

# Rules The Lazy Susan: Federal Rules of Evidence 404 and 405

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2d Series

## ANYTHING YOU CAN DO, I CAN DO BETTER

By Michael F. Maloney and Pamela B. Hamrin

As a former prosecutor, I can tell you with dubious certainty, that the first words uttered by prosecutors are not “Mama” or “Dada.” In fact, if you were to gather up all their baby tapes, the ones their parent’s proudly marked “first words,” you would see thousands of babies jubilantly flailing their arms and legs as they said: “Your honor, I’m offering it to show proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.” Then you would see the future prosecutor baby, turn aside their smug little future prosecutor baby faces and flash their best “Nancy Grace” grins at the poor little future defender babies.

The language of 404 and 405 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 their intent is to prove that our clients acted in conformity with their lying dog ways. While 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. Too often we use 404(a)’s character evidence language instead of 404(b)’s language and are told we can only throw our mud-balls in the vicinity of the government witness without actually hitting them. This is otherwise known as Rule 405 which restricts pure character evidence to testimony as to reputation or by testimony in the form of an opinion.

This presentation’s purpose is to give you a refresher course on the rules of engagement for a legal mud-ball fight, a/k/a Federal Rules of Evidence 403, 404 and 405. We will focus on the defendant’s affirmative use of 404(b) evidence in cases involving self-defense, mistaken identity, and the government’s use of cooperating witnesses. Discussions about blunting the prosecution’s use of such evidence will be left for another time.

The attached written materials are a general “how to” guide for a defendant’s affirmative use of 404(b).



## SELF-DEFENSE

- Goal:** To show that the alleged victim was the aggressor.
- Preferred Mud:** Evidence of the alleged victim's other crimes, wrongs or acts that reflect upon motive, intent, preparation, plan or absence of mistake or accident in threatening, assaulting or attempting to assault the defendant, requiring the use of force in self-defense.
- How:** Either in response to a government objection or through a pretrial motion in limine, inform the court that you are **not** offering the evidence for the purpose of proving that the alleged victim acted in conformity with his violent character, rather pursuant to Rule 404(b) you are **offering it for other purposes** such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. You should articulate the specific purpose or purposes for which you wish to enter the evidence.
- Examples:** 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 yelled "Hey get the fuck out of here." Ceasar Monterio, who was on the other end of Fortini's shotgun, stared at Fortini, then lunged towards him 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 baddest 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.
- Circuit Treatment:** **1<sup>st</sup> Circuit:** *Fortini v. Murphy*, 257 F.3d 39, 46-47 (1<sup>st</sup> Cir. 2001) (federal habeas case - in murder case court found that specific acts of victim/aggressor admissible to show intent of victim);

**2<sup>nd</sup> Circuit:** *United States v. Schatzle*, 901 F.2d 252, 255-56 (2<sup>nd</sup> Cir. 1990) (excessive force case - specific acts of victim offered to show quick temper of victim as evidence of instigation of altercation not allowed under 404(a) or (b); some limited impeachment allowed);

**4<sup>th</sup> Circuit:** *United States v. Piche*, 981 F.2d 706, 712-13 (4<sup>th</sup> Cir. 1992), *superseded by statute on other grounds*, Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3664, *as recognized in United States v. Ziadeh*, 104 Fed.Appx. 869, 876 (4<sup>th</sup> Cir. 2004) (specific instances of past conduct of victim not allowed; limited to reputation or opinion evidence because character of victim not an essential element of defense);

**7<sup>th</sup> Circuit:** *Palmquist v. Selvik*, 111 F.3d 1332, 1341 (7<sup>th</sup> Cir. 1997) (specific instances only admissible if character was an essential element of self-defense claim; district court did not abuse its discretion in excluding evidence);

*But see United States v. Smith*, 230 F.3d 300, 308 (7<sup>th</sup> Cir. 2000) (when specific instances are known to the one claiming self-defense, such instances should be admissible as essential element of claim – clarifying *Palmquist*);

**8<sup>th</sup> Circuit:** *United States v. Gregg*, 451 F.3d 930, 934-35 (8<sup>th</sup> Cir. 2006) (specific acts evidence of victim's prior violent conduct to show aggressor properly excluded because not an essential element of claim);

**9<sup>th</sup> Circuit:** *United States v. Keiser*, 57 F.3d 847, 854-57 (9<sup>th</sup> Cir. 1995) (no specific acts of victim to show aggressor because not essential element to self-defense);

*Compare United States v. James*, 169 F.3d 1210, 1214-15 (9<sup>th</sup> Cir. 1999) (records of past violent acts of victim admitted under 404(b) to show state of mind and as corroboration of defendant's reason to fear);

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

**11<sup>th</sup> Circuit:** *United States v. Cousins*, 842 F.2d 1245, 1249 (11<sup>th</sup> Cir. 1988) (extrinsic evidence of specific instances of witness' misconduct admissible for material fact but not to impeach credibility – not self-defense case);

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

**Practice pointer:**

**Anything you can do I can do better!** While the prosecutor has to withstand the 403 “prejudice” balancing to use 404(b) evidence, the defense can argue that this is less applicable to the defendant’s use of the same evidence because prejudice to the government is not the underlying concern.

**The government may only respond in kind.** The prosecutor is not allowed to initiate the introduction of character evidence, rather, he/she may only offer character evidence to rebut that which is offered by the defendant. Therefore, when a defendant puts on evidence attacking an alleged victim’s character, it opens the door for the prosecutor to introduce evidence reflecting favorably on the alleged victim’s character, but it does not open the door for the prosecutor to introduce evidence attacking the defendant’s character. That door is only opened when a defendant introduces evidence reflecting favorably upon her own character, then, and only then, may the prosecutor introduce evidence attacking the defendant’s character.

Specifically, if the defendant introduced evidence that the alleged victim had a reputation for being violent, it would open the door for the prosecutor to put on evidence that the alleged victim had a reputation for peacefulness. However, if the defendant did not introduce any character evidence regarding the alleged victim, the prosecutor would not be allowed to introduce evidence that the alleged victim had a reputation for peacefulness. (Rule 404(a))

Similarly, it is only when the defendant puts on evidence of his/her own pertinent character traits, that the prosecutor can introduce its own evidence regarding the defendant’s character. Therefore, if a defendant chooses not to put on evidence regarding his/her character, the prosecutor may not introduce any evidence of the defendant’s character. (Rule 404(a))

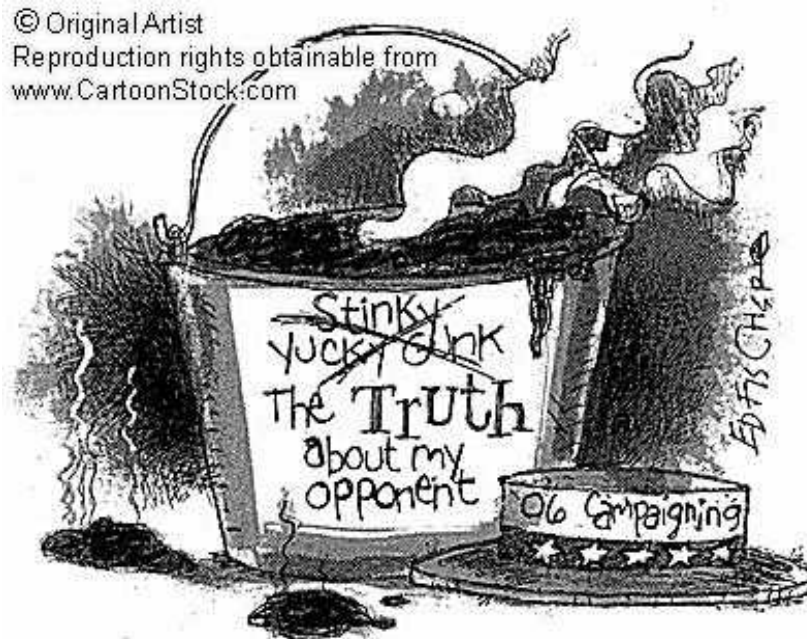
When determining whether to introduce character evidence, keep in mind that rule 405 allows either party to inquire about specific instances of conduct during the cross-examination of a character witness. Therefore, if your client has anything approximating an assault conviction, its best to leave that door closed and focus all your attention on the alleged victim’s character.

**Characterizing character evidence:** Real character evidence is 404(a) evidence and is usually limited to reputation and opinion. Rule 404(b) is “other crimes, wrongs, and acts” evidence. Be careful in defining these in your arguments so as not to confuse the court and risk being misunderstood on appellate review. References in these materials to character evidence refers to reputation or opinion evidence under 404(a).

**Backup plan:**

If the court prohibits you from putting on specific instances of the alleged victim’s conduct, you should 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. Don’t use 404(a) language in this instance or you will be stuck with that on appeal.

Then, but only then, should you proceed to put on character evidence by testimony as to the alleged victim’s reputation or by testimony in the form of an opinion as to whether the alleged victim possesses a character trait relevant to your defense. (Rules 404(a)(2) and 405)



## Mistaken Identity

**Goal:** To corroborate the defense of mistaken identity.

**Preferred Mud:** Any evidence tending to show that some unknown third person committed the crime rather than the defendant.

**How:** Introduce evidence of similar crimes which occurred close in time and location to your client's alleged crime if your client has either 1) 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. "[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 (1949).

Introduce evidence of an alleged co-conspirator's other similar crimes, wrongs or acts to show that the co-conspirator was capable of concocting and managing the conspiracy without the defendant's participation.

**Examples:** Richard Stevens was convicted of a brutal robbery/aggravated sexual assault because of the victims' 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 between 9:30 p.m. and 10:30 p.m.; were perpetrated on military personnel; items from both robberies were subsequently found at or near Fort Meade, Maryland; and involved a black assailant who was described similarly by his victims. The victim in the second robbery stated that Stevens was not his assailant. The 3<sup>rd</sup> Circuit reversed holding that a defendant "may introduce 'reverse 404(b)' evidence so long as its probative value under Rule 401 is not substantially outweighed by Rule 403 considerations . . . [such] as undue waste of time and confusion of the issues."

*United States v. Stevens*, 935 F.2d 1380, 1404 (1991)

Robert and Samuel Cohen were convicted of wire fraud, conspiracy and tax evasion. An alleged co-conspirator, Jerry Faw, plead 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 his previous employer. The trial court found that such evidence was not relevant. The 11<sup>th</sup> Circuit reversed holding that “[e]vidence that he 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. Robert and Samuel Cohen*, 888 F.2d 770 (11<sup>th</sup> Cir. 1989)

**Practice Pointer:**

**Anything you can do I can do better!**

Many courts have found that when the defendant offers “reverse” 404(b) evidence that a lower standard of admissibility should be required by the defendant using other-crimes evidence than when it 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 (3<sup>rd</sup> Cir. 1991) (*quoting State v. Garfole*, 388 A.2d 587, 591 (NJ 1978) (“...when the defendant is offering that kind of proof exculpatory, 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 (2<sup>nd</sup> Cir. 1984) (internal citations omitted) (“We believe 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”).



## Cooperating Witnesses

- Goal:** To use reverse 404(b) evidence against a cooperating witnesses to support the defendant's theory of the case.
- Preferred Mud:** Evidence of the cooperating witness' other crimes, wrongs or acts that show his/her motivation or intention to act as a cooperating witness, his/her preparation or plan to escape full punishment for their crime, or for any other purpose which assists the defendant in proving his/her theory of the case.
- How:** Either in response to a government objection or through a pretrial motion in limine, inform the court that you are **not** offering this evidence pursuant to Rule 608 for the purpose of attacking the witness' credibility, rather pursuant to Rule 404(b) you are **offering it to prove your theory of the defense** which includes, but is not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. You should articulate the specific purpose or purposes for which you wish to introduce the evidence.
- Practice pointer:** You should remind the trial court that Rule 404(b) is a rule of inclusion "which allows such evidence unless it tends to prove only criminal propensity. The list provided by the rule is **not** exhaustive and the 'range of relevancy outside the ban is almost infinite.'" *United States v. Stephans*, 365 F.3d 967, 975 (11<sup>th</sup> Cir. 2004) (*citing United States v. Cohen*, 888 F.2d at 776 (11<sup>th</sup> Cir. 1989) (emphasis added)).
- Examples:** In *United States v. Stephans*, 365 F.3d 967, the 11<sup>th</sup> Circuit Court of Appeals 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.
- In *United States v. Gonzalez*, 140 Fed.Appx.170 (11<sup>th</sup> Cir. 2005), Gonzalez was accused of importing cocaine from Ecuador and selling it to Miami customers, including Luiz

Perez. The government's case rested on Perez's testimony. Gonzalez's defense theory "was that Perez implicated Gonzalez to protect the cocaine's alleged true supplier, Jorge Luis Vasquez. To substantiate this theory, Gonzalez attempted to establish that Perez had a motive to protect Vasquez, that Vasquez previously supplied cocaine to Perez, and that Vasquez had arranged for the importation of containers from Ecuador into South Florida while communicating with Perez.

Perez denied during cross examination that he had past drug dealings with Vasquez. During his case-in-chief, the defendant was prohibited from putting on the Perez's cell mate to testify that the Perez had admitted to him that he had falsely accused the defendant as he was afraid to implicate his true supplier, Vasquez, whom he stated had connections at the Miami port who could pull containers. The defendant was further prohibited from introducing freight invoices and cell phone records showing that Vasquez was calling Perez and persons in Ecuador, Colombia and Venezuela around the same dates he was arranging for the importation of containers from Ecuador. The district court excluded the evidence as collateral in part because Perez's impeachment could not be proved by extrinsic evidence. (Rule 608)

The Circuit reversed stating that while extrinsic evidence of Perez's past drug dealings with Vasquez could not be used for the sole purpose of attacking Perez's general credibility, "such evidence could be used to refute specifics to which [Perez] had previously testified." *Gonzalez, id.* at 175 (*citing United States v. Cousins*, 842 F.2d 1245, 1249 (11<sup>th</sup> Cir. 1988)). The court further reasoned that it was improper to exclude the freight invoices and cell phone records as it "bolsters the defense theory" by tending to show that Vasquez had the means to import drugs in the manner charged in the case at hand.

**Practice pointer:**

The prosecutor may attempt to convince the judge that Rule 608(b) prohibits the admission of extrinsic 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** it is for the **sole** purpose of attacking or supporting the witness' character for truthfulness or

untruthfulness. However, the prohibition does **not** apply if the evidence is offered for any other purpose such as those listed in rule 404(b). The advisory committee notes for the 2003 amendments state that “[by] limiting the application of the Rule to proof of a witness’ character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment such as contradiction, prior inconsistent statement, bias and mental capacity to Rule 402 and 403.

**Backup plan:**

Should the court prohibit you from putting on specific instances of the witness’ conduct, you should preserve the issue for appeal by making an offer of proof. The offer of proof should describe in detail the prior acts and the basis upon which they are admissible under Rule 404(b). You should tie your rationale for admissibility to your theory of the defense.

Then, but only then, should you proceed to put on evidence in the form of opinion or reputation as to the character of the witness for untruthfulness. (Rule 608)



**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 § 404:5 (updated 2007).

Lori J. Henkel, "Admissibility of Evidence of Pertinent Trait under Rule 404(a) of the Uniform Rules of Evidence," 56 A.L.R. 4<sup>th</sup> 402 (1987).

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).