

Lead Story: Rule 404(b) – Ten Common Questions & Misconceptions

Issues to Consider on the Admissibility of “Other Crimes, Wrongs or Acts” Evidence

FRE 404(b) prohibits the introduction of other crimes, wrongs or acts “to prove the character of a person in order to show action in conformity therewith.” Yet the rule allows the introduction of other acts evidence for limited purposes if it bears on a relevant issue, such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Despite its normally broad discretion in admitting such evidence, trial courts frequently demonstrate some trepidation in admitting “other acts” evidence, which is often a hotly contested issue on appeal. Counsel confronting a FRE 404(b) issue may avoid problems in its application by considering the following common questions and misconceptions:



Q1: If Rule 404(b) evidence is commonly referred to as “prior bad acts” evidence, can “subsequent” acts be admitted under the rule?

While it is true that attorneys can frequently be heard in court referring to the “prior bad acts” rule, the text of FRE 404(b) applies to “other crimes, wrongs, or acts” without limiting the timing of the evidence in relation to the charges or claims. Several circuits have noted that FRE 404(b) applies to subsequent and prior acts, including:

❖ **Second Circuit:** *United States v. Germosen*, 139 F.3d 120, 128 (2d Cir. 1998) (“The fact that the evidence involved a subsequent rather than prior act is of no moment.”)

❖ **Third Circuit:** *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 518, 520-24 (3d Cir. 2003) (“The evidence admitted in this case differs from garden variety Rule 404(b) matter because it is evidence, not of a prior bad act in a criminal case, but of a subsequent good act in a civil case. Nonetheless, this evidence is encompassed by the plain text of Rule 404(b) which addresses “other . . . acts,” not just prior bad acts.”)

❖ **Fourth Circuit:** *United States v. Hadaway*, 681 F.2d 214, 217 (4th Cir. 1982) (noting “subsequent conduct may be highly probative of prior intent”)

❖ **Sixth Circuit:** *United States v. Carney*, 387 F.3d 436, 452 (6th Cir. 2004) (“Rule 404(b) expressly permits the admission of relevant ‘other acts,’ not merely ‘prior acts.’”) (discussed in the November 2004 issue of the FEDERAL

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❖ **Ninth Circuit:** *United States v. Hinojosa*, 297 F.3d 924, 928 (9th Cir. 2002) (noting “subsequent Rule 404(b) evidence may be relevant and admissible”)

❖ **Eleventh Circuit:** *United States v. Hurley*, 755 F.2d 788, 790 (11th Cir. 1985) (subsequent and prior acts are admissible under FRE 404(b))

Q2: Does the “other” act have to be wrongful or unlawful?

No. Rule 404(b) expressly applies to “[e]vidence of other crimes, wrongs, or acts”. While the “other” act can be a crime or wrongful, it need not be unlawful or wrongful to be admissible. The evidence can consist of “other acts” as well as “other crimes” or “other wrongs”. See, e.g., *United States v. Vega*, 188 F.3d 1150, 1154 (9th Cir. 1999) (“we note that this rule applies to all ‘other acts,’ not just bad acts”; concluding border crossings and bank deposits were subject to FRE 404(b)); *United States v. Williams*, 900 F.2d 823, 826 n.2 (5th Cir. 1990) (“‘Other act’ extrinsic evidence need not be evidence of other wrongful acts but may be evidence of any extrinsic acts relevant to the criminal act charged.”) (emphasis in original). In fact, at least one circuit to consider the issue has noted that FRE 404(b) supports admission of “subsequent good acts.” *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 518, 520-24 (3d Cir. 2003) (in civil employment discrimination case, admitting subsequent “good” acts to show non-discriminatory intent under FRE 404(b)).

Q3: Can evidence of an acquittal be admitted under Rule 404(b)?

Generally yes. Because Rule 404(b) applies to “[e]vidence of other crimes, wrongs, or acts,” evidence based on an acquittal may be admitted under the rule. *See, e.g., Dowling v. United States*, 493 U.S. 342, 348-49 (1990) (robbery evidence, introduced at first trial and resulting in an acquittal, was admissible under Rule 404(b) in subsequent prosecution for bank robbery); *United States v. Carney*, 387 F.3d 436, 452 (6th Cir. 2004) (in firearms case, allowing admission of acquitted and dismissed counts from first trial under Rule 404(b)) (discussed in the November 2004 issue of the FEDERAL EVIDENCE REVIEW); *United States v. Rocha*, 553 F.2d 615, 616 (9th Cir. 1977) (per curiam) (in possession of marijuana with intent to distribute, affirming admission at second trial admission of prior marijuana transportation arrest resulting in acquittal to show knowledge and intent). Of course, each of the Rule 404(b) requirements must be met before any “other” act evidence may be admitted.

Q4: Does Rule 404(b) apply in civil cases?

Rule 404(b) evidence most commonly arises in criminal cases. However, the rule also applies in civil cases, as noted by the Supreme Court. *Huddleston v. United States*, 485 U.S. 681, 685 (1988) (noting Rule 404(b) “applies in both civil and criminal cases”); *see also S.E.C. v. Happ*, 392 F.3d 12 (1st Cir. 2004) (in civil securities fraud action, letters of defendant admitting improper purchases of a first company’s stock shares were admissible to show the defendant’s state of mind (scienter) in trial involving a second company stock purchases) (discussed in 2 FED. EVID. REV. 36 (Jan. 2005)); *Ansell v. Green Acres Contracting Co., Inc.*, 347 F.3d 515, 518, 520-24 (3d Cir. 2003) (in civil employment discrimination case, admitting subsequent “good” acts to show non-discriminatory intent under Rule 404(b)). As another example, in March, the Seventh Circuit held, in a sex discrimination case, that a supervisor’s statements “regarding lesbians in the City’s police department and the use of the word ‘fag’” were properly admitted under Rule 404(b). *See Barnes v. City of Cincinnati*, 401 F.3d 729 (7th Cir. Mar. 22, 2005) (p. 270). The language of Rule 404(b) does not limit its application to federal criminal cases.

Q5: Rule 404(b) contains a list of purposes to admit the evidence (including “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident”). Is this list exclusive?

The list is illustrative, and not exclusive or exhaustive. *See, e.g., United States v. Cruz-Garcia*, 344 F.3d 951, 955 (9th Cir. 2003) (noting the Rule 404(b) “list is illustrative, not exhaustive”); *United States v. Ramirez-Lopez*, 315 F.3d 1143, 1154 (9th Cir. 2003) (evidence of consciousness of guilt, including threats made to a trial witness, may be admitted under Rule 404(b)); *United States v. Blankenship*, 775 F.2d 735, 739 (6th Cir. 1985) (“The list of permissible uses is not exclusive. Courts have recognized other permissible uses of such evidence; for example, to show a common scheme or plan.”) (citations omitted).

Further, FRE 404(b) is often referred to as a rule of inclusion, rather than exclusion. Other act evidence is generally admissible – it is *only* when offered to prove propensity that it is excluded. *See, e.g., United States v. Young*, 573 F.2d 1137, 1139-40 (9th Cir. 1978) (“The rule is an inclusionary one: unless introduced to prove criminal disposition, evidence of other crimes and acts is admissible when relevant to issues at trial.”) (citing other cases); *see also United States v. Rrapi*, 175 F.3d 742, 748 (9th Cir.), *cert. denied*, 528 U.S. 912 (1999).

Q6: When does the “reasonable notice” requirement apply? What is the purpose of the pretrial notice requirement?

In 1991, Rule 404(b) was amended to include a pretrial reasonable notice requirement in criminal cases: “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.” According to the drafters of the amendment, the pretrial notice requirement “is intended to reduce surprise and promote early resolution on the issue of admissibility”. ACN (1991).

The failure to comply with the pretrial notice requirement may be fatal. *See, e.g., United States v. Carrasco*, 381

F.3d 1237, 1241-43 (11th Cir. 2004) (per curiam) (in drug prosecution, when no pretrial FRE 404(b) notice was provided, admission of testimony concerning past dealings and drug transactions involving one codefendant was not harmless error; while some of the transactions were “arguably” inextricably intertwined and not subject to notice, failure to provide notice of other FRE 404(b) incidents required reversal) (discussed in 1 FED. EVID. REV. 27 (Sept. 2004)). The failure to provide pretrial notice may be excused upon a showing of “good cause,” as provided under the rule. See, e.g., *United States v. Smith*, 383 F.3d 700, 706-07 (8th Cir. 2004) (“good cause” shown for rebuttal evidence discovered after government rested at trial) (discussed in the October 2004 issue of the FEDERAL EVIDENCE REVIEW).

Q7: What is a “reasonable” amount of time for providing the required notice?

The “reasonable notice” requirement under FRE 404(b) contains no specific time limit and has been typically construed to include about two weeks prior to trial. See, e.g., *United States v. Kern*, 12 F.3d 122, 124 (8th Cir. 1993) (14 days before trial was adequate notice under the circumstances); see also ACN (1991) (“Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case.”). What constitutes “reasonable notice” may of course depend on the circumstances and evidence.

Q8: What is the “inextricably intertwined evidence” rule and how does it relate to Rule 404(b)?

The “inextricably intertwined” doctrine operates as an important exception to FRE 404(b) evidence. Under this exception, the requirements of FRE 404(b) need not be shown because the evidence is not “other” acts evidence but “intertwined” with the charge or claim. The exception generally applies where the evidence to be admitted is either “a part of the transaction that serves as the basis for the criminal charge” or claim, or to allow “a coherent and comprehensible story regarding the commission of the crime.” *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-13 (9th Cir. 1995) (cited in *United States v. DeGeorge*, 380 F.3d, 1203, 1220 (9th Cir. 2004) (noting two categories of “inextricably intertwined” evidence)). Other courts recognize similar doctrines, sometimes referred to as “intrinsic acts” evidence:

❖ **Sixth Circuit:** *United States v. Barnes*, 49 F.3d 1144, 1149 (6th Cir. 1995) (“When the other crimes or wrongs occurred at different times and under different circumstances from the offense charged, the deeds are termed ‘extrinsic.’ ‘Intrinsic’ acts, on the other hand, are those that are part of a single criminal episode. Rule 404(b) is not implicated when the other crimes or wrongs evidence is part of a continuing pattern of illegal activity. When that circumstance applies, the government has no duty to disclose the other crimes or wrongs evidence.”; Rule 404(b) did not apply to conduct which was intrinsic to the charged count of possession with intent to distribute methamphetamine where: “there was a direct connection between the earlier ‘short’ drug shipment and the receipt of the one for which defendants were charged” and the trial court determined that this other drug act was necessary “to make up for a prior shipment which was short”)

❖ **Seventh Circuit:** *United States v. Spaeni*, 60 F.3d 313, 316 (7th Cir. 1995) (“Under this doctrine, evidence of uncharged criminal activity is admissible to provide the jury with a complete story of the crime on trial, to complete what would otherwise be a chronological or conceptual void in the story of the crime, or to explain the circumstances surrounding the charged crime.”)

❖ **Eighth Circuit:** *United States v. O’Dell*, 204 F.3d 829, 833 (8th Cir. 2000) (noting “crimes or acts which are ‘inextricably intertwined’ with the charged crime are not extrinsic and Rule 404(b) does not apply”)

❖ **Tenth Circuit:** *United States v. Lambert*, 995 F.2d 1006, 1007 (10th Cir. 1993) (noting evidence is “direct or intrinsic” to the offense charged if “both acts are part of a single criminal episode or the other acts were necessary preliminaries to the crime charged”).

❖ **Eleventh Circuit:** *United States v. Wright*, 392 F.3d 1269, 1276 (11th Cir. 2004) (“Evidence of criminal activity other than the charged offense is not extrinsic under Rule 404(b) if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense. Moreover, [e]vidence, not part of the crime charged but pertaining to the chain of events explaining the context ... is properly admitted if linked in time and circumstances with

the charged crime, or forms an integral and natural part of an account of the crime ... to complete the story of the crime for the jury.”) (citations and quotation marks omitted) (discussed in 2 FED. EVID. REV. 38 (Jan. 2005) (Rule 404(b), *United States v. Wright* (11th Cir.))

Q9: Since “other” act evidence is admitted for a limited purpose, what role do limiting instructions serve with Rule 404(b) evidence? What happens if a limiting instruction is not given?

Numerous cases have noted that an appropriate limiting instruction can serve to mitigate any potential for unfair prejudice and to ensure the jury considers the evidence for the limited purpose in which it is offered. *See, e.g., Huddleston v. United States*, 485 U.S. 681, 691-92 (1988) (limiting instruction reduces danger of conviction based on prior acts). However, while a limiting instruction is strongly advised, the failure to give a limiting instruction is not always fatal. The opponent of the evidence may waive any challenge if an objection is not made at trial.

Q10: If the trial court errs in admitting or excluding Rule 404(b) evidence, what remedies remain?

The harmless error doctrine may apply to Rule 404(b) evidence. *See, e.g., United States v. Jones*, 389 F.3d 753, 758 (7th Cir. 2004) (error in admitting evidence of two prior convictions (possession of cannabis with intent to deliver and for attempted delivery of a controlled substance) was harmless) (discussed in the December 2004 issue of the FEDERAL EVIDENCE REVIEW)); *United States*

v. Linares, 367 F.3d 941, 949 (D.C. Cir. 2004) (evidence of prior arrest was irrelevant to any issue; but error was harmless) (discussed in the August 2004 issue of the FEDERAL EVIDENCE REVIEW)); *United States v. Flores*, 73 F.3d 826, 832-33 (8th Cir.) (claim that prior acts evidence failed to either satisfy Rule 404(b) or comply with the notice requirements was harmless), *cert. denied*, 518 U.S. 1027 (1996); *United States v. Ross*, 886 F.2d 264, 267 (9th Cir. 1989) (in prosecution for conspiring to defraud the United States, making false statements, and improperly using wife’s social security number, any error in admitting use of wife’s social security number 13 years before was harmless), *cert. denied*, 494 U.S. 1083 (1990).

**Text of Federal Rule of Evidence 404(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.”

Additionally, alternative theories for admission may be considered on appeal under the appellate doctrine that the appeals court may affirm on any basis finding support in the record. *United States v. Nazemian*, 948 F.2d 522, 530 (9th Cir. 1991) (noting principle), *cert. denied*, 506 U.S. 835 (1992); *see also United States v. Verdusco*, 373 F.3d 1022, 1030 (9th Cir.) (“If evidence is properly admitted under one rule, then improper

admission under the second rule is harmless.”; concluding that because evidence was admissible under Rule 404(b), it was unnecessary to consider challenge to evidence under Rule 609), *cert. denied*, 125 S.Ct. 508 (2004); *see generally SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943) (noting appellate review doctrine: “It would be wasteful to send a case back to a lower court to reinstate a decision which it had already made but which the appellate court concluded should properly be based on another ground within the power of the appellate court to formulate.”). Alternative theories for admission of evidence under Rule 404(b) are noted in this issue’s “Practice Tip – Federal Rule of Evidence 404(b)” (p. 242). 