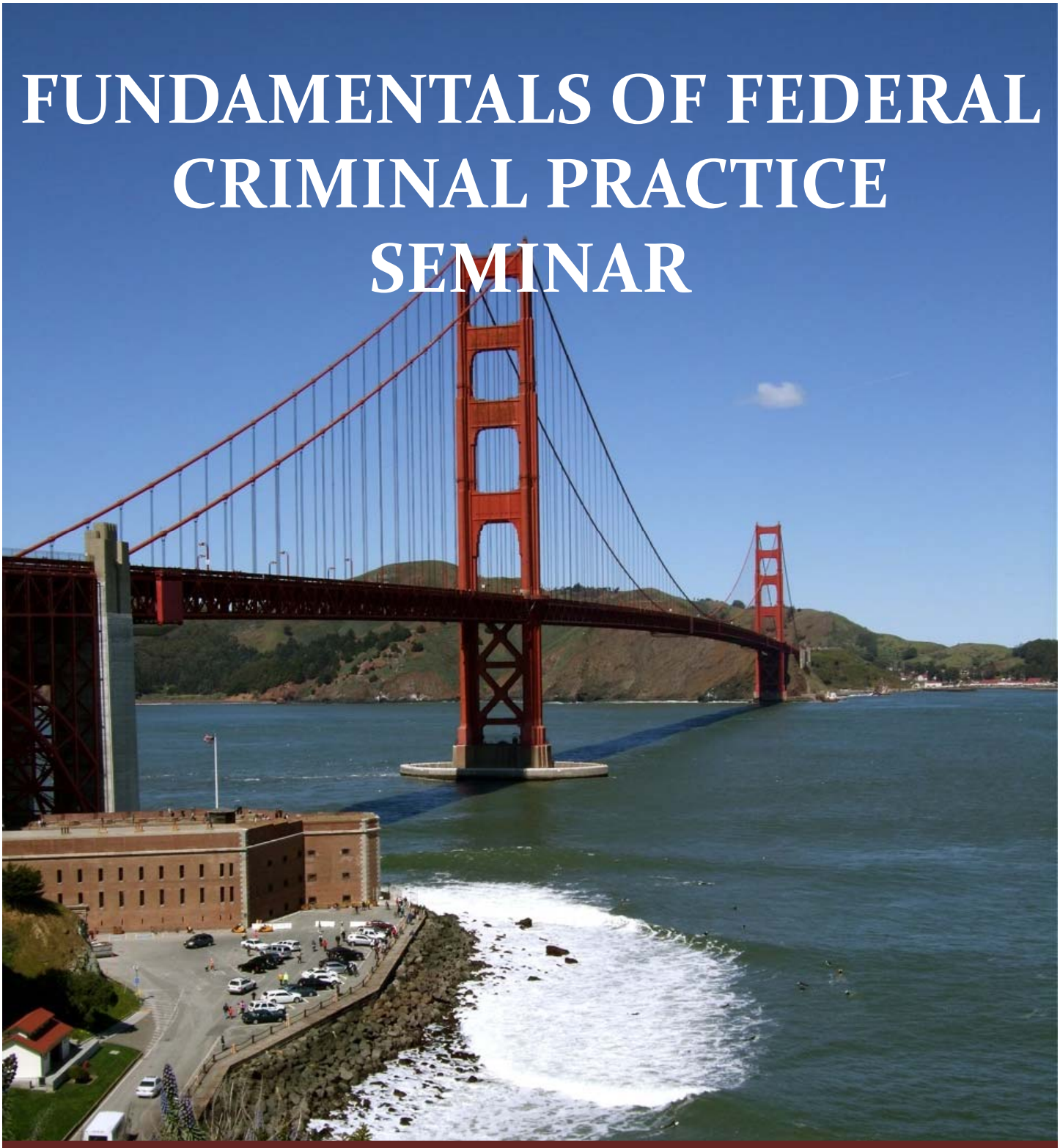
FUNDAMENTALS OF FEDERAL CRIMINAL PRACTICE SEMINAR



Anything You Can Do, I Can Do Better: The Affirmative Use of Federal Rule of Evidence 404(b)

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I. Introduction

Rule 404(b) of the Federal Rules of Evidence is a prosecutor's best friend at trial. Prosecutors practically come out of the womb armed with the familiar incantation, "Your Honor, I'm offering the evidence to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The language of 404(b) is second nature to prosecutors because they love to throw mud at our clients and they know they won't get to throw their best mud balls if they tell the judge that their intent is to prove that our clients acted in conformity with their bad-boy ways. In contrast, when we actually see a couple of juicy mud balls in our pail, we are so surprised and giddy we don't know what to say.

The good news is that we are often tying our own hands when it comes to the affirmative use of the Federal Rules of Evidence. We should be saying, with an Ethel Merman belt, "Anything you can do, I can do better." This presentation will give you a refresher course in Rules of Evidence 403, 404, and 405 and provide ideas on how you can turn the tables on the government.

II. Applicable Rules of Evidence

A. Federal Rule of Evidence 404

Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

> **(1) Character of the accused**. In a criminal case, evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;
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> **(2) Character of alleged victim**. In a criminal case, and subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the alleged victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a homicide case to rebut evidence that the alleged victim was the first aggressor;
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> **(3) Character of witness.** Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(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 for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or 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, 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.

B. Federal Rule of Evidence 405

Rule 405. Methods of Proving Character

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.

(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of that person's conduct.

C. Federal Rule of Evidence 403

Rule 403. Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time.

Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

III. Admission of 404(b) Evidence by the Government

There is good reason for the government to be smug when wielding the language of 404(b). The government's 404(b) evidence is almost always admitted against the defendant at trial, and admission is generally upheld on appeal.

A. Inevitability of Admission

Admission of "extrinsic acts" under Rule 404(b) is appropriate provided: 1) the evidence is offered for a proper purpose; 2) there is sufficient evidence to support a finding that the defendant committed the similar acts; and 3) the probative value of the evidence is not

outweighed by the risk of unfair prejudice. See Huddleston v. United States, 485 U.S. 681, 685 (1988). Rule 404(b) is a "rule of inclusion which allows such evidence unless it tends to prove only criminal propensity." United States v. Stephans, 365 F.3d 967, 975 (11th Cir. 2004); see also United States v. Turner, 583 F.3d 1062, 1065 (8th Cir. 2009); United States v. Basham, 561 F.3d 302, 326 (4th Cir. 2009). "The list provided by the rule is not exhaustive and the 'range of relevancy outside the ban is almost infinite.'" Stephans, 365 F.3d at 975 (internal citation omitted).

B. Practice Pointers for Limiting the Damage

1. Make the government talk

When the court asks a prosecutor for the purpose for which he or she is offering 404(b) evidence, the prosecutor typically parrots the words of the rule like a talismanic incantation. Don't let the prosecutor get away with it. The more the prosecutor talks, the more likely he or she is to slip into "propensity" language and the better chance you have of keeping the evidence out. When you make your objection at trial, press the government on its explanation. At the very least, you'll make a better record for appeal.

2. Ask for a limiting instruction

Upon request, a trial court shall "instruct the jury that the similar acts evidence is to be considered only for the proper purpose for which it was admitted." Huddleston, 485 U.S. at 691-92; Fed.R.Evid. 105. Consider invoking this rule to mitigate the prejudice to your client.

IV. Defendant's Affirmative Use of Rule 404(b) / "Reverse 404(b)"

A. Defendant's right to offer evidence under Rule 404(b)

Rule 404(b) speaks to the admission of other crimes, wrongs, or acts against "a person," and does not specify that the "person" must be a criminal defendant. See Huddleston, 485 U.S. at 685. Accordingly, most courts hold that defendants have the same right to offer Rule 404(b) evidence as prosecutors. See, e.g., United States v. Montelongo, 420 F.3d 1169, 1174 (10th Cir. 2005); United States v. Stevens, 935 F.2d 1380, 1404 (3d Cir. 1991); United States v. Cohen, 888 F.2d 770, 776 (11th Cir. 1989). A defendant's 404(b) evidence is often called "reverse 404(b)" evidence. See, e.g., United States v. Stevens, 935 F.2d 1380, 1401 (3d Cir. 1991) (a seminal case). If presented correctly, "reverse 404(b) evidence" is truly an area where "Anything you can do, I can do better."

B. Defendant's Advantages

1. Defendant does not have to provide notice of his 404(b) evidence

Rule 404(b) imposes on the government an affirmative obligation to provide notice prior to trial of the "general nature" of the 404(b) evidence it intends to produce. The rule does not mention a corresponding defense obligation.

2. Court less concerned about risk of prejudice

Many courts have found that, when the defendant offers "reverse 404(b)" evidence, a lower standard of admissibility should be required than when 404(b) evidence is used offensively by the government. This is the case, some courts have reasoned, because the risk of prejudice to the defendant is reduced or removed from the equation. See United States v. Stevens, 935 F.2d 1380, 1403 (3d Cir. 1991) ("when the defendant is offering [404(b) evidence] exculpatorily, prejudice to the defendant is no longer a factor, and simple relevance to guilt or innocence should suffice as the standard of

admissibility"); United States v. Aboumoussallem, 726 F.2d 906, 911-12 (2d Cir. 1984) ("the standard of admissibility when a criminal defendant offers similar acts evidence as a shield need not be as restrictive as when a prosecutor uses such evidence as a sword"); but see United States v. Lucas, 357 F.3d 599 (6th Cir. 2004) (using same test for admissibility regardless of who offers the evidence). If you're in one of the lucky jurisdictions, or the question is unsettled where you practice, use this caselaw to your advantage.

3. Defendant has a constitutional right to present a defense

The Constitution guarantees a criminal defendant "'a meaningful opportunity to present a complete defense.'" Holmes v. South Carolina, 547 U.S. 319, 324 (2006) (internal citation omitted). Thus, unlike the government, a defendant can use the Constitution as support for his introduction of "reverse 404(b)" evidence.

V. Reverse 404(b): Common Scenarios

A. Self Defense

1. Goal

The goal in using Rule 404(b) evidence in a self-defense case is to show that the alleged victim was the aggressor. To accomplish this goal, use evidence of the alleged victim's other crimes, wrongs, or acts that reflect upon his motive, intent, preparation, plan, or absence of mistake in threatening, assaulting, or attempting to assault the defendant. Incidents of violence of which the defendant was aware are admissible to show the defendant's intent and state of mind when he acted, both of which are proper purposes under 404(b).

2. Examples

Fortini v. Murphy, 257 F.3d 39 (1st Cir. 2001). After hearing a disturbance outside his home, Robert Fortini, shotgun in hand, went outside to sit on his porch. Approximately 30 minutes later he heard two sets of footsteps and a voice say, "Watch this shit, we're going to wake some motherfuckers up." He then saw someone move rapidly up his porch. Fortini stepped forward and told the intruders to get out of there. Ceasar Monterio, who was on the other end of Fortini's shotgun, lunged towards Fortini and the gun. Fortini shot and killed Monterio. At trial, the court prevented Fortini from putting on evidence that, a few minutes before Monterio arrived at Fortini's house, Monterio assaulted four other men and was heard to yell, "I'll kill them all, remember my face, I'm Ceasar Monterio, I'm the badest motherfucker in town." The First Circuit Court of Appeals found that it was error for the court to exclude such evidence as it was relevant to the alleged victim's state of mind.

United States v. James, 169 F.3d 1210 (9th Cir. 1999). James was accused of aiding and abetting the manslaughter of her boyfriend, David Ogden. The actual shooter in the incident was James' 14-year-old daughter. James argued self-defense, and was permitted to testify regarding acts of violence that Ogden had told her he committed. However, she was not permitted to introduce court records to prove that these acts of violence actually did occur. The Ninth Circuit held that James should have been allowed to submit the records under Rule 404(b) as proof that 1) she wasn't making up the stories; and 2) she had reason to fear.

3. Other useful cases

United States v. Bordeaux, 570 F.3d 1041, 1049-50 (8th Cir. 2009) (provided defendant was aware of them, prior bad acts of victim admissible under Rule 404(b) to establish defendant's state of mind and reasonableness of defendant's use of force)

Perrin v. Anderson, 784 F.2d 1040, 1044-45 (10th Cir. 1986) (specific acts of victim to show that he was aggressor admissible in 1983 claim which was tantamount to self-defense claim)

United States v. Burks, 470 F.2d 432, 437 (D.C. Cir. 1972) (specific violent acts of victim admissible in self-defense case even if unknown to defendant).

4. Practice Pointers:

a. Frame your argument in 404(b) terms

Be careful in defining your arguments so as not to confuse the court regarding your basis for seeking admission of the evidence. Make a point to distinguish between Rules 404 and 405. Evidence of specific acts is *not* admissible character evidence under *Rule 405(b)* unless that character trait is an essential element of the defense. If not an essential element, evidence of the character trait may only be proved by reputation or opinion evidence, and offering such evidence can trigger an opportunity for the prosecutor to rebut. Fed.R.Evid. 404(a); Fed.R.Evid. 405(a) & (b). Courts generally agree that violent character of the victim is not an essential element of a self-defense claim, see United States v. Piche, 981 F.2d 706, 711-12 (4th Cir. 1992) (superseded on other

grounds), so use the language of 404(b) when advocating for the admission of your evidence.

b. Have a backup plan & offer of proof ready

If the court prohibits you from putting on specific instances of the alleged victim's misconduct, preserve the issue for appeal by making an offer of proof. Offers of proof, depending upon your court, may be made by an oral proffer, a written proffer, or through examination of the witness outside the presence of the jury. Again, use only 404(b) language in your offer of proof. Only after making an offer of proof should you proceed to put on opinion or reputation testimony if you have weighed the risks of government rebuttal under Rules 404(a) and 405(a).

B. Mistaken Identity & Third Party Guilt

1. Goal

Submit reverse 404(b) evidence to show mistaken identity or to cast suspicion on a third person. Introduce evidence of similar crimes which occurred close in time and location to your client's alleged crime if: 1) your client has an alibi to the other similar crimes, or 2) an eyewitness to the other similar crimes has excluded your client as the perpetrator of the other similar crimes. In such instances, the defendant "should. . . have the right to show that crimes of a similar nature have been committed by some other person when the acts of such other person so closely connected in point of time and method of operation as to cast doubt upon identification of the defendant as a person who committed the crime

charged against him." State v. Bock, 229 Minn. 449, 458, 39 N.W.2d 887, 892 (Minn. 1949).

2. Examples

United States v. Stevens, 935 F.2d 1380, 1404 (3d Cir. 1991). Richard Stevens was convicted of a brutal robbery / aggravated sexual assault because of the victim's identification of him as the perpetrator. At trial, the court prevented Stevens from putting on evidence of another robbery that had occurred three days after his alleged offense. The two robberies occurred within a few hundred yards of each other, were armed robberies, involved a handgun, occurred at the same time of night, and were perpetrated on military personnel, but the victim in the second robbery stated that Stevens was *not* his assailant. Money orders from both robberies were cashed in Fort Meade, Maryland, and one was cashed by someone *other than* Stevens. The Third Circuit held that the evidence of the other robbery was admissible under Rule 404(b) to support the defendant's defense of mistaken identification.

United States v. Montelongo, 420 F.3d 1169 (10th Cir. 2005). Montelongo was a truck driver who was scheduled to drive a load from New Mexico to Michigan with a co-driver, Carmen McCalvin. The two picked up the semi-truck they were to drive from its owner, Mr. Gomez. They drove until they were stopped at a border control checkpoint. The officer conducting the checkpoint concluded that cigarette smoke and orange air freshener coming from the semi were attempts to mask the smell of narcotics. During a search of the vehicle, officers found cellophane-wrapped marijuana bundles stored underneath the mattress of the truck's sleeping compartment. At their trial on drug charges, both defendants contended that Mr. Gomez was

responsible for the marijuana and that they had no knowledge of it. They sought to elicit testimony from Gomez about an incident a few months before their arrest during which marijuana was found in the sleeping compartment of a second semi-truck owned by Gomez being driven by two other men. Though the district court excluded the testimony, the Fifth Circuit held that the similarities between the two crimes and their temporal proximity made the evidence admissible under Rule 404(b) as proof of the defendants' lack of knowledge.

United States v. Robinson, 544 F.2d 110 (2d Cir. 1976). Second Circuit finds error in the trial court's refusal to permit an accused bank robber to prove mistaken identity by showing that a third man, who resembled the accused, had committed two other bank robberies six days prior to the robbery at issue.

3. Practice Pointers

a. Use the Constitution

The Supreme Court's decision in Holmes v. South Carolina, 547 U.S. 319 (2006), suggests that a defendant has a Constitutional right to put on evidence of third-party guilt or mistaken identity if it is part of his overall theory of the defense. Frame your arguments for admission in both Constitutional and 404(b) terms.

b. Minimize evidence needed to prove the point

Courts cite the need to avoid a "mini-trial" on other crimes as a reason for excluding reverse 404(b) evidence of mistaken identity or third party guilt. Relevant evidence may

be excluded if its probative value is outweighed by considerations of undue delay. Fed.R.Evid. 403. Be ready to present your 404(b) evidence as efficiently as efficient as possible, and have an answer ready when the judge wonders how much time presentation of the evidence will take.

b. Make an offer of proof

As always, if the court denies your request to admit the evidence, construct your record on appeal by making an offer of proof.

C. Cooperating Witnesses & Co-Conspirators

1. Goal

Use reverse 404(b) evidence of a cooperating witness or co-conspirator's other crimes, wrongs or acts to highlight issues such as: 1) a co-conspirator's motivation to act as a cooperating witness; and 2) a co-conspirator's ability and/or opportunity to commit the offense without the defendant.

2. Examples

United States v. Stephens, 365 F.3d 967 (11th Cir. 2004). The Eleventh Circuit reversed when the district court excluded testimony that the CI was still involved in the illicit sale of methamphetamine at the time he was alleged to have made several controlled purchases from the defendant. The court reasoned that Rule 404(b) allowed such evidence to show that the CI could have obtained the methamphetamine he turned over to the Government from a source other than the defendant.

United States v. Cohen, 888 F.2d 770 (11th Cir. 1989). Robert and Samuel Cohen were convicted of wire fraud, conspiracy and tax evasion. An alleged co-conspirator, Jerry Faw, pled guilty and agreed to testify against the Cohens. During cross-examination the Cohens attempted to question Faw about a similar conspiracy he was involved in wherein he defrauded a previous employer. The trial court found that such evidence was not relevant, but the Eleventh Circuit reversed. The Court of Appeals held that "[e]vidence that [Faw] had the opportunity and ability to concoct and conduct the fraudulent scheme without the aid or participation of the Cohens was relevant to the issue of their guilt."

United States v. McClure, 546 F.2d 670 (5th Cir. 1977). Brian Carroll, a man of questionable character with a reputation for violence, approached a DEA Agent and offered to become a confidential informant. The agent hired Carroll and promised him $50 for every new seller of a gram of heroin and $100 for every new seller of an ounce. The defendant, George Michael McClure, sold an ounce of heroin to the DEA Agent through a deal arranged by Carroll. McClure's defense was that he was afraid of Carroll and was threatened with dire consequences if he refused to make the sale. In support of his defense, McClure sought to submit testimony by other persons that Carroll had also intimidated them into selling heroin. The district court would not allow the evidence, but the Fifth Circuit reversed. The Fifth Circuit deemed the evidence admissible under Rule 404(b) as proof of the defendant's lack of intent and the informant's scheme.

3. Practice Pointers

a. Beware of Rule 608(b)

The prosecutor may attempt to convince the judge that Rule 608(b) prohibits the admission of your evidence of other crimes, wrongs or acts to attack the credibility of a witness. **This is not a correct statement of the law.** Rule 608(b) does prohibit the use of specific instances of a witness' conduct if offered for the **sole** purpose of attacking or supporting the witness' character for truthfulness or untruthfulness. The prohibition does not apply if the evidence is offered for any other purpose such as those listed in Rule 404(b). As always, state your grounds for admissibility in 404(b) language.

b. Make an offer of proof

Should the court prohibit you from putting on specific instances of the witness' conduct, preserve the issue for appeal by making an offer of proof.

V. Additional resources

For anything you ever wanted to know (and some things you may not) about Rule 404, refer to the following:

Fred Warren Bennett, "Admission of Character Evidence and Evidence of Other Acts," 21 Am.Jur. Proof of Facts 3d 629 (updated June 2007) (discussion and form questions)

Michael H. Graham, "Relevancy and its Limits: Rule 404 - Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes," 1 Winning Evidence Arguments § 404(b)

Jimmie E. Tinsley, "Alleged Victim's Commission of Prior Acts of and Reputation for Violence," 15 Am.Jur. Proof of Facts 2d 167 (updated June 2007) (discussion and form questions)

Thomas Lundy, "Reverse 404(b) Instructions: Using Uncharged Acts or Misconduct to Bolster the Defense," 26 March *Champion* 43 (March 2002) (available on Westlaw) (sample instructions)