

Relevance and the FRE

Professor Jules Epstein

August, 2021



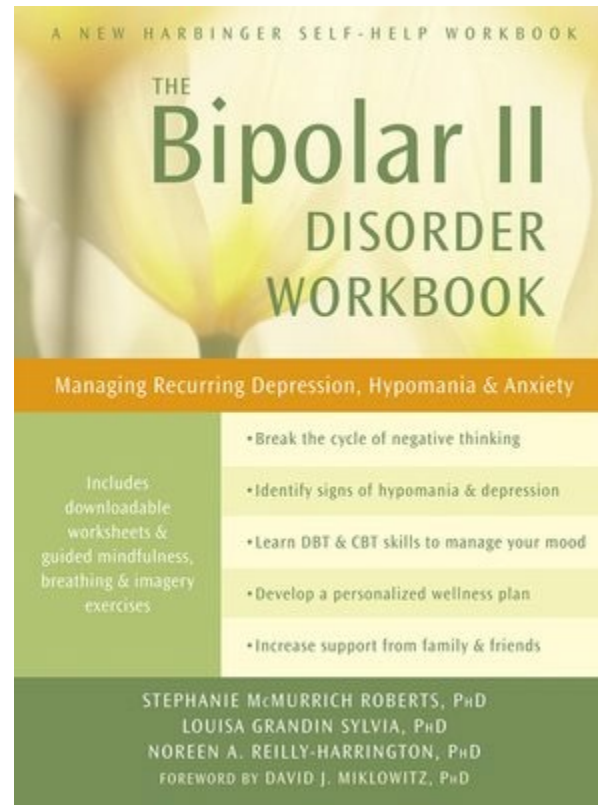
Let's Get Right To Work

A starting hypothetical

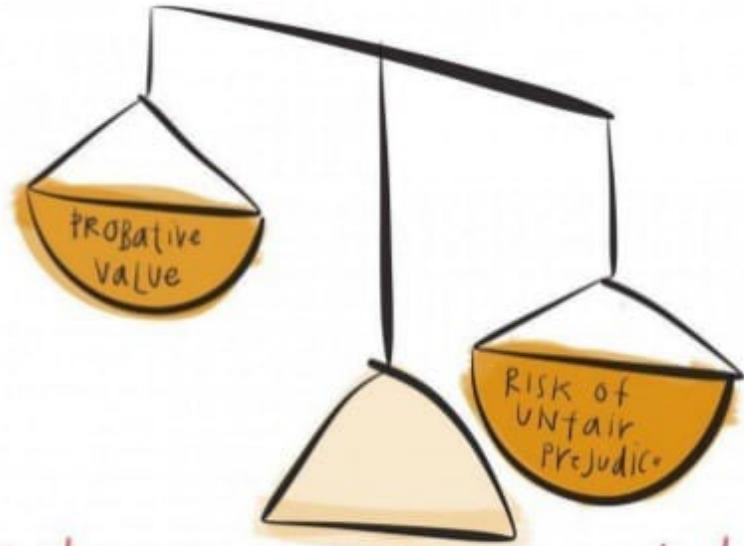
- ▶ A bicyclist and a motorist are in a collision. The motorist's contention is that the bicyclist was too hard to see because the bicycle had no rear flashing light.
- ▶ The accident happened at noon on a bright sunny day; and the bicyclist was wearing a yellow reflective bike jersey and a yellow helmet. The town where the accident occurred has an ordinance that reads "bicycles must use a flashing tail light after sundown and before sunrise. At all other times use of such lights is discretionary."

One More

- ▶ **What Is Bipolar II Disorder?**
- ▶ Bipolar II disorder involves moods cycling between high and low over time.
- ▶ In bipolar II disorder, the "up" moods never reach full-blown mania. The less-intense elevated moods in bipolar II disorder are called hypomanic episodes, or hypomania.



Unfair Prejudice – Rule 403




Evidence will be EXCLUDED.



RELEVANT
INFORMATION

Two questions

One more question - from night 1



WHAT DIFFERENCE
WOULD IT MAKE AT
NOON?

**CONDITIONAL
RELEVANCE**



MainEnglish

Relevance - Just Another Brick...



Relevance - The Rule

- ▶ Evidence is relevant if:
 - ▶ (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
 - ▶ (b) the fact is of consequence in determining the action.

- ▶ **THESE ARE THE LITIGATOR'S POWER WORDS.**

Relevance - to what?

- ▶ On the night in question there was a full moon. Relevant?
- ▶ Insanity Defense?
- ▶ Eyewitness Identification?
- ▶ Bankruptcy?



Relevance - to what?

- ▶ Relevancy is not an inherent characteristic of any item of evidence
- ▶ but exists only as a relation between an item of evidence and a matter properly provable in the case.

401 Advisory Committee Notes



What is “of consequence?”

- ▶ 401 dropped "material."
- ▶ The fact to be proved may be **ultimate, intermediate, or evidentiary**; it matters not, so long as it is of consequence in the determination of the action.

USCS Fed Rules Evid R 401

What is “Evidentiary?”

- ▶ No clear definition
- ▶ Not related to elements



“Of consequence” and theory/themes

- ▶ The rule requires minimal logical relevance-
- ▶ any tendency to make the existence of a fact more or less probable.
- ▶ YOUR APPROACH - Here is my story, and this helps tell it ULTIMATELY, in an INTERMEDIATE way, or EVIDENTIARILY.

Relevant? Test Yourself

- ▶ Charge - Rape
- ▶ Defense - no sexual contact at all
- ▶ Disputed evidence:
- ▶ No DNA/semen in body swabs or underwear

- ▶ Is the absence of physical evidence relevant, since rape occurs as long as there is penetration for any duration?

**ABSENCE OF
EVIDENCE IS NOT
EVIDENCE OF
ABSENCE.**

QUOTEHD.COM

Dr. Carl Sagan
American Astronomer

Relevant? Test Yourself

- ▶ Evidence that merely advances an inference of a material fact may be admissible, even where the inference to be drawn stems only from human experience.
- ▶ Commonwealth v. Hawk, 551 Pa. 71, 79, 709 A.2d 373, 377, 1998 Pa. LEXIS 172, *12 (Pa. 1998)

A New 401 Case

- ▶ Charge - conspiracy to commit wire and mail fraud
- ▶ Defense - I am too good a businessman and too good a company president to have participated in or tolerated the business risks inherent in discount fraud,
- ▶ Rebuttal Evidence - racist and misogynistic phone calls



holding

- ▶ the recordings do not rebut Hazelwood's argument that he was a "good businessman."
- ▶ Having a bad set of personal beliefs did not make it more likely that Hazelwood made bad business decisions.

United States v. Hazelwood, 979 F.3d 398, 409, 2020 U.S. App. LEXIS 34202, *20, 2020 FED App. 0345P (6th Cir.), 12, 113 Fed. R. Evid. Serv. (Callaghan) 1816, 2020 WL 6336133



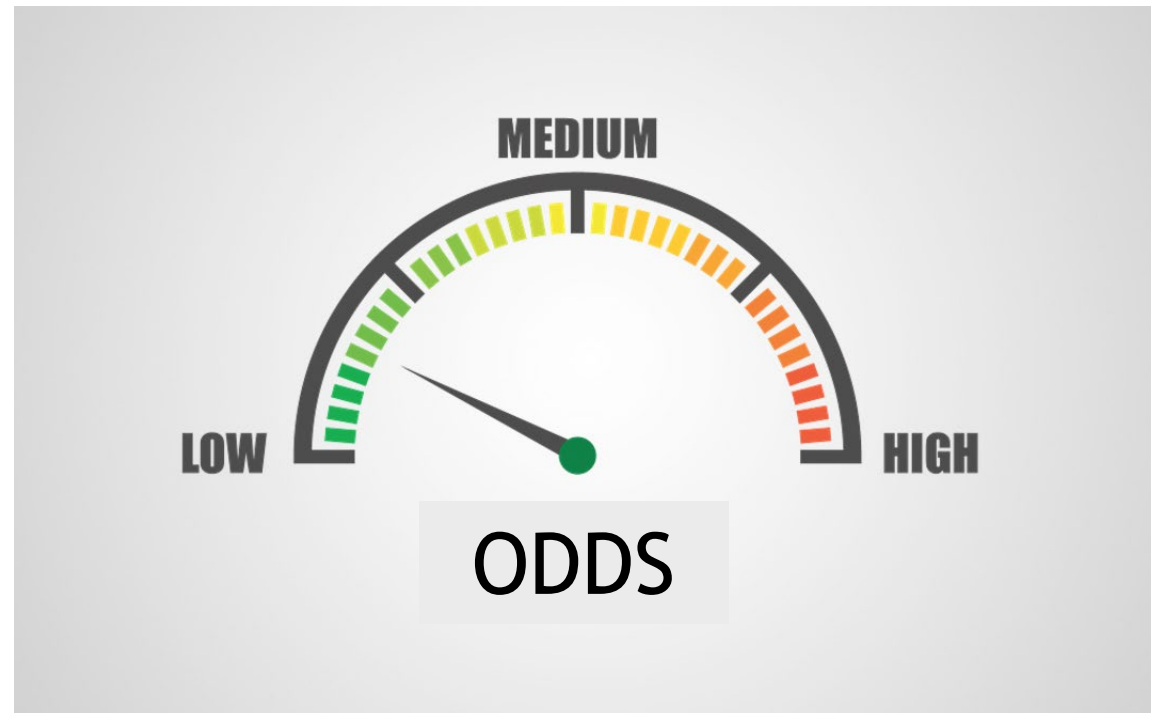
IRRELEVANT.

A RECENT RELEVANCE (STATISTICS) CASE

- ▶ Blood on defendant's boot (homicide case) = victim's DNA profile
- ▶ **JURY IS THEN TOLD:** the statistical probability: one in 66.16 quadrillion in the Caucasian population, one in 366.3 quadrillion in the African-American population, and one in 1.168 quadrillion in the Hispanic population.
- ▶ **PROBLEM** -victim is Asian
- ▶ **ARE THE STATISTICS IRRELEVANT?**

ANSWER - RELEVANT

- ▶ It reduces the likelihood that someone else contributed the blood.





PENNSYLVANIA SAYS
"NO"

RULE 413

AND IS THIS RELEVANT?

Are These Relevance Challenges Correct?

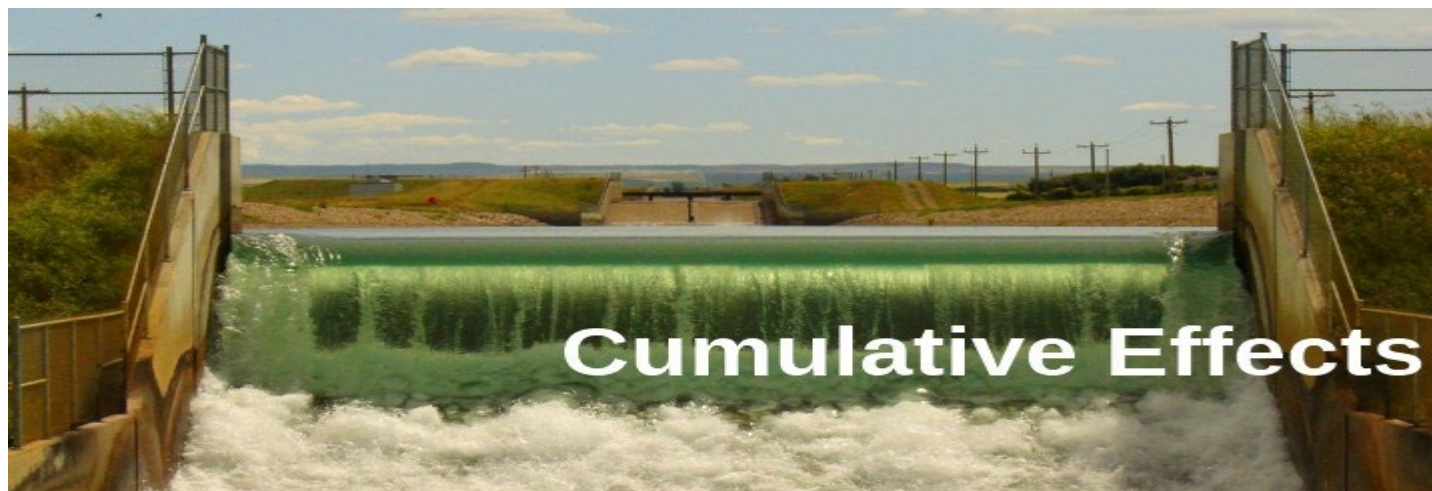
- ▶ “It’s irrelevant because I stipulate to that.”
- ▶ “It’s irrelevant because they proved it five other ways already.”



Relevance and alternate methods of proof

- ▶ the availability of alternative proofs...did not affect its evidentiary relevance

Old Chief v. United States



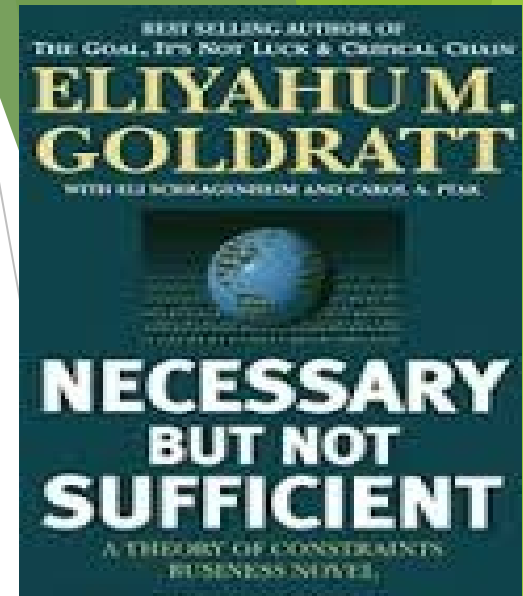
Relevance - The Bottom Line(s)

- ▶ Really low threshold
- ▶ Hard to win an irrelevance objection - and bad to make it at trial (since a 99% likelihood of losing)
- ▶ Greater focus - the remaining 400 rules

irrelevant

One Last Relevance Point

- ▶ Relevant evidence is **admissible unless** any of the following provides otherwise:
 - ▶ the United States Constitution;
 - ▶ a federal statute;
 - ▶ these rules; or
 - ▶ other rules prescribed by the Supreme Court.
- ▶ Irrelevant evidence is not admissible.



Acts or Character

The **ACT**[®]



Character and 404(b)



Let's Talk "Character"


Successful Character Traits

responsible
caring
honest
helpful
enthusiastic
creative
confident

Inferring Character Traits from a Character's Actions

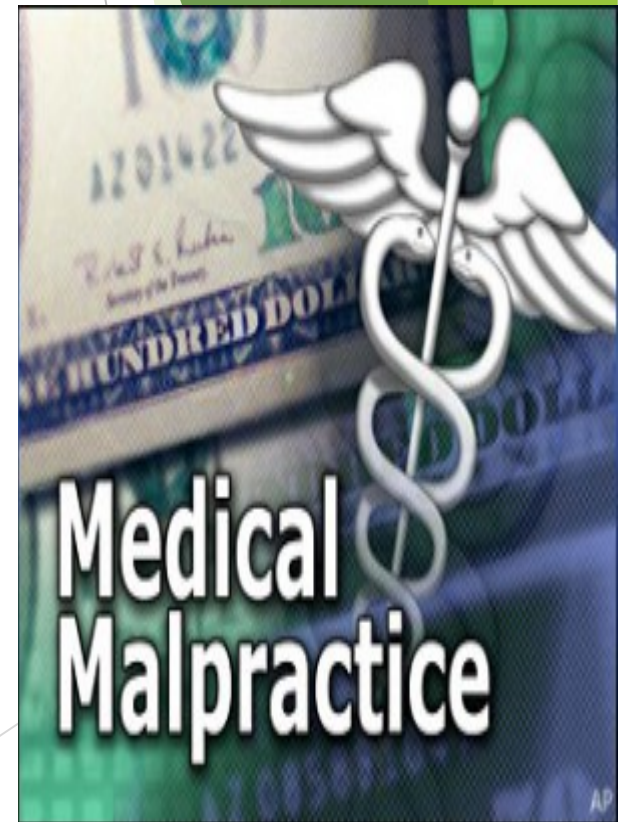


Book Title: _____

 Action	Inferred Character Trait

Quick Test

- ▶ Dr. Fingers is being sued for allegedly leaving a sponge inside a patient, causing an infection.
- ▶ Nurse: “Dr. Fingers is an incredibly caring and careful doctor.”
- ▶ Nurse: “I have done 1,000 operations with Dr. Fingers, and she counts sponges before closing the incision every time.”



Basic Character Rules

- ▶ No character evidence in civil cases to prove action in conformity
- ▶ *Some* character [**pertinent trait**] in criminal cases to prove action in conformity
- ▶ ***Witness*** character OK in criminal and civil

- ▶ Defendant's good character
- ▶ Victim's bad character
- ▶ Defendant's bad character to rebut *any* proof that homicide victim was initial aggressor



Character - The “Dance”

- ▶ Proved by reputation/ **opinion**
- ▶ **Rebut** by
 - ▶ Specific act (not arrests, convictions)
 - ▶ Contrary reputation



A Special Circumstance - Character and Self-Defense

OCTOBER 30, 2018

Allegations of racial comments and cocaine use complicate Rittenhouse Square stabbing case

At Tuesday's preliminary hearing for Michael White, a divisive case got even more heated

BY **BRIAN HICKEY**
PhillyVoice Contributor



BRIAN HICKEY/PHILLYVOICE

Sean Schellenger's mother Linda speaks to reporters after the man who allegedly stabbed her 37-year-old son to death in July was held over for trial on charges including third-degree murder, possession of an instrument of crime and voluntary manslaughter.

E
C
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fr

O

Where does this testimony fit?

In 2008 I was a bouncer, in a bar, in Florida.

Schellenger became unruly.

It took three bouncers to eject him.

He three punches

He bit my elbow, leaving a scar that remains.



Character of the Victim



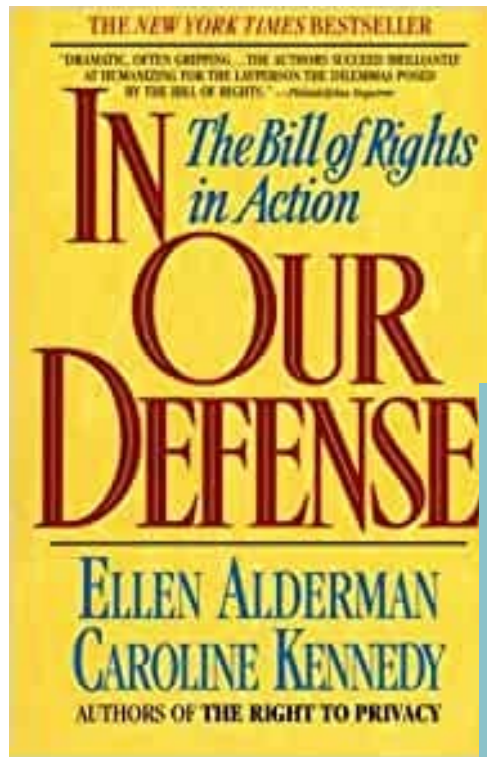
1. To prove victim actually was the aggressor - conviction or not
2. To prove defendant's reasonable fear of victim



*Crucial Interview Questions

What are you **passionate** about?

Anyone see *any* concerns in *this* case?



403
FORBIDDEN



What is Prohibited?


- ▶ Evidence of a **crime, wrong, or other act**
- ▶ is not admissible to prove a person's character
- ▶ in order to show that on a particular occasion the person acted in accordance with the character.

THE DIFFERENCE

Bible Character: Huzzakiah - 2 Kings 18:19
Bible Verse: Romans 12:1-2

PEACEFUL

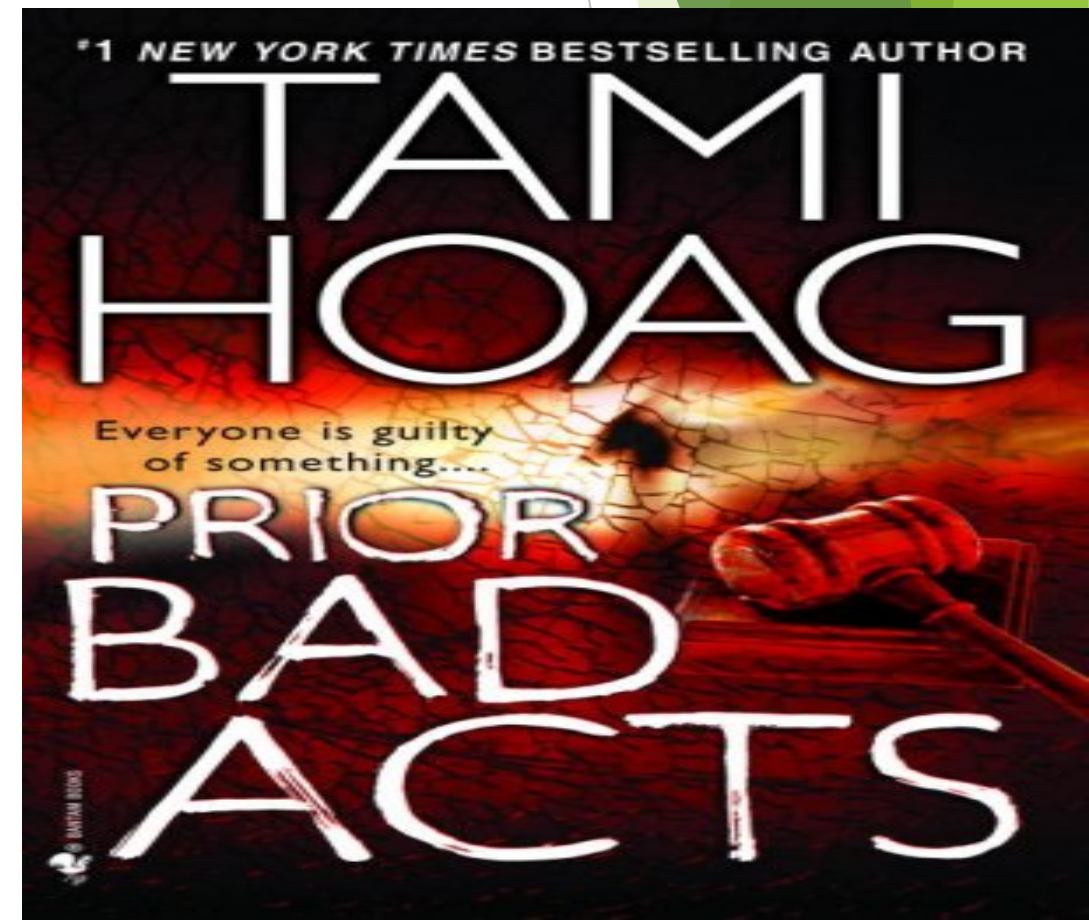
Choosing to remain calm
by not worrying
and trusting God.

PEACEFUL
RachaelCarman.com ©  Jn 3:30



“other acts” evidence

- ▶ When are “other acts” admissible, and when are they “character?”



Visualizing “Other Acts”

- ▶ Is the other conduct “inside” or “outside” of the box?
- ▶ Even if “inside,” is it relevant? (At a drug bust, there are child porn photos on the table.)

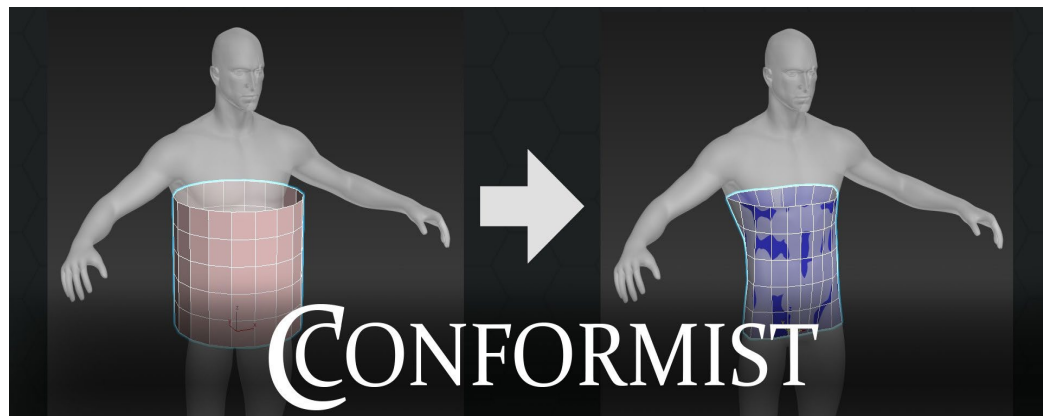
Time
Place
Act

A Starting Presumption

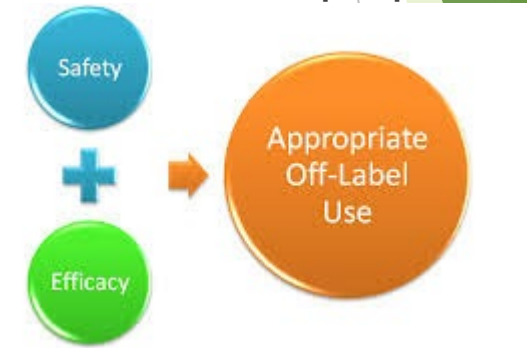
- ▶ All acts “outside of the box” = character.
- ▶ What is “character?”
- ▶ “Character” is “propensity.”
- ▶ “Propensity” is “did it once, did it again.”

Making sense of the rule

- ▶ Evidence of a crime, wrong, or other act
- ▶ is not admissible to prove a person's character
- ▶ to show that on a particular occasion the person acted in accordance with the character.



- ▶ may be admissible for another purpose, such as
- ▶ motive,
- ▶ opportunity,
- ▶ intent,
- ▶ preparation, plan, knowledge, identity, absence of mistake, or lack of accident.



Where's the line (what does it show)?

- ▶ Current charge: robbing a pnc bank on easter, 2017, with a purple gun



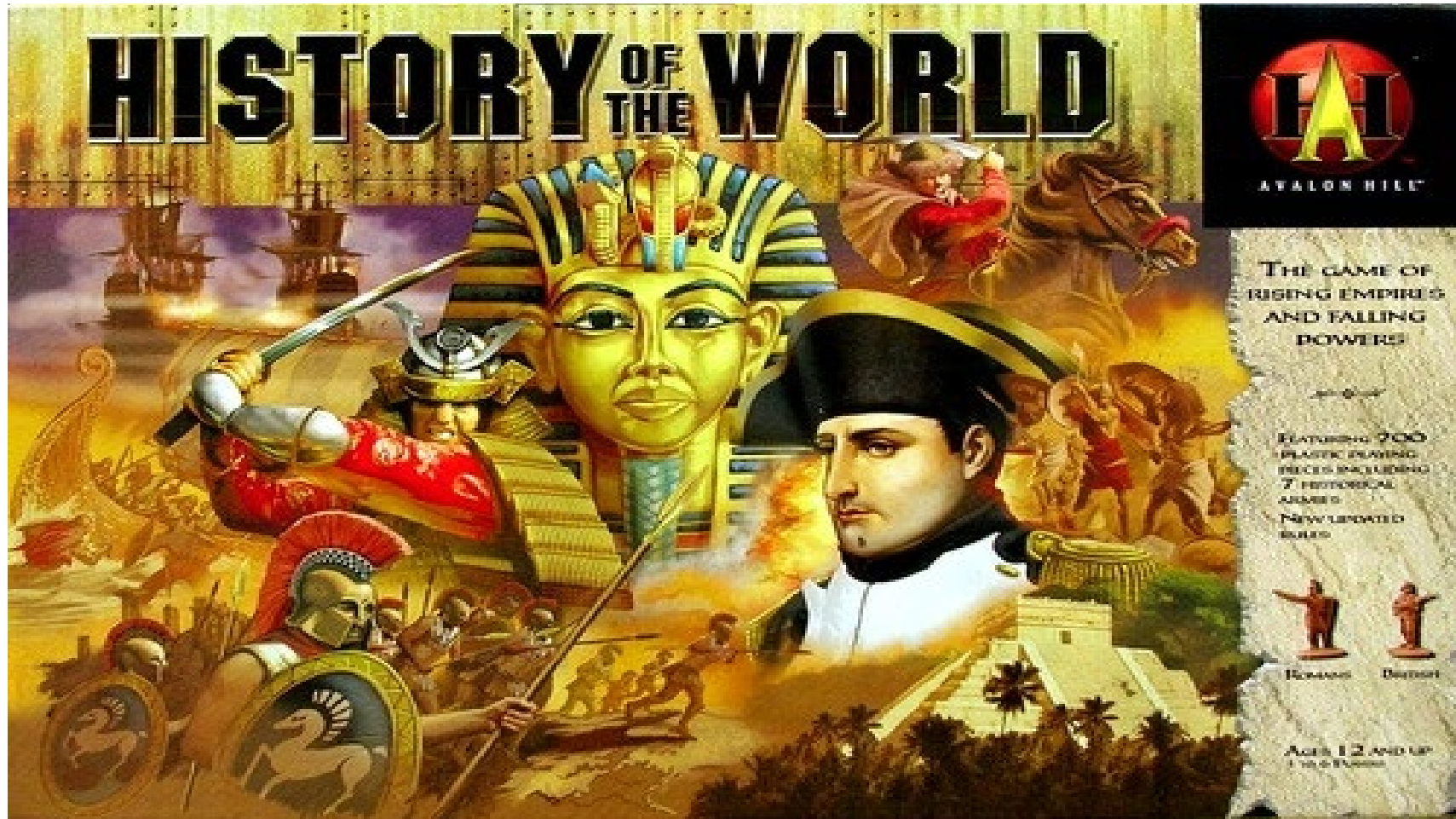
- ▶ Robbed a bank in 2009
- ▶ Robbed a bank with a gun in 2009
- ▶ Robbed a pnc bank in 2009
- ▶ Robbed a pnc bank in 2009 with a gun
- ▶ Robbed a pnc bank on easter Sunday in 2009 with a gun
- ▶ Robbed a pnc bank on easter Sunday in 2009 with a purple gun

What's A Potential Problem?



Who cares if he's guilty THIS time? I'm okay with punishing him again for his prior sexual abuse case.

First, Some History



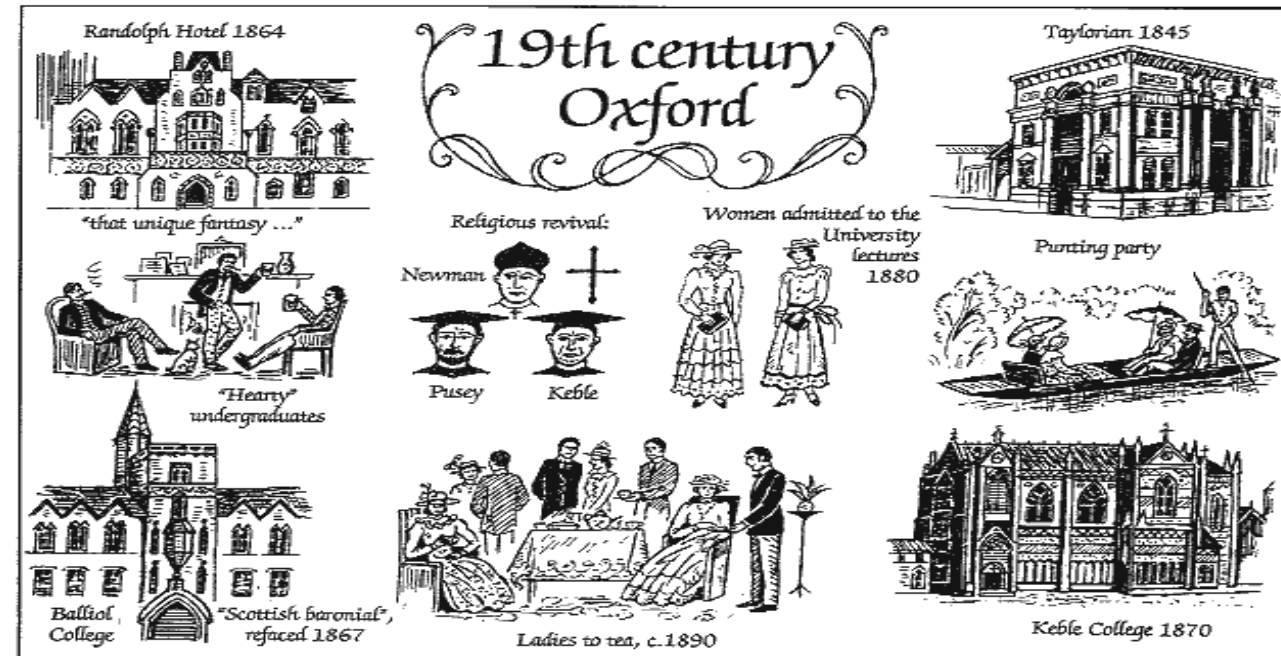
The Antecedents of 404(b)

- ▶ Early English courts did not recognize a rule excluding evidence of prior bad acts, and instead evaluated the admissibility of such acts according to the ordinary test of relevance.



The Evolution

- ▶ By the turn of the nineteenth century, British and American courts were in agreement that prior act evidence introduced for the limited purpose of showing a defendant's propensity to commit the charged offense should be excluded.



“Let it in” or “Keep it Out”

- ▶ “exclusionary” or “inclusionary”

Some courts
agree to
disagree



- ▶ [Third Circuit]: “inclusionary” = breadth of exceptions, not presumptively admissible

New Jersey - In or Out



EXCLUSION

- ▶ Because N.J.R.E. 404(b) guards against [a conviction based] on earlier reprehensible conduct, the rule "is often described as [one] of exclusion."

State v. Skinner, 218 N.J. 496, 514 (N.J. 2014)

An Aside

- ▶ Reliance on propensity evidence does not violate Due Process.
- ▶ the trial court's discretion to exclude propensity evidence...saves [a propensity rule] from defendant's due process challenge.

People v. Falsetta,
21 Cal. 4th 903, 917
(Cal. 1999)



"And Dubois, here, is in charge of due process."

What is Permissible?

- This evidence may be admissible for another purpose, such as proving
- motive,
- opportunity,
- intent,
- preparation,
- plan,
- knowledge,
- identity,
- absence of mistake, or
- lack of accident

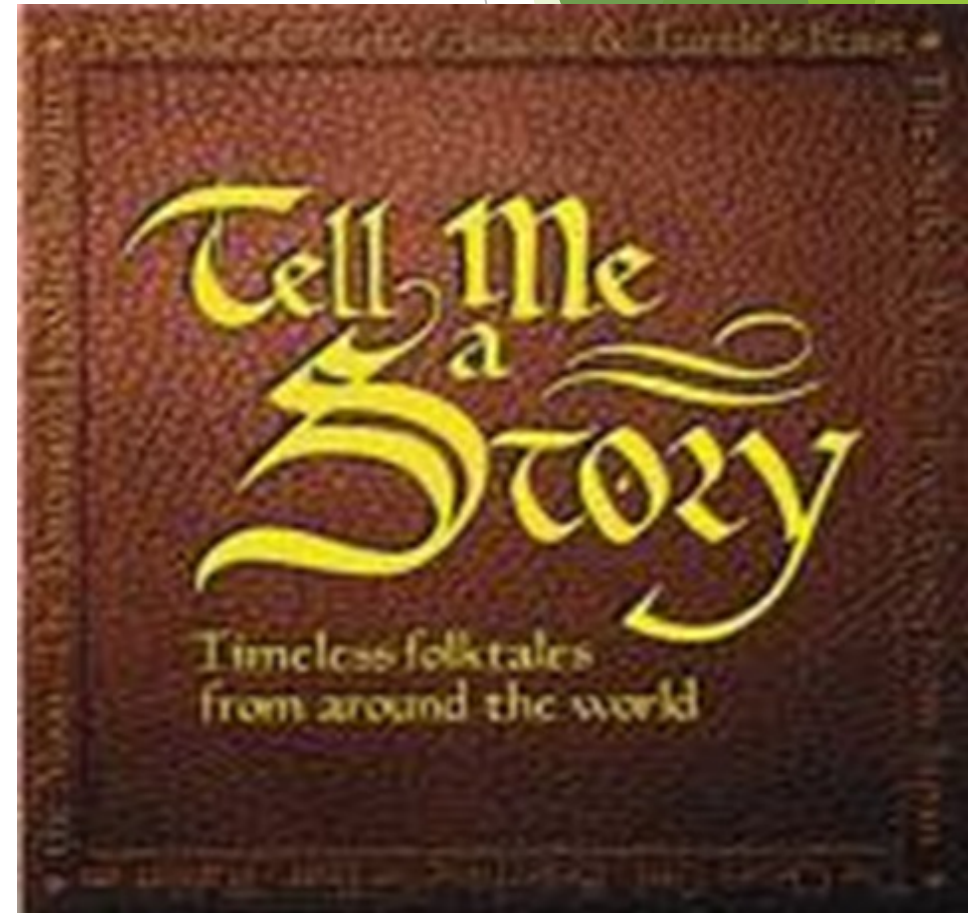
Are There More Grounds?

- ▶ The list is not exclusive

What is Permissible [Pennsylvania]?

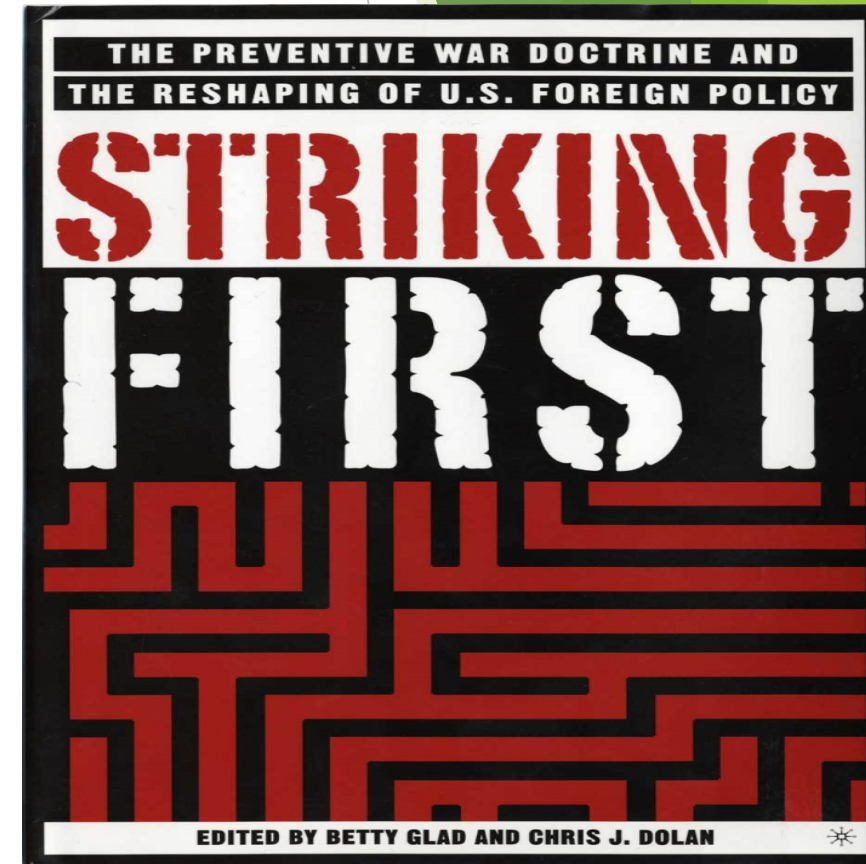
The 'un-enumerated' category

- ▶ when it forms part of the chain or sequence of events leading to the crime at issue,
- ▶ figures in the history of the event
- ▶ or was part of the natural development of the facts



404(b) and Other Acts Evidence

- ▶ IS ABSENCE OF MISTAKE ONLY RESPONSIVE TO A PLEA OF MISTAKE?
- ▶ PENNSYLVANIA "At least for...a homicide prosecution, where the victim...is unavailable, we reject the notion that proof of an absence of accident is admissible only for responsive purposes."



The “No Panic” Exception



The “No Panic” Exception

- ▶ Appellant admitted the murder
- ▶ defense was lack of specific intent to kill,
- ▶ the evidence regarding the five prior robberies was sufficiently intertwined with Appellant's claim that he had experienced a "panicky reaction"
- ▶ Commonwealth v. Jordan, 65 A.3d 318, 325 (Pa. 2013)

A PARTICULARLY HIGH-PROFILE CASE

Los Angeles Times



ENTERTAINMENT & ARTS

In surprise move, Pennsylvania Supreme Court will hear Bill Cosby's appeal



Bill Cosby arrives for a sentencing hearing following his sexual assault conviction at the Montgomery County Courthouse in

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L.A. County nears state's safety threshold for positive coronavirus infections. Will it last?

CALIFORNIA
California desperate for signs of turnaround after stunning coronavirus setbacks

TELEVISION
'Watchmen' leads 2020 Emmy nominations; 'Mrs. Maisel,' 'Ozark' also score big

LIFESTYLE
Full bladders, closed bathrooms. Strategies for peeing while out during coronavirus

HOUSING & HOMELESSNESS
They made a home under L.A.'s freeways. But soon they could be forced to move



Where Do We Find 404(b) Evidence?



facebook®



Social Media

- ▶ there are pictures of Torrence smoking a "blunt,"
- ▶ gesturing with his hands as if he is holding an invisible firearm.
- ▶ Other photos show Torrence "giving the finger" (Exhibit G), pointing an imaginary gun, and making other gestures.



Social Media

- ▶ While these "finger guns" may be minimally probative, the danger of unfair prejudice resulting from the depiction of Torrence smoking "a blunt" substantially outweighs the probative value.

Social Media - However

- ▶ remainder of the photos depicting Torrence associating with many of his co-defendants may be introduced as evidence at trial.
- ▶ The photos display solidarity among the Defendant and other co-conspirators.

United States v. Torrence, 2012 U.S. Dist. LEXIS 97492, 11-12 (E.D. Pa. July 12, 2012)

404(b) - IT'S NOT JUST FOR CRIMINALS

- ▶ The car accident caused my brain problems
- ▶ Defense expert - no, your prior pot smoking did
- ▶ Guerrero v. Smith, 280 Mich. App. 647, 653, 761 N.W.2d 723, 730, 2008 Mich. App. LEXIS 1818, *4 (rejecting 404(b) 'bad character' claim)

Another Civil Case



- ▶ Employee sues over workplace injury
- ▶ Moves to bar her history of drug addiction
- ▶ “evidence that Plaintiff exhibited drug-seeking behavior as well as evidence of her past addiction issues are relevant to her claimed damages and **motivation** for seeking medical treatment.”

Kirchheiner v. Home Depot U.S.A., 2021 U.S. Dist. LEXIS 133227, *9

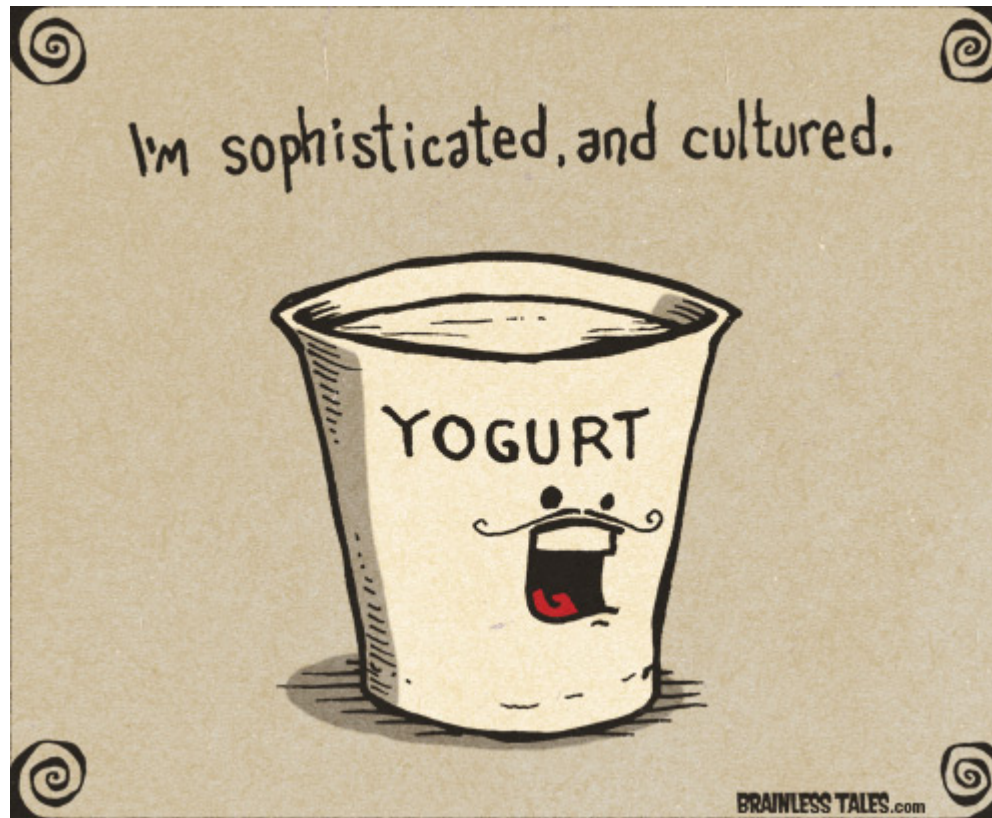
What Else Non-Criminal?



**10 DEADLIEST
PLANE CRASHES**



404(b) - A More Sophisticated Approach



Intrinsic - When Acts Are Not 404(b) Acts

- ▶ If an act is “intrinsic” to a charge/element, 404(b) does not apply



In With The New

- ▶ whether the evidence relates to "other crimes," and thus is subject to continued analysis under Rule 404(b), or
- ▶ whether it is evidence intrinsic to the charged crime, and thus need only satisfy the evidence rules relating to relevancy

State v. Rose, 206 N.J. 141, 179, 19 A.3d 985, 1009, 2011 N.J. LEXIS 628, *69-71 (N.J. 2011)

IN WITH THE NEW

Let's Define "Intrinsic" - 1

- ▶ Intrinsic = two narrow categories of evidence.
- ▶ First, evidence is intrinsic if it "directly proves" the charged offense.
- ▶ If uncharged misconduct directly proves the charged offense, it is not evidence of some "other" crime.

Let's Define "Intrinsic" - 2

- ▶ "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime."

The Latest

- ▶ A threatens B with knife
- ▶ A was drinking alcohol earlier in the day and after the alleged attack
- ▶ **PROSECUTION: Drunkenness=intrinsic=intent**

The Holding

- ▶ Although intoxication may have provided the motive for Casado's actions, it did not constitute intrinsic evidence.
- ▶ The intoxication evidence did no more than aid in "complet[ing] the [state's] story" of that day's events.
- ▶ Evidence of Casado's alcohol consumption and intoxication is thus subject to Rule 404 analysis

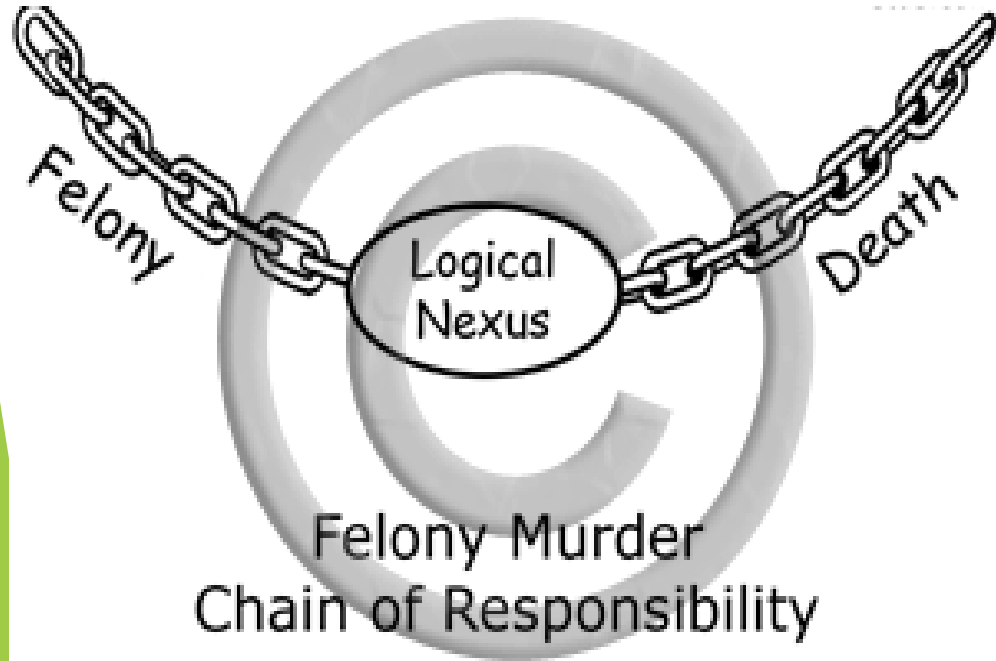
State v. Casado, 2021 Ariz. App. Unpub. LEXIS 265, *8,
2021 WL 839377

Can You Define “Intrinsic?”

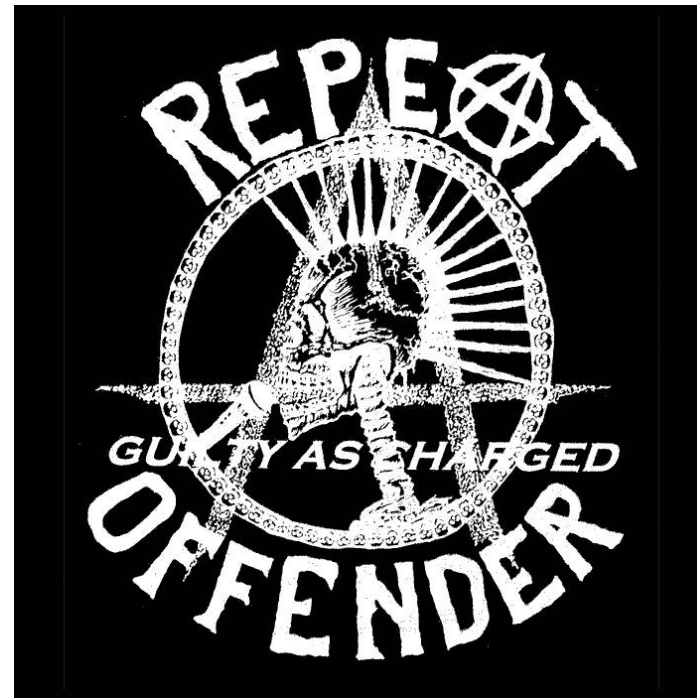


A Hornbook Illustration - 1

INTRINSIC



NOT INTRINSIC



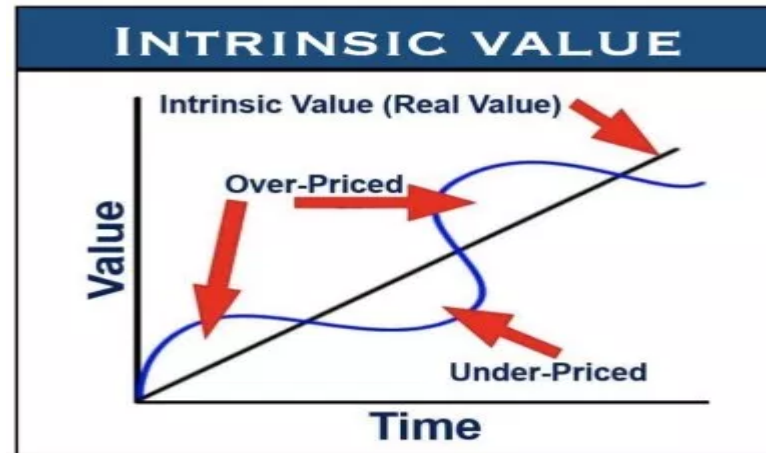
A 2019 ILLUSTRATION



- ▶ Charge - felon not to possess firearm with obliterated serial number **FEDERAL CRIME**
- ▶ Conduct - seen using firearm when shooting witnesses as a gang enforcer **STATE CRIME**

2019 ILLUSTRATION - 2

▶ HOLDING:



- ▶ U.S. V. PEETE, 6th Cir. July 15 2019 (Memorandum)

Who/what does 404 apply to?



Split Decisions

- ▶ Evidence of AbbVie's alleged improper conduct with respect to Depakote, another of its drugs, is inadmissible evidence of AbbVie's corporate character. See Fed. R. Evid. 404(b).

Konrad v. AbbVie, Inc. (In re Testosterone Replacement Therapy Prods. Liab. Litig. Coordinated Pretrial Proceedings), No. 14 C 1748, 2017 U.S. Dist. LEXIS 81614, at *1093 (N.D. Ill. May 29, 2017)

- ▶ it is unclear whether Rule 404(b) applies to corporations.

Ross v. Am. Red Cross, No. 2:09-cv-00905-GLF-MRA, 2012 U.S. Dist. LEXIS 77475, at *12 (S.D. Ohio June 5, 2012)

Corporations and 404(b) -Recent Law

Objection!!!!

- ▶ Mr. Napier's testimony alleges "poor climate and culture" caused the subject accident
- ▶ Whether a **corporation** may assume a 'character' for the purposes of Rule 404(b) has been largely unanswered by the caselaw." Thus, the more appropriate way to address Defendants' concern is through the exclusionary principles found in Rule 403
- ▶ *Fernandez v. Transp. Designs, Inc.*, 2017 U.S. Dist. LEXIS 131287, *10



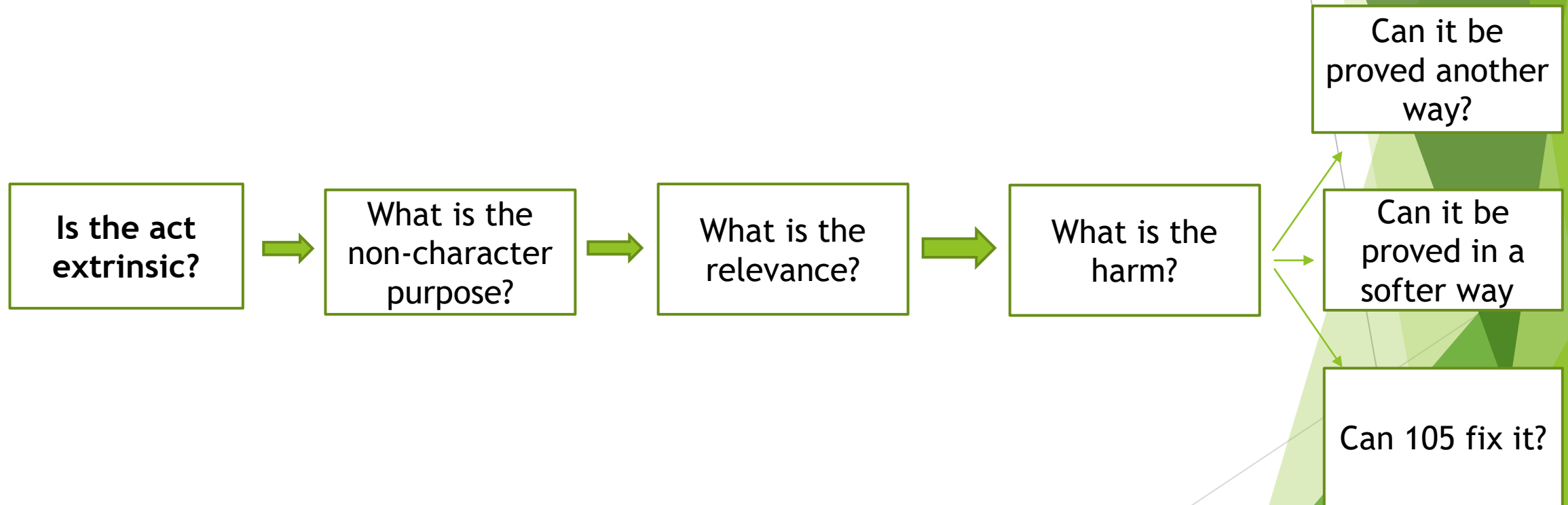
So, What Do You Argue Regarding Corporations?

- ▶ Law of your jurisdiction
- ▶ 404 as applicable
- ▶ 404 as analog under 401 / 403

One More Option With Non-Humans



Is there a 404(b) process map?



IS 404(b) SYMMETRIC FOR PROSECUTION AND DEFENSE?

- ▶ The drug paraphernalia isn't mine - it's my housemate's.
- ▶ See, he's been busted twice before with similar paraphernalia.



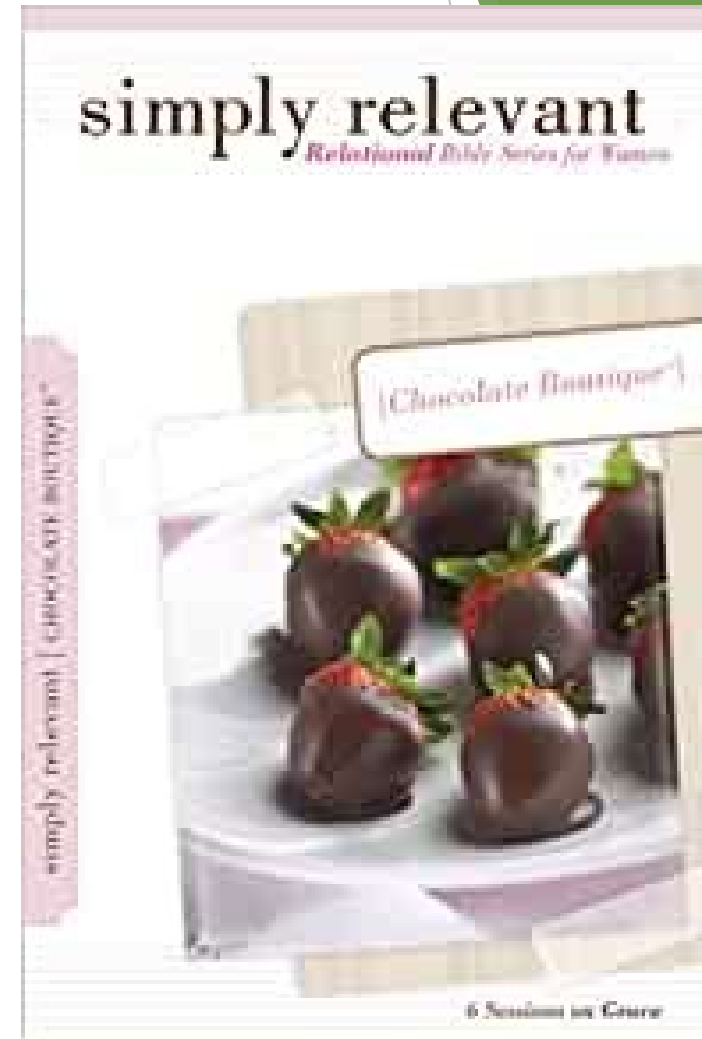
A kinder/gentler 404(b)?
Signature?
Just 401?

Pennsylvania's Answer 2021

- ▶ our lower courts have been incorrectly applying Rule 404(b) standards to evidence of crimes or bad acts of a third person offered by a defendant as exculpatory evidence.
- ▶ Commonwealth v. Yale, 2021 Pa. LEXIS 1888, *25



- ▶ determining the admissibility of third person guilt evidence requires nothing more than the traditional inquiries prompted by our rules of evidence.



Some Final 404(b) Considerations

- ▶ Case theory - design with and without (but prepare for the worse case)
- ▶ *Voir dire* - if evidence is ruled admissible, test juror reactions(?)
- ▶ *The Ohler* concern - can you preserve it for appeal?

One Other Facet of 404(b) Practice

- ▶ the other-crime/bad-acts evidence must be sanitized
- ▶ only those facts are admitted that are reasonably necessary to advance the probative purpose for which the evidence is proffered.



Sanitizing Illustrated

- ▶ Robbery 1 - credit card taken
- ▶ Robbery 2 - defendant presents credit card from crime 1 *and then* robs new victim
- ▶ Credit card use admissible; not second robbery
- ▶ Commonwealth v. Foose, 441 Pa. 173 (Pa. 1971)



BEFORE WE LEAVE 404(b)

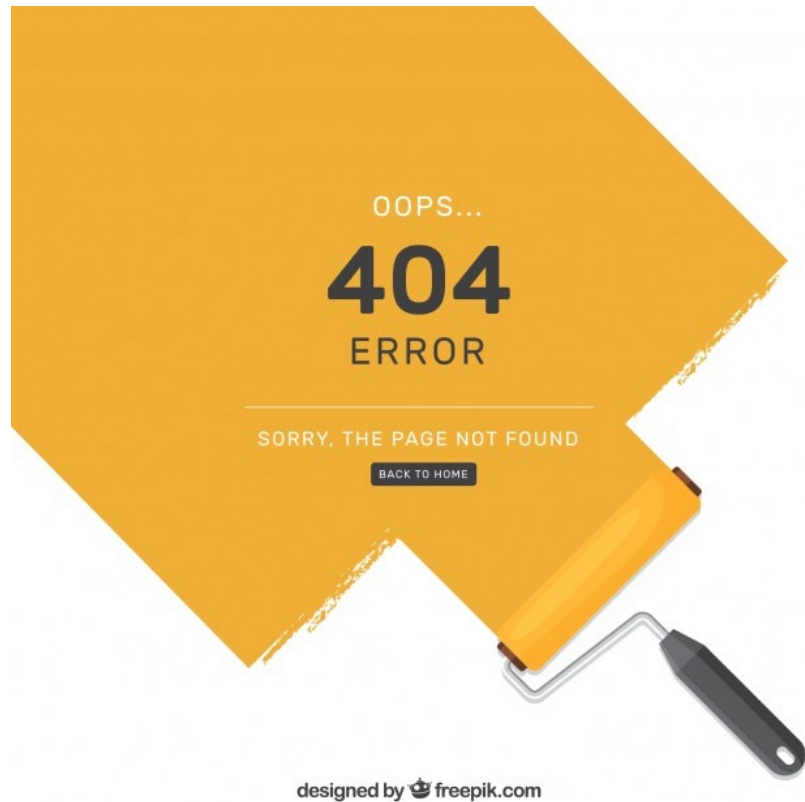
NORMAL VISION



TUNNEL VISION



Test “other acts” evidence twice



One Last Word

- ▶ Watch for mis-use/over-use in closing argument.



On To *Allowable* Character



Reputation
is "everything"

Opinion
matters

Let Me Hear From You



Limited to Criminal Defendant or Victim/Complainant

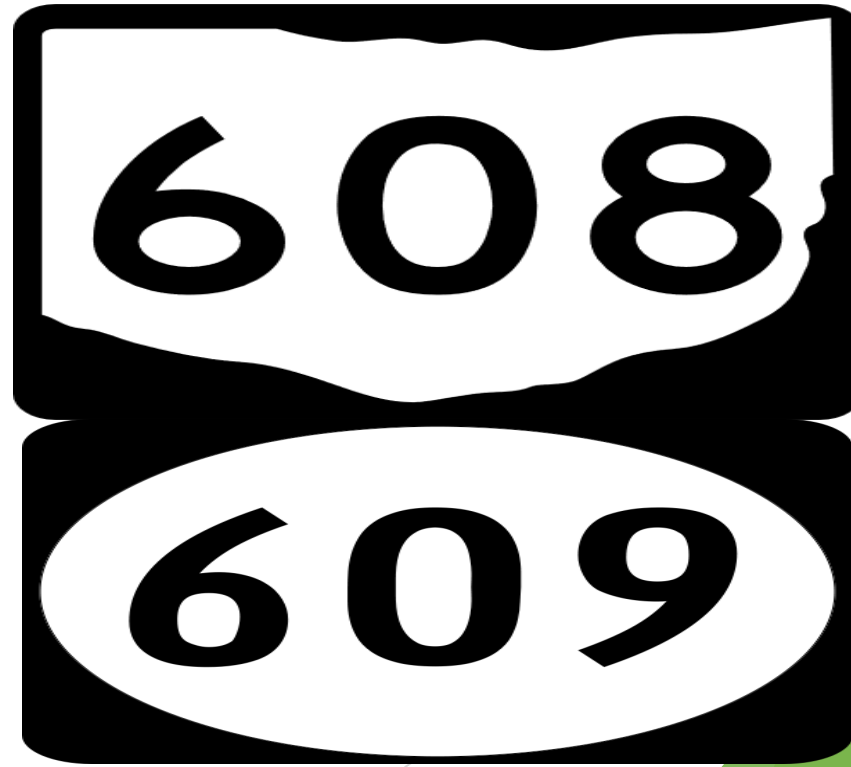
- ▶ **(A)** a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;
- ▶ **(B)** subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:
 - ▶ **(i)** offer evidence to rebut it; and
 - ▶ **(ii)** offer evidence of the defendant's same trait; and
- ▶ **(C)** in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

The Two Worlds of Character

Guilty or Not Guilty



Honest or Dishonest
(Witness)



Pertinent Trait

Crime

- ▶ Homicide / Assault
- ▶ Rape
- ▶ Theft
- ▶ Reckless *mens rea*
- ▶ Drug selling

Trait

- ▶ Non-violence
- ▶ Non-violence
- ▶ Honesty
- ▶ Carefulness?
- ▶ Law-abiding?

Making Character Evidence Count

Traditional

- ▶ Do you know XXXX?
- ▶ Do you know others who know XXXX?
- ▶ Among those people, what is his reputation for being non-violent?

Preferred

- ▶ Tell the jury how, and for how long, you have known XXXX?
- ▶ In what capacity or activities?
- ▶ Do you know others from that group/setting who know XXXX?
- ▶ Do you know others from *other* groups/settings who know XXXX?
- ▶ Tell the jury what they say about XXXX and his reputation for being non-violent.

The Forbidden Question

- ▶ What are the acts/deeds you have seen XXXX do?



Attacking Character Evidence

403 danger
if witness is
a police
officer

Circumscribing the context



“Bad” Character Witness



Attacking Character Evidence - 2

1. Impeaching the character witness
 1. Convictions [same pertinent trait]
 2. Arrests [same pertinent trait]
 3. Bad acts [same pertinent trait]
 4. **CONSIDER AGE OF PRIOR, AND A 403 EXCLUSION AS TOO REMOTE**

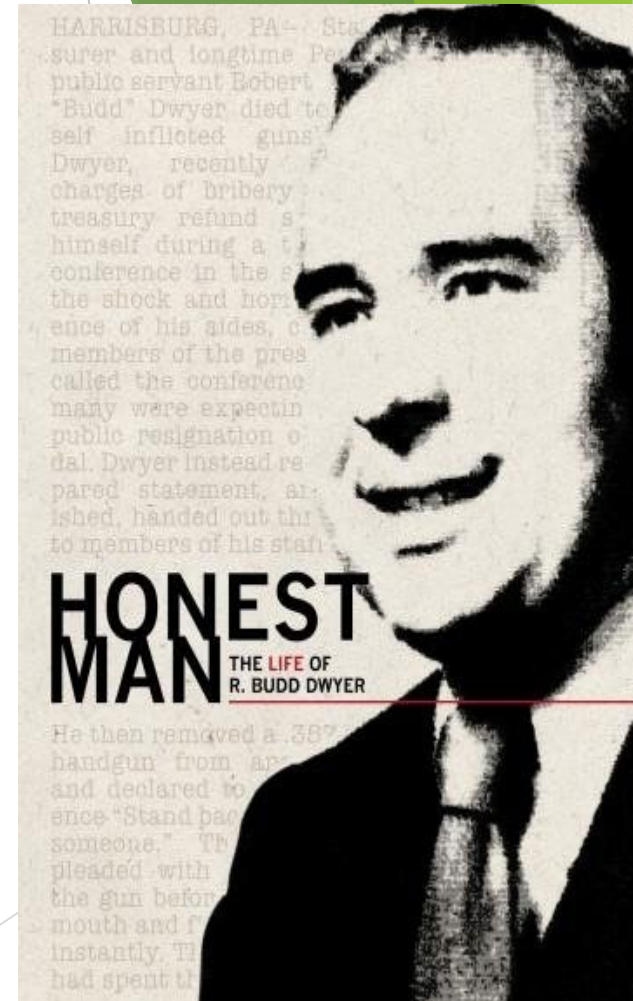
Character Witnesses and the Danger Zone - The “Guilt-Assuming” Question

- ▶ “You have told us XXXX has a good reputation for being non-violent. If he indeed committed this crime, stabbing the victim 12 times, that would change, correct?”
- ▶ **THIRD CIRCUIT:**
- ▶ posing a guilt-assuming hypothetical to a **reputation** character witness is improper.
- ▶ a person testifying regarding a present **opinion** should be open to cross-examination on how additional facts would affect that opinion.

United States v. Kellogg, 510 F.3d 188, 196 (3d Cir. Pa. 2007)

Attacking Character Evidence - A Test

- ▶ Crime: Knowingly transferring an automatic weapon
- ▶ character witnesses testified - honest and law-abiding individual.
- ▶ In cross-examination of those witnesses, the government asked whether they were familiar
- ▶ with allegations that he was behind on child support payments and
- ▶ with allegations of sexual harassment against Holt at his workplace.



Attacking Character Evidence - A Test

- ▶ Holt opened the door for the prosecution to examine the witness' familiarity with his reputation.
- ▶ Holt does not now allege that the government lacked a good faith basis for the allegations.

United States v. Holt, 170 F.3d 698, 701 (7th Cir. Ill. 1999)

A Caveat

- ▶ The impeachment does not prove bad character - it negates good
- ▶ PAY ATTENTION IN CLOSING ARGUMENT



A Last “Character” Note - Is It Character To Begin With?

- ▶ “I came to the house and saw my brother in police custody.
- ▶ Police said he was high.
- ▶ *That surprised me, as I didn’t know he used drugs.”*

AND THE ENVELOPE, PLEASE?

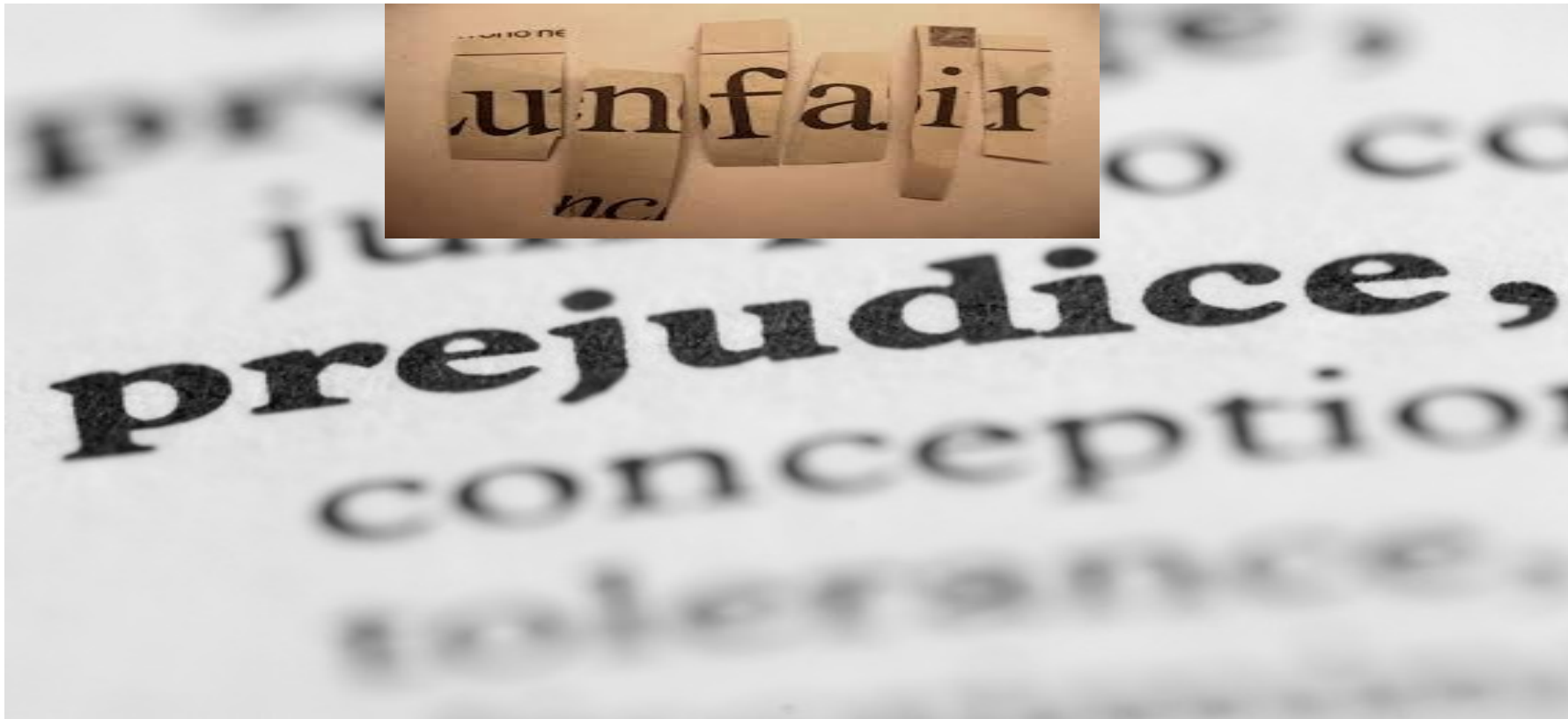


- ▶ In this case, the defendant opened the door to evidence concerning his character.

State v. Patterson, 241 So. 3d 433, 444, 2018 La. App. LEXIS 436, *19, 2016-1104 (La.App. 4 Cir. 03/07/18);, 2018 WL 1181050

- ▶ **RESULT:** Sister could be questioned about whether she knew of her brother's prior conviction

Relevant *BUT*



The Mistake

- ▶ ATTORNEY: Objection, prejudicial.
- ▶ JUDGE: Exactly - hence admissible

- ▶ Without anything more, such an objection does not preserve the issue of admissibility. Evidence cannot be excluded simply because it is prejudicial. Almost all evidence is prejudicial to somebody. Saying evidence is prejudicial is another way of saying it is relevant.

State v. Bostick, 307 S.C. 226, 229 (S.C. Ct. App. 1992)

The Rule

- ▶ The court **may** exclude relevant evidence if
- ▶ its probative value is **Omitted in Pa.**
- ▶ **substantially outweighed** by a **danger of** one or more of the following:

The Rule

- ▶ unfair prejudice,
- ▶ confusing the issues,
- ▶ misleading the jury,
- ▶ undue delay,
- ▶ wasting time, or
- ▶ needlessly presenting cumulative evidence.

USCS Fed Rules Evid R 403

“Unfair” Versus “Fair” Prejudice

- ▶ the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged.
- ▶ an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

Old Chief v. United States, 519 U.S. 172, 180 (U.S. 1997)

403 - A Strong or Weak Rule

- ▶ May
- ▶ Substantial
- ▶ Unfair



Defeating 403 Objections

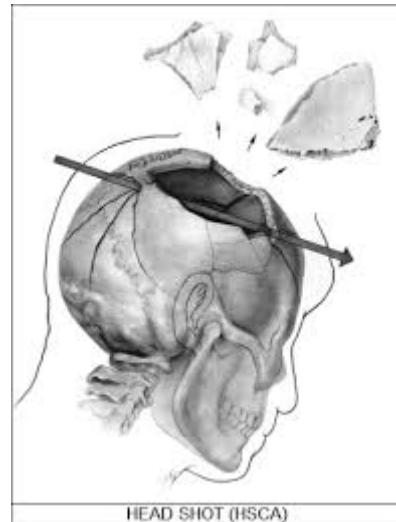
- ▶ The right to tell a colorful story with descriptive richness.
- ▶ there lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be.
- ▶ If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing.

Old Chief v. United States, 519 U.S. 172, 187 (U.S. 1997)



Defeating 403 Objections

- ▶ Essential to a critical element



Rethinking 403 - Using Science

- ▶ **Gruesome evidence and emotion: anger, blame, and jury decision-making.**
- ▶ In a 2 x 3 study that varied the gruesome content of photographic and verbal evidence, gruesome verbal evidence did not influence mock juror emotional states, and had no impact on the conviction rate.
- ▶ The conviction rate when visual evidence in the form of gruesome or neutral photographs was included was significantly higher than the conviction rate without photographic evidence.



Rethinking 403 in Criminal - Import Civil Law Practice

- ▶ Equitable reasons that because it never contested the insured's qualification as a disabled person within the meaning of the disability income policy, all evidence of the physical condition of Gonzalez pertained solely to an assessment of damages -- not liability.
- ▶ The presentation of such evidence during the liability phase of the trial therefore created unfair prejudice which warrants bifurcation

Gonzalez-Marin v. Equitable Life Assurance Soc., 845 F.2d 1140, 1145 (1st Cir. P.R. 1988)

LET'S TEST THIS

- ▶ Admit
- ▶ Tone Down
- ▶ Tone Down
- ▶ Exclude

WARNING
THE RELATED CONTENT
MAY BE DISTURBING
TO SOME INDIVIDUALS

Test 1 - homicide trial



Test 2 - Nursing Home Conditions Civil Case



Test 3 - Auto Accident

- ▶ Accident on a hill on a dark, snowy night.
- ▶ Request to use below photo at trial
- the precise road



Pennsylvania, 403 and Photos: Commonwealth v. Woodard, 129 A.3d 480 (2015)

- ▶ If the **photograph** is not **inflammatory**,
 - ▶ it may be admitted if it is relevant and can serve to assist the jury in understanding the facts of the case.
 - ▶
- ▶ If the **photograph** is **inflammatory**,
 - ▶ determine whether the **photograph** is of such essential evidentiary value that its need clearly outweighs the likelihood of inflaming the minds and passions of the jurors.

Pennsylvania and Photos: A Dissenting View

- ▶ disturbing photographs of murder victims... foster[] anger, shallower mental processing, greater reliance on shortcuts and stereotypes, and enhanced certainty even in the absence of any material probative contribution of the photographic evidence in question



THE SCIENCE OF VISION and 403: SLLL00000WWW WWW MOTION

A recent study revealed something worrying about crimes captured on video



Caroline Simon  

Aug. 6, 2016, 2:02 PM  2,845  4

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The Main *FEDERAL* Case

OLD

 **CHIEF**[®]

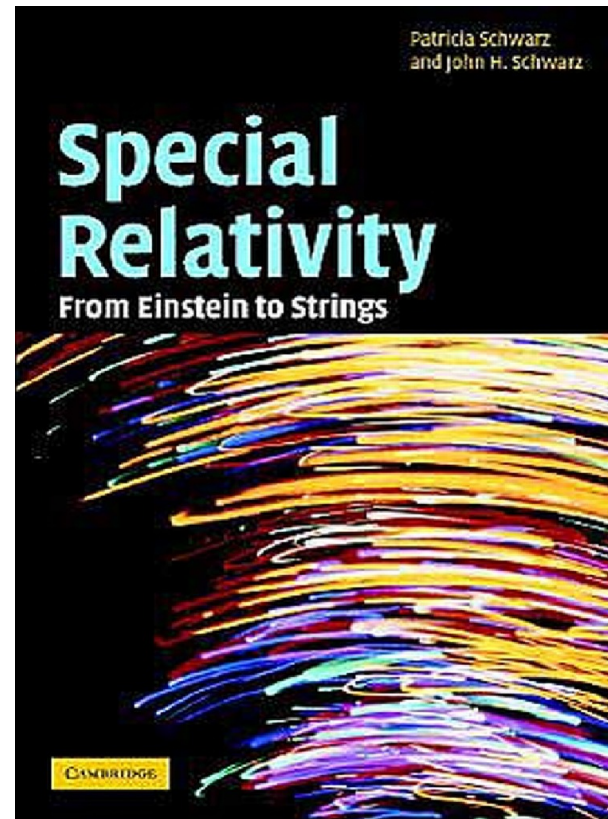
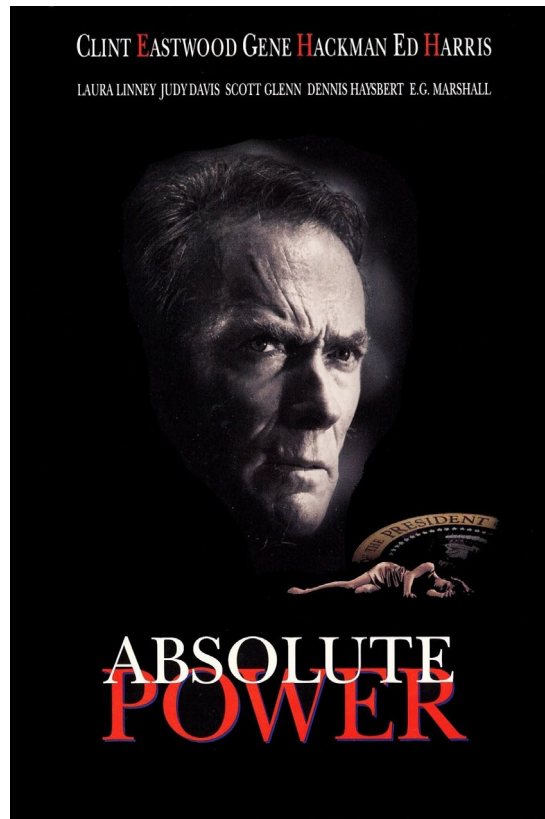
The 403 “Calculus”

OLD CHIEF BALANCE	PREJUDICE	PROBATIVE VALUE
ELEMENT - FORMER FELON - PROVED BY FELONY AS A GUN CRIME	SCALE OF 1 - 10 10	SCALE OF 1-10 10
ELEMENT - PROVED BY STIPULATION	8	10

The 403 Calculus - Part II

Evidence	Prejudice	Probative Value
ELEMENT - FORMER FELON - PROVED BY FELONY AS A GUN CRIME	SCALE OF 1 - 10 10	SCALE OF 1-10 8 (DISCOUNTED VALUE)
ELEMENT - PROVED BY STIPULATION	8	10

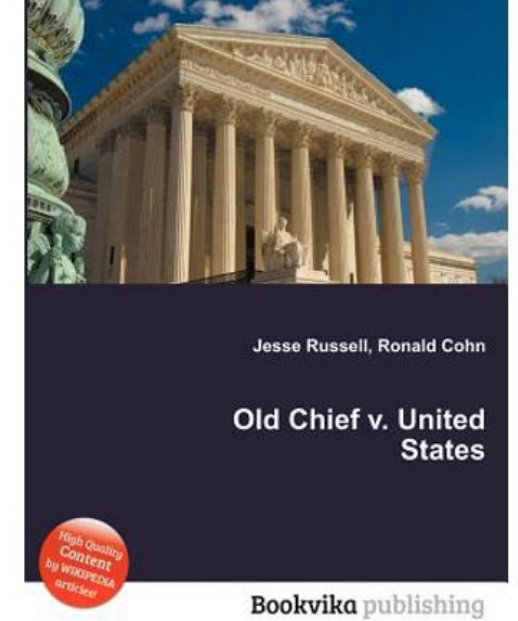
HOW ‘PROBATIVE’



AND IF THERE IS NO OTHER WAY TO PROVE AN ELEMENT?

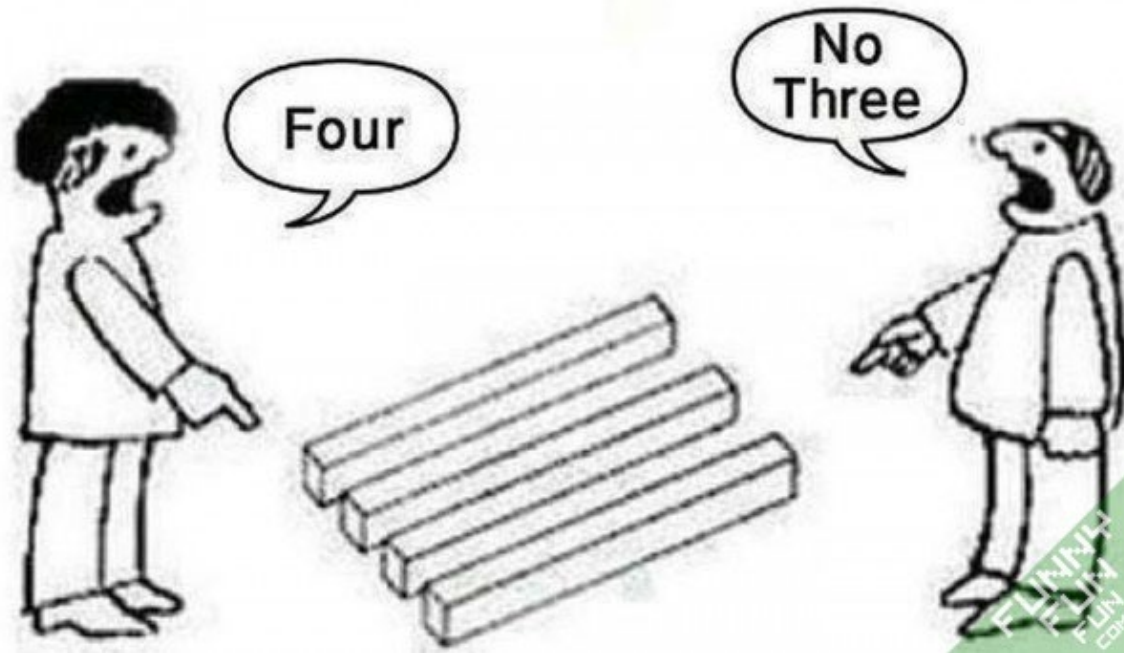


- ▶ The probative worth
- ▶ of any particular bit of evidence
- ▶ is obviously affected by
- ▶ the scarcity or abundance
- ▶ of other evidence on the same point



It's Not Only "Unfair Prejudice"

It is really confusing!!!

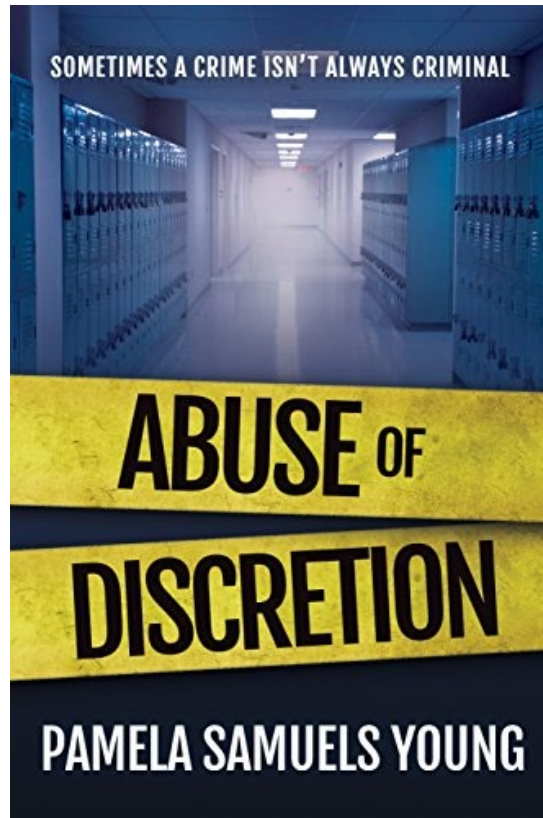


403 - The Final Thought: Be Solomonic

- ▶ 403 is not “all or nothing”
- ▶ It can be a “tone it down” approach.
- ▶ *If* a stipulation is offered, it had better be comprehensive and unequivocal.



AND WHAT ABOUT 403 ON APPEAL?



- ▶ BUT
- ▶ Not if trial judge fails to analyze it on the record OR
- ▶ Blatant error of law
- ▶ GN Netcom_ Inc. v. Plantronics_ Inc. (3rd Circuit July 2019)

LET'S GO BACK TO 404 - THE 404-403 INTERPLAY



- ▶ A jailor was indicted for beating up an inmate - **intentional assault**
- ▶ The government intended to introduce testimony that the jailor had also battered a different prisoner and concealed that crime.
- ▶ The jailor objected AND offered a conditional stipulation: if the jury believed that he committed the charged assault, he would admit intent.

The 404-403 Interplay

- ▶ Certainly relevant
- ▶ But
- ▶ Too similar
- ▶ High risk jury will treat as propensity
- ▶ Lots of other evidence of intent
- ▶ United States v. Asher, 910 F.3d 854 (6th Cir. 2018)



Reversed!

“Special” Relevance Rules - 406-415

Special Rules and Exceptions



It Isn't "Character"

- ▶ **Have you ever used/encountered habit evidence?**



HABITS
OF
MIND

The “Habit” Rule

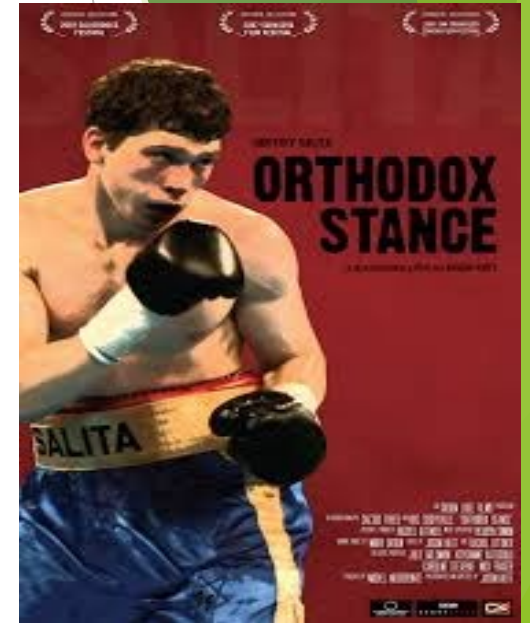
- ▶ Evidence of
- ▶ a person’s habit or
- ▶ an organization’s routine practice
- ▶ to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice.

Is it “Habit?”

- ▶ “I always buckle my seat belt before I leave the driveway.”
- ▶ “I have driven with Tom 10 times, and each time he has buckled his seatbelt before leaving the driveway.”
- ▶ “He regularly has a few beers on his lunch break at work.”
- ▶ “It is our business’ regular practice to pay bills within fifteen days of receipt of an invoice.”

Consider this - Habit?

- ▶ testimony as to the religious “habits” of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick...
- ▶ **Holding:** It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of ‘invariable regularity.’



Habit - The Facets

- ▶ Numerosity
- ▶ Semi-automatic
- ▶ Specific response to a particular stimulus

Subsequent Remedial Measures



SRM - The Basics

- ▶ When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:
 - ▶ negligence;
 - ▶ culpable conduct;
 - ▶ a defect in a product or its design; or
 - ▶ a need for a warning or instruction.

SRM - Objective Not Subjective

- ▶ Defendant said at deposition that they “removed and replaced the stairs as part of a larger remodeling project in the basement due to water damage, **for cosmetic reasons only.**”
- ▶ definition does not suggest that a **subsequent remedial measure** exists only when it is taken solely to remedy some unsafe condition.

Garcia v. Goetz, 2018 IL App (1st) 172204, ¶ 44

**It is
what it is.
Accept it
and move
on.**

SRM *Exceptions*

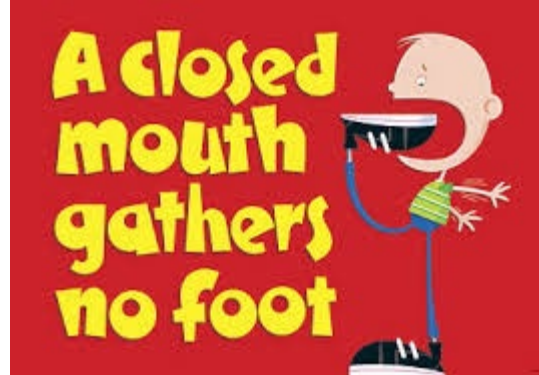
- ▶ the court may admit this evidence for another purpose,
- ▶ such as impeachment or —
- ▶ **if disputed** —
- ▶ proving ownership, control, or the feasibility of precautionary measures.

Approach This Rule Defensively

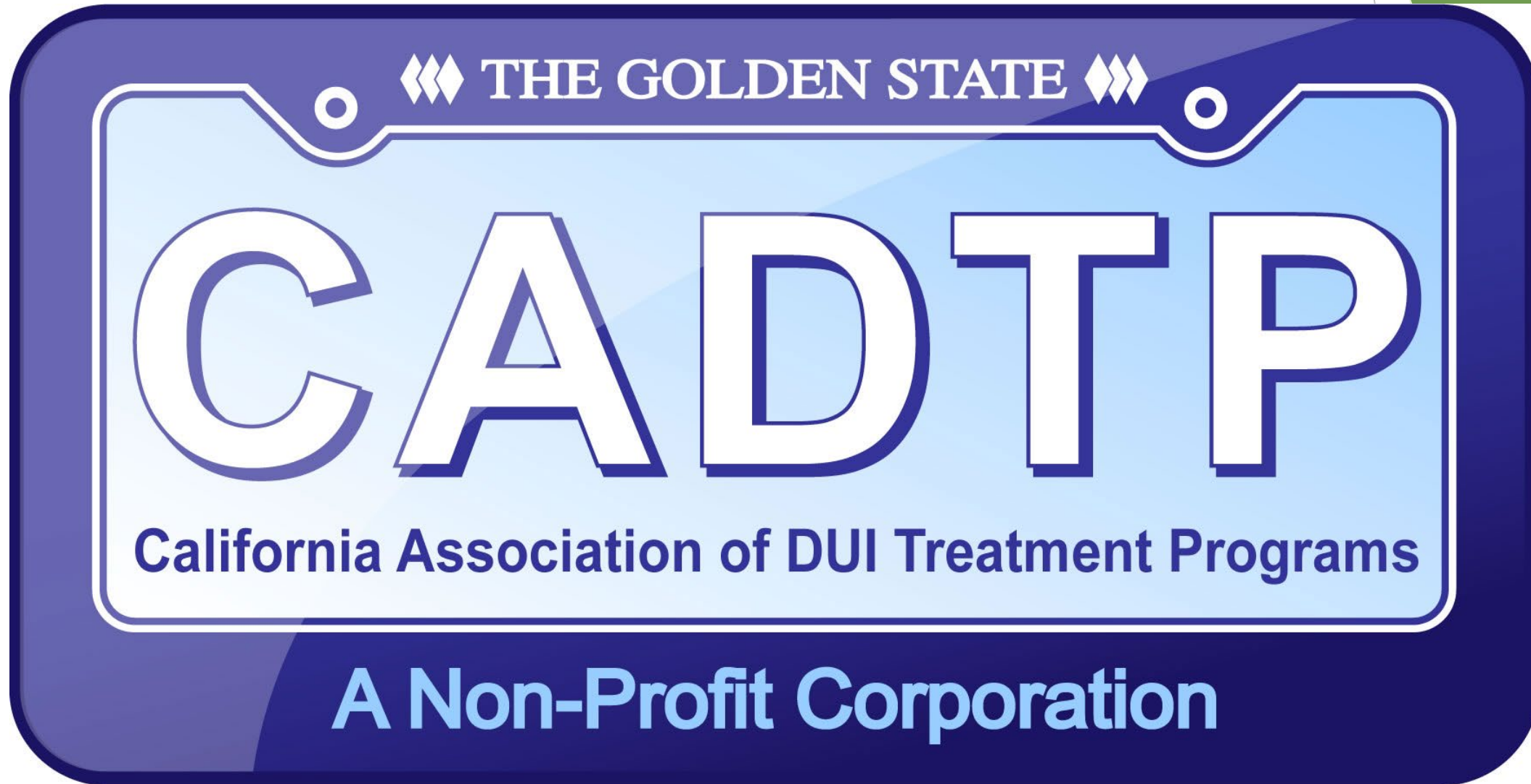


The Warning

- ▶ *If* the door is open, watch for misuse in closing argument



SRM and Criminal Cases(?)



Evidence in the News

- ▶ **Joan Rivers dead at 81: Fellow comedians remember 'one of a kind' star on Twitter, social media**



Evidence in the News

- ▶ The doctor who performed an endoscopy on Joan Rivers before she went into cardiac arrest has stepped down as medical director of the Manhattan clinic where she was treated and he is no longer doing procedures there



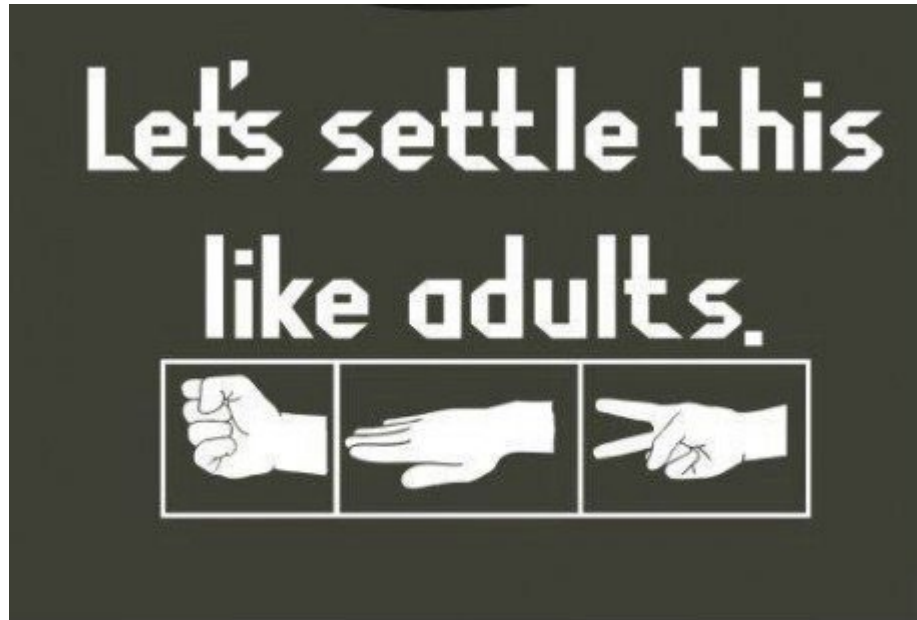
**Retire Earlier
Than Old**

*There's More To Life
Than Work*

Evidence in the News

- ▶ May the jury be told that the clinic dismissed the medical director after this incident?
- ▶ What if the director simply resigned?
- ▶ SRM?
- ▶ Relevance?
- ▶ 403?

Moving on



Settlement - Offers and Proffers



Offers
In Compromise

Does The Rule Apply?

- ▶ Auto accident - car hits bicycle.
- ▶ Bicyclist on ground.
- ▶ Car driver runs over and says “I’ll pay all your bills - just don’t report this to my insurance company.”



Compromise Offers and Negotiations

- ▶ The essential preconditions - **validity or amount of a disputed claim**
- ▶ 'All right, I was negligent. Let's talk about damages' (inadmissible)—
- ▶ 'Of course, I owe you the money, but unless you're willing to settle for less, you'll have to sue me for it' (admissible)."

Offers and Hearsay

- ▶ These are generally “party opponent” statements - but inadmissible for public policy reasons
- ▶ REMEMBER - lawyer is “agent” and therefore speaking as a party

Final Point - There Are Exceptions

- ▶ The court may admit this evidence for another purpose, **such as**
- ▶ a witness's bias or prejudice,
- ▶ negating a contention of undue delay, or
- ▶ proving an effort to obstruct a criminal investigation or prosecution.

Back to the Hypo - A Slight Change

- ▶ Auto accident - car hits bicycle.
- ▶ Bicyclist on ground.
- ▶ Car driver runs over and says “I’ll pay all your medical bills - just don’t report this to my insurance company.”



We Need Health Care

- ▶ Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.



Consider These Scenarios

- ▶ “I’ll pay all your medical bills.”
- ▶ “I’ll pay all your medical bills - just don’t report this to my insurance company.”
- ▶ “I’ll pay all your medical bills. I wasn’t paying attention and was on my cellphone.”

Consider These Scenarios

▶ **RULE COMMENT:**

- ▶ Contrary to Rule 408, dealing with offers of compromise
- ▶ the present rule does not extend
- ▶ to conduct or statements
- ▶ not a part of the act of furnishing or offering or promising to pay.

Let's Not Forget "Insurance"



The Rule

- ▶ that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.
- ▶ But the court may admit this evidence for another purpose, such as
 - ▶ proving a witness's bias or prejudice or
 - ▶ proving agency, ownership, or control.

Let's Test This



Problem

- ▶ Samantha Mercury owns a home at the corner of 5th and Elm. On January 12 there was a terrible snowfall and she shoveled the sidewalk. On January 13th Max Beard fell on ice outside her home and broke his hip. One year later he sues.

Question 1

- ▶ At trial, Max testifies that “as I lay there after I fell on the ice, Samantha came out and said that it was all her fault. She said she’d pay any medical bills and see what her homeowners’ insurance covers.”
 1. The entire statement is inadmissible as an offer to compromise.
 2. The entire statement is inadmissible because it mentions insurance and medical bills.
 3. The words that it was her fault are the only words that are admissible.

Question 2

- ▶ In the same trial, Samantha denies that the place Max fell is sidewalk on her property; she claims it belongs to a neighbor. Max finds proof that, two months AFTER the ice incident, Samantha paid Jones Cement company to replace that portion of the sidewalk.
 1. The evidence is inadmissible as a subsequent remedial measure.
 2. The evidence discusses a subsequent remedial measure, but is admissible because Samantha is contesting ownership.
 3. The evidence does not fall under the subsequent remedial measure rule.

Question 3

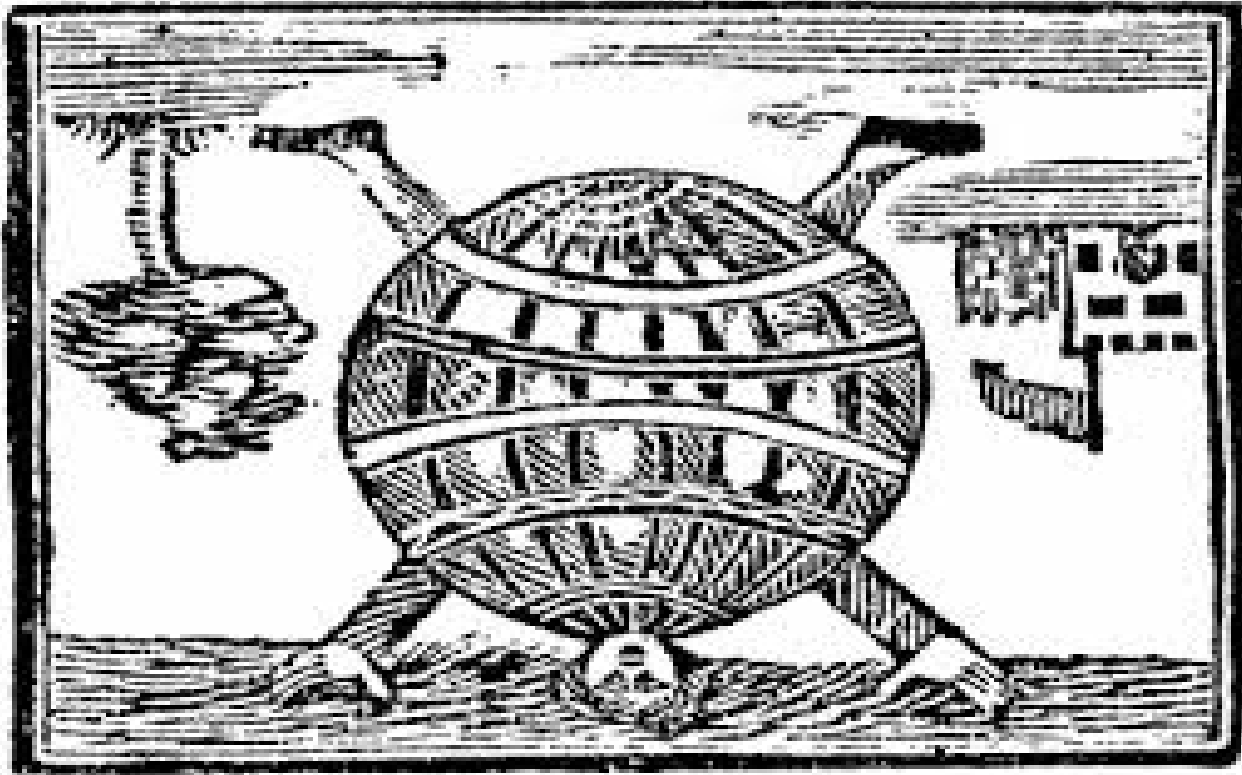
- ▶ After Max testifies about his injuries, Samantha calls Ace Watcher, who says “I was near the home of Max two days after the alleged accident, and I saw him cross-country skiing with his kids. He didn’t look hurt at all.” On cross-examination, Max wants to ask Ace “don’t you work for Samantha’s insurance company, and aren’t you just trying to save them from having to pay a claim?”
 1. The question is improper, as the word “insurance” may never be mentioned in court, no matter what.
 2. The question is improper, because insurance can be used to pay medical bills.
 3. The question is proper, as the reference to insurance is not to prove liability but to show the possible bias of a witness.

If the answer is “3,”

- ▶ How do we prove bias and omit “insurance?”



The Final “Special Relevance” Rules - Sex Crimes/Torts



A PARTICULARLY HIGH-PROFILE CASE

Los Angeles Times



ENTERTAINMENT & ARTS In surprise move, Pennsylvania Supreme Court will hear Bill Cosby's appeal



Bill Cosby arrives for a sentencing hearing following his sexual assault conviction at the Montgomery County Courthouse in

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HOUSING & HOMELESSNESS
They made a home under L.A.'s freeways. But soon they could be forced to move



Sexual Assault - Criminal & Civil

- ▶ Cases Involving *Sexual Misconduct* (412)

- ▶ Criminal:

- ▶ Rape, Sexual Assault, Statutory Rape, Sexual Assault by Person of Trust, *etc.*

Sexual Assault - Civil & Criminal

- ▶ Civil:

- ▶ Sexual Harassment

- ▶ Tort claim for sexual assault

- ▶ Excluded (e.g. for 412-415):

- ▶ Pornography; Obscenity

Sexual Assault - Criminal & Civil

▶ Rape Shield:

- ▶ Cases of “sexual misconduct” [civil or criminal] - Rule 412, Fed.R.Evid.

▶ Defendant’s Conduct:

- ▶ Cases of “sexual assault” or “child molestation” [civil or criminal] - Rules 413-415, Fed.R. Evid.

▶ Otherwise, Rules 404, 405, 608 and 609

Rape Shield - Character or Behavior of Complainant - I

- ▶ Rule 404(a):
- ▶ 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...

RAPE SHIELD - PENNSYLVANIA

- ▶ Evidence of specific instances of the alleged victim's
- ▶ Allegations of past sexual victimization



FALSE NARRATIVE

Rape Shield - Character or Behavior of Complainant - II

► Rule 412.

(a) The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence...that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

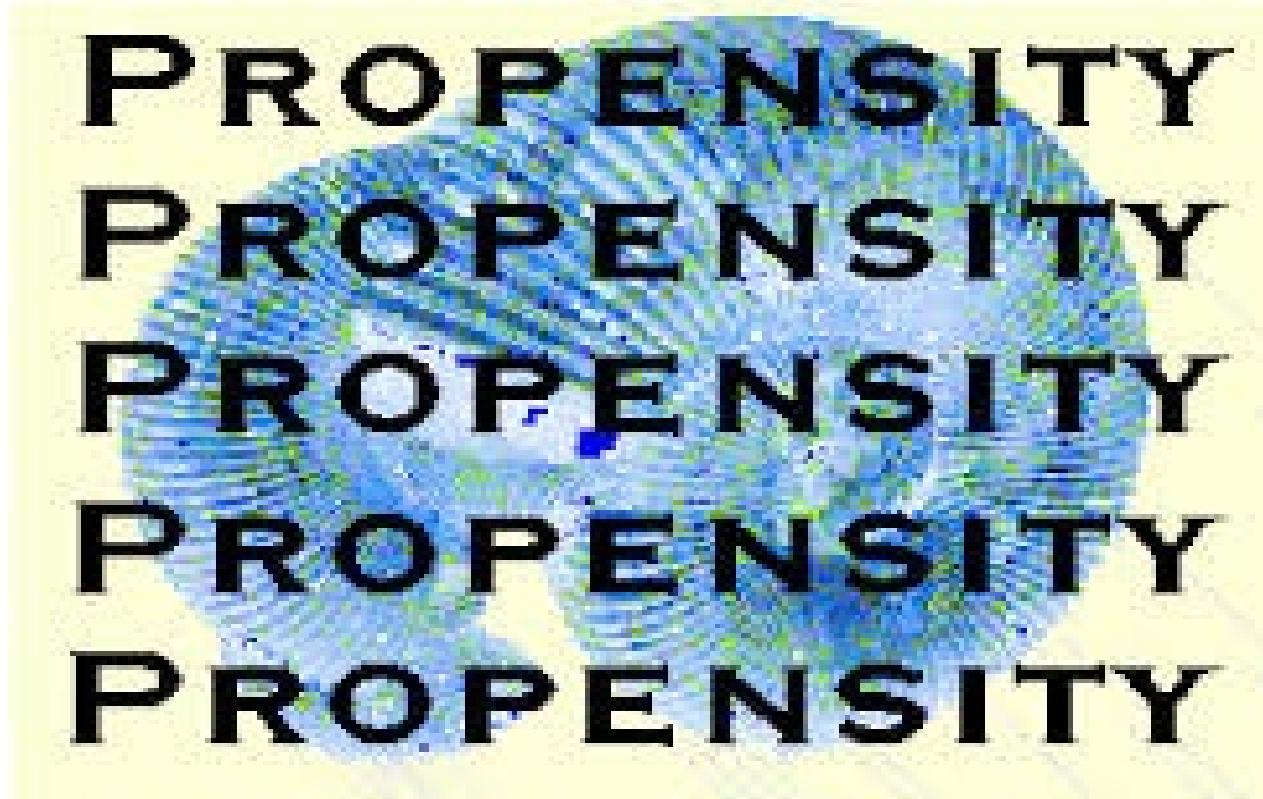
Know The Exceptions

- ▶ Explain physical evidence
- ▶ Conduct with same defendant
- ▶ Required by the Constitution - Bias/Motivation

Right to Present a Defense

- ▶ Words spoken by complainant, to explain defendant's state of mind.
- ▶ Proof of other conduct, to show the witness' possible motivation for a false accusation.
- ▶ Prostitution (in a sex-for-money dispute defense)
- ▶ Child's alternative source of knowledge

413-415 - It's All About Character



Sexual Assault/Misconduct Rules and Civil Cases

▶ 412

- ▶ In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition
- ▶ if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.

▶ 415

- ▶ In a civil case involving a claim for relief based on a party's alleged sexual assault or child molestation,
- ▶ the court may admit evidence that the party committed any other sexual assault or child molestation.

And rule 403?



- ▶ the balancing requirements of Rule 403 should be applied to Rules 413-415 "with a thumb on the scale in favor of admissibility";

And if your state has no 413-415?

- ▶ 404(a)
- ▶ 404(b)
- ▶ 403
- ▶ 401





Coming Soon...

