

EVIDENCE OF OTHER “BAD ACTS” IN INTIMATE PARTNER VIOLENCE, SEXUAL VIOLENCE, STALKING, AND HUMAN TRAFFICKING PROSECUTIONS¹

In proving a case of intimate partner violence, sexual violence, stalking, or human trafficking, it is often helpful—even crucial—to introduce evidence that the defendant has committed some other crime or “bad act”—usually before or after (but sometimes contemporaneously with) the charged crime. Such evidence is often viewed with caution by trial and appellate courts, because of the perceived risk that juries will convict the defendant based upon evidence that s/he committed some crime other than the one charged, or that the defendant is a “bad person” and therefore probably guilty of the charged crime.

One scholar has observed that “Rule 404(b) has generated more reported decisions than any other provision of the Federal Rules. In many jurisdictions, the admissibility of uncharged-misconduct evidence is not only the most frequently litigated issue on appeal, but also the most common ground for reversal.”² If the courts view such evidence with caution, so must the prosecutor. With careful preparation and presentation, however, the prosecutor can confidently seek to admit such evidence for a proper purpose. This *STRATEGIES in Brief* provides an introduction to some of the circumstances in which evidence of other crimes and bad acts may be useful in proving a case, the legal theories under which such evidence may be admissible, and the mechanics of seeking to introduce it.

It is essential that the prosecutor determine what the law of his or her jurisdiction will permit by way of evidence of other crimes and bad acts. Admissibility and other requirements may be governed under the jurisdiction’s evidence rules, statutory provisions, or case law—or some combination thereof—that may specify the permissible theories of admissibility, the purposes for which the evidence can be admitted, any conditions or tests for admissibility, any limitations on admissibility (such as remote acts), and procedural requirements (*e.g.*, notice to the defense within a specific timeframe or required limiting instructions). Some evidence may be admissible on multiple grounds, or admissible on only one or two of several possible grounds. For further information on jurisdiction-specific issues contact AEQUITAS for technical assistance at info@aequitasresource.org or (202) 558-0040.

Whether evidence of an act for which the defendant has been previously acquitted at trial will be admissible varies from one jurisdiction to another. The United States Supreme Court has held that the Fifth Amendment’s protection against double jeopardy does not prohibit the prosecution from introducing evidence of a crime for which the defendant was acquitted.³ Many jurisdictions bar such evidence of acquittals, however.⁴ Even if evidence of an act for which the defendant is acquitted is admissible, it may be necessary for the court to permit the defendant to introduce evidence that the charge resulted in an acquittal.⁵

Prosecutors should file pretrial motions *in limine* any time they anticipate introducing evidence of a defendant’s crimes or other bad acts, regardless of whether such a motion is required by law. Motions are discussed in greater detail *infra*, but it is important to identify, and to argue, any potentially applicable grounds for admission.

Below are brief descriptions of the theories under which evidence of other bad acts might be admissible, depending on the law of the jurisdiction.

EVIDENCE SHOWING PROPENSITY

The majority of jurisdictions never permit evidence to show that a defendant has a “propensity” for committing a particular kind of crime. However, some jurisdictions permit evidence to show propensity, at least for certain types of crimes—typically, in cases involving sexual violence, sexual abuse of children, or (more rarely) domestic violence.⁶ The evidence rules or statutes may not explicitly state that the evidence is admissible to show “propensity,” but rather may state in general terms that evidence of prior acts may be admitted to prove any issue for which it is relevant.⁷ Jurisdictions with broad rules of admissibility for certain crimes may require less-painstaking analysis for the evidence of other acts to be admissible; nevertheless, a motion should always be filed to seek a ruling in advance before attempting to introduce such evidence, and a limiting instruction cautioning the jury about the manner in which they consider and weigh such evidence may still be necessary.

EVIDENCE RULE 404(B)

Federal Rule of Evidence 404(b) and equivalent state or tribal evidence rules or statutes⁸ prohibit the introduction of evidence of a crime, wrong, or other act to prove a person’s character in order to show that that the person acted in conformity with that character trait on a particular occasion. In the criminal context, this translates to a general prohibition on the introduction of evidence for the purpose of showing that the defendant has a propensity to commit a particular crime. The rule, however, is considered to be one of *inclusion* rather than exclusion; it explicitly *permits* evidence of other bad acts for purposes other than propensity—such as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The proper purposes for which such evidence may be admitted is generally not limited to those explicitly listed in the Rule. In most jurisdictions, any legitimate issue relevant to proof of the crime or of the defendant’s guilt (*e.g.*, consciousness of guilt) can be grounds for admitting such evidence. Such evidence can consist of uncharged or unreported acts, prior convictions, possibly prior acts for which the defendant was acquitted of any crime,⁹ and noncriminal behavior reflecting adversely on the defendant’s character (*e.g.*, acts of marital infidelity; acts of emotional abuse).

RES GESTAE OR ACTS “INEXTRICABLY INTERTWINED” WITH THE CHARGED CRIME¹⁰

Some courts refer to “bad acts” that are part and parcel of the events surrounding the charged crime, or ones that cannot be excluded without compromising the jury’s ability to understand what occurred, as “*res gestae*” acts or acts “inextricably intertwined” with, or “intrinsic to” the criminal act. In some cases, this theory will be considered a proper purpose under Rule 404(b) and analyzed according to precedent on that Rule; in others, it is considered an independent ground for admission and not subject to the same requirements. An example of *res gestae* might be an abuser’s threat to kill the victim’s pet during the course of events culminating in an assault. Such an act committed months previously might be analyzed under Rule 404(b), while an act in the course of events immediately surrounding the crime might be admitted on a *res gestae* theory.

Some courts have explicitly rejected the utility of *res gestae* as a basis for admitting such evidence. In jurisdictions that have disapproved the use of the term, or related terms, prosecutors should avoid arguing it as a basis for admitting the evidence and rely instead upon ordinary 404(b) analysis.¹¹ In jurisdictions that do still recognize the concept, depending upon the available precedent, the prosecutor might argue it as a “purpose” under Rule 404(b) and/or as an independent ground for admission.¹²

WHY INTRODUCE PRIOR ACTS EVIDENCE IN AN INTIMATE PARTNER VIOLENCE PROSECUTION?

In prosecuting an intimate partner violence case, one beneficial strategy is to establish the history of abusive behavior, dominance, and control by the defendant that led to the criminal act.¹³ Introducing other acts evidence in a domestic violence case:

1. Provides greater context for the current crime as part of a pattern of abuse. Many abusers escalate from emotional/psychological violence to physical violence.¹⁴ Evidence of prior assaults against an intimate partner can demonstrate the context in which a particular assault occurred, which is necessary to understand the extent of the victimization, as well as the perpetrator's intent.
2. Helps the jury understand *why* the crime happened—to explain otherwise inexplicable or confusing criminal acts or dynamics between the victim and the defendant.
3. Overcomes victim-blaming biases exploited by the defense.¹⁵ This strategy is particularly effective when accompanied by expert testimony explaining the effects of the violent history on the victim's behavior.¹⁶
4. Helps establish the requisite purpose, intent, or knowledge that is an element of the offense.
5. Strengthens evidence-based prosecutions where a victim is unable or unwilling to participate in the prosecution of the abuser, or recants statements from the original complaint, by showing that the victim has reason to fear the defendant or that the defendant has historically manipulated the victim.¹⁷

WHY INTRODUCE OTHER ACTS EVIDENCE IN A CASE OF SEXUAL VIOLENCE?

Where the sexual violence involves intimate partners, many of the relevant purposes will be those described in the foregoing section—sexual violence is often part of the overall pattern of power and control. In both intimate-partner sexual assaults and others in which the parties are acquainted with each other (a casual dating relationship, co-workers, classmates, neighbors, etc.), defendants will often assert a consent defense. Evidence of other acts can be helpful to overcoming this defense by, for example, establishing the perpetrator's plan, intent, or preparation for the assault. In the case of a stranger assault, evidence of other acts may help to establish the identity of the perpetrator, or the method by which the victim was selected. Among the helpful reasons to introduce such evidence are:

1. To establish evidence of the defendant's intent or plan. For example, assaults involving the same plan to offer an intoxicated victim a ride home after friends have left the victim alone with the defendant at a bar helps to show that this was a purposeful plan.
2. To establish the elements of force or absence of consent by linking the perpetrator's abuse of the victim on other occasions to the victim's "submission" to penetration or other sexual contact in the present case.
3. To establish that the defendant has knowledge of the effects of drugs or alcohol as a tool of victimization.
4. To establish that the defendant selected victims for particular reasons, such as to exploit particular vulnerabilities.
5. To establish the identity of the perpetrator, when identity is at issue, where some aspect of the other crime sufficiently links the defendant to the present crime (*e.g.*, use of a specific, uniquely identifiable weapon; possession of property taken during prior crime). For this kind of evidence, the crimes do not have to be identical or even similar in nature, as long as the evidence sufficiently links the defendant to the present crime.¹⁸

6. To establish the identity of the perpetrator, when identity is at issue, on the theory that both are “signature crimes”—crimes with sufficiently unusual similarities as to “earmark a crime as the defendant’s handiwork.”¹⁹ “Signature crime” as a basis for admitting evidence of another crime is probably the most difficult to establish, and the most vulnerable to attack on appeal, because of the common requirement that the similarities be sufficiently unusual to amount to a “signature,” making it unlikely that anyone other than the defendant was the perpetrator.²⁰

WHY INTRODUCE OTHER ACTS EVIDENCE IN A STALKING CASE?

Stalking consists of a course of conduct involving related or connected incidents, rather than a single incident.²¹ Many of the incidents could be considered discrete criminal offenses (*e.g.*, harassment, threats, assaults, criminal mischief), but collectively the acts constitute the criminal offense of stalking. If the prior conduct is included within the scope of the stalking (*i.e.*, as part of the course of conduct), there is no need for a motion to admit evidence under Rule 404(b), since the evidence is part of the proof of the crime at issue. In other cases, the defendant’s acts against a current or previous victim may be appropriately introduced under 404(b) to:

1. Establish motive, intent, or plan, and to provide a larger context for the crime charged. Most victims are stalked by a person they know,²² and a majority of victims that are being stalked by an intimate partner have been physically assaulted by that partner.²³ Evidence of prior assaults during the relationship can show that the defendant’s current stalking is intended to maintain control over the victim.
2. Challenge the defendant’s claim of mistake or accident. A history of violence against the victim may help to show that the encounters with the victim are not mere coincidence, but rather intentional, purposeful conduct.
3. Show a pattern of behavior by the defendant sufficient to rebut arguments that the defendant was “framed,” that the victim was in fact the stalker, or other common defenses.²⁴
4. Help prove identity when the anonymous stalker makes reference to other acts that occurred during the relationship.
5. Prove, where relevant, the requisite harm element in some stalking statutes requiring that the offender’s actions caused the victim to be in fear.

WHY INTRODUCE OTHER ACTS EVIDENCE IN A HUMAN TRAFFICKING CASE?

Sex trafficking involves compelling the victim, by the use of force, fraud, or coercion, to engage in sexual acts in exchange for anything of value.²⁵ Labor trafficking occurs when work or services are compelled by force, fraud, or coercion. Traffickers assert dominance and control over their victims by means of physical violence, threats, and/or psychological manipulation, all of which are targeted to cause submission. Similar to stalking charges, trafficking is usually considered an ongoing offense and therefore the offender’s conduct throughout the course of the trafficking will be admissible evidence used to establish the “force, fraud, or coercion” element of the charge. However, in some cases it may be necessary to separately litigate the admission of other acts evidence under 404(b):

1. To demonstrate and explain the trafficker’s actions in the larger context of the trafficker-victim relationship, assisting the jury in understanding the dynamics of power, control, and traumatic bonding in trafficking situations.²⁶
2. To establish the elements of force, fraud, or coercion in the instant case.²⁷

- To show the defendant’s plan, preparation, or scheme to benefit from the commercial sexual exploitation of the victim. For example, testimony from prior victims of the alleged trafficker can describe the means by which the defendant selected victims (*e.g.*, through a social media app, or at the mall) and how the relationship with the prior victims progressed from a honeymoon period into a “grooming” phase until the victims were finally “turned out” for commercial sexual exploitation.²⁸

OTHER ACTS: PURPOSE, THEORY, AND EXAMPLES

PURPOSE	THEORY	EXAMPLES
Motive	To show the reason behind the perpetrator’s behavior.	<ul style="list-style-type: none"> • Prior verbal threat to “make the victim not so pretty” where assault caused serious physical injury or disfigurement. • Prior beatings or threats with accusations of infidelity.
Opportunity	To show the defendant had the means to commit the charged act (<i>e.g.</i> , possessed a weapon, created circumstances that facilitated the crime).	<ul style="list-style-type: none"> • Pointing a gun at someone else, shortly before shooting victim. • Theft of victim’s cell phone, or disabling means of escape. • Purchase of drugs later used to facilitate sexual assault of victim.
Intent	To show the perpetrator’s intent to inflict a specific type or degree of harm.	<ul style="list-style-type: none"> • Prior assaults against the victim, to disprove claims of self-defense or of protecting the victim from self-harm. • Prior severe assault against victim, to prove intent in subsequent attack that was interrupted by police response or third-party intervention.
Preparation, Plan, Knowledge	To show evidence of steps taken to accomplish the crime against the victim or knowledge about the victim or the harm that would result.	<ul style="list-style-type: none"> • Stalking of victim to determine victim’s location or living arrangements as part of plan to break into victim’s home. • Prior strangulation of a victim to show defendant knew victim would be rendered unconscious. • Rape/assault of the victim as part of plan to isolate and control victim for sex trafficking.
Identity	To show the other act and charged crime have some uniquely identifiable characteristic, or are “signature crimes” pointing to the defendant.	<ul style="list-style-type: none"> • Use of identical, uniquely identifiable weapon. • Other crime had “signature elements” — identical words, unique behavior, highly distinctive characteristics. Note that mere similarity or common characteristics generally insufficient.
Absence of Mistake or Accident	To show the defendant was not mistaken about facts/circumstances otherwise justifying, excusing, or mitigating the offense; to show harm to the victim was not accidental.	<ul style="list-style-type: none"> • Prior assaults to show victim’s injuries were not result of accidental contact. • Prior assaults to show defendant not mistaken as to need for self-defense.

HOW TO INTRODUCE PRIOR BAD ACTS EVIDENCE

Any time a prosecutor anticipates introducing evidence of prior bad acts, a pretrial motion *in limine* should be filed, regardless of whether the rule, statute, or case law explicitly requires such a motion. By carefully briefing the issue for the trial court, the prosecutor will be forced to think through and articulate the basis (or bases) for admitting the evidence; the court will have the time to research the issue if necessary and to carefully consider the arguments before deciding. Presenting such evidence without a preliminary ruling from the court increases the risk of mistrial or reversal on appeal.

The motion should assert any and all potentially applicable grounds for admission, including as many of the “purposes” under Rule 404(b) as may be applicable, and should seek from the court a ruling on each of the grounds, in the alternative. Often courts will determine that evidence is admissible on a single ground and therefore not consider any others. By requesting a ruling on each of the grounds for admission, an appellate court will have a complete record of the court’s rulings and reasoning as to each of the proffered arguments.

Each jurisdiction will have its own standards or tests for the admissibility of evidence of other bad acts, which might vary depending upon factors such as the specific purpose for which the evidence is to be offered. For example, in Minnesota, evidence of other bad acts under Rule 404(b) must be “clear and convincing,” while evidence offered under the statute permitting evidence of prior acts of domestic violence (a “propensity” statute) has no such requirement.²⁹ The United States Supreme Court has held that evidence offered under Fed. R. Evid. 404(b) need not meet even the “preponderance” standard to be admissible.³⁰ In *Huddleston v. United States*,³¹ the Supreme Court established the analysis *federal* courts must undertake in determining the admissibility of evidence under Rule 404(b):

1. Prior bad act evidence must be admitted for a *proper purpose* under the Rule,³² and not to demonstrate the offender’s propensity towards the criminal act.
2. The prior bad act evidence must be *relevant* to the charged crime.
3. The proffered evidence’s *probative value not be substantially outweighed by the danger of unfair prejudice*. The court must weigh these competing interests, as required under Fed. R. Evid. 403.
4. The defense may request that *the court give a limiting instruction*, as outlined in Fed. R. Evid. 105, to protect against jury misuse of the 404(b) evidence.

The *Huddleston* analysis is not of constitutional dimension; it is simply an interpretation of the Federal Rule; admissibility in a particular jurisdiction will be determined by the law of that jurisdiction. The requirements set forth in *Huddleston* are, however, typical in most jurisdictions. In addition to the specific requirements pertaining to evidence of other bad acts, any such evidence must also satisfy the general rules pertaining to evidence, including the requirements that the evidence be relevant³³ and that the probative value of the evidence not be substantially outweighed by the danger of unfair prejudice.³⁴ In addition to relevance, there may be an additional requirement of materiality, which focuses upon whether the issue on which the evidence is offered is actually or seriously in dispute.³⁵ Thus, for example, when the defense to a rape case involving acquaintances is consent, evidence of a prior crime offered solely to prove identity might not be considered material; however, the same crime might be admissible for some other purpose on a matter that is at issue, such as proof of a common scheme or plan to render the victim incapable of consent through use of alcohol or drugs.³⁶

Courts sometimes consider the probative value versus the prejudicial effect of the proffered evidence as part of the over-

all analysis of admissibility under Rule 404(b); other times they conduct a separate balancing analysis under Rule 403.³⁷ The temporal proximity of the prior act may be considered as part of this weighing process. Generally speaking, acts that are very remote in time from the charged crime are likely to be less probative, and more prejudicial, than acts committed closer in time.³⁸ Some courts have taken the position that the remoteness of the prior act affects only the weight that should be accorded such evidence, rather than its admissibility.³⁹

When evidence of other bad acts is admissible for a limited purpose, a limiting instruction is appropriate to ensure the jury does not consider it for an impermissible purpose (such as propensity, where evidence showing propensity is not permitted). The instruction should clearly explain the specific purpose(s) for which the jury *can* consider the evidence. Even if the defense fails to request a limiting instruction, the prosecutor should make such a request, wording the instruction in sufficiently strong terms that there will be little possibility of the jury's failing to understand the limited purpose for which the evidence is being admitted. Doing so may prevent reversal of a conviction on appeal. Such an instruction is appropriate at the time the evidence is admitted and should, generally, be repeated at the end of the trial.⁴⁰

COMMON OBJECTIONS TO PRIOR BAD ACTS EVIDENCE

Common objections to the admissibility of other acts include that the evidence is:

1. of different conduct;
2. relating to different circumstances;
3. too remote in time;
4. not offered for one of the specifically-named purposes;
5. offered to prove an issue that is not seriously in dispute; or
6. more prejudicial than probative.

Overcoming these objections and protecting the record for appeal rests on analyzing each jurisdiction's specific rules and considering the available evidence. For guidance and assistance in overcoming specific objections, contact AEquitas at info@aequitasresource.org or (202) 558-0040.

ENDNOTES

- 1 This article was authored by AEquitas CEO Jennifer G. Long and Attorney Advisors Teresa M. Garvey, Jane Anderson, and Viktoria Kristiansson. The authors would like to thank Madelyn La France, Legal Intern at Georgetown University for her contributions to this resource and Mary Katherine Burke, Associate Attorney Advisor, AEquitas.
- 2 Edward Imwinkelried, *The Second Coming of Res Gestae: A Procedural Approach to Untangling the "Inextricably Intertwined" Theory for Admitting Evidence of an Accused's Uncharged Misconduct*, 59 CATH. U. L. REV. 719 (2010).
- 3 Dowling v. United States, 493 U.S. 342 (1990); *see also* United States v. Rocha, 553 F.2d 615, 616 (9th Cir. 1977) (holding that evidence of prior drug acquittal is admissible to prove knowledge and intent in subsequent prosecution).
- 4 *See* State v. J.M., Jr., 137 A.3d 490 (N.J. 2016) (holding that evidence of crime for which defendant was acquitted may not be admitted at trial for subsequent crime).
- 5 *See, e.g.*, Ex parte Bayne, 375 So.2d 1239 (Ala. 1979), *overruled on other grounds*, Ex parte Burgess, 827 So.2d 193 (Ala. 2000).
- 6 Alaska, Arizona, Arkansas, California, Connecticut, Florida, Georgia, Illinois, Kansas, Louisiana, Nebraska, Oklahoma, and Wisconsin, allow propensity evidence in sexual violence cases generally. The Federal Rules of evidence permit propensity evidence in cases of "sexual assault" (FED. R. EVID. 413) and "child molestation" (FED. R. EVID. 414). Colorado has adopted a relaxed standard for admission of evidence of other sex crimes for purposes other than propensity. Michigan, Missouri, Texas, Utah, and Virginia allow evidence of propensity only in cases of child sexual abuse. Alaska, California, Illinois, Louisiana, Michigan, and Wisconsin allow propensity evidence in domestic violence cases.
- 7 *E.g.*, FED. R. EVID. 413(a).
- 8 Prosecutors should check their jurisdiction's law to determine the categories of other acts evidence provided in the rules of evidence (or other statutory provisions) and how those categories, and the permissible purposes for which the evidence may be used, have been analyzed by the courts.
- 9 *See* Notes 4 and 5, *supra*.
- 10 For a thoughtful discussion of the intricacies of the doctrine of *res gestae* and its relationship to Rule 404(b), *see* IMWINKELRIED, *supra* Note 2.
- 11 In the above example of a threat to kill a pet, in a jurisdiction that does not recognize *res gestae* as an independent basis for admission, such evidence might be admissible under Rule 404(b) as proof of the defendant's motive to put the victim in fear or to control the victim.
- 12 For a thoughtful, comprehensive discussion of the various approaches to, and criticisms of, the concepts of *res gestae* or "intrinsic" evidence, *see* United States v. Green, 617 F.3d 233 (3d Cir. 2010), and sources cited therein.
- 13 *See* Carolyn Copps Hartley & Roxanne Ryan, *Prosecution Strategies in Domestic Violence Cases: Telling the Story of Domestic Violence*, NAT'L INST. OF JUSTICE 1-4 (1998), <https://www.ncjrs.gov/pdffiles1/nij/grants/194074.pdf>; Pamela Vartabedian, *The Need to Hold Batterers Accountable: Admitting Prior Acts of Abuse in Domestic Violence Cases*, 47 SANTA CLARA L. REV. 157 (2007).
- 14 Non-criminal abusive behavior can include emotional and verbal abuse of the victim. Certain physical intimidation tactics and acts of low-level physical violence—*e.g.*, looming over a victim, screaming obscenities, or grabbing and pushing—may not rise to the level of criminal act (depending on the jurisdiction), but are nevertheless abusive and harmful to the victim. If repeated over time by the abuser, the violence may increase in frequency and escalate in severity. For a clearer depiction of the various forms of violence in domestic violence relationships, *see* DOMESTIC ABUSE INTERVENTION PROGRAMS, THE POWER AND CONTROL WHEEL, <http://www.theduluthmodel.org/pdf/PowerandControl.pdf>.
- 15 Defendants may employ arguments that exploit the public's tendency to blame a victim for the actions of the defendant or to question the victim's credibility (by suggesting, for example, that if the defendant was abusive, the victim would have left).
- 16 Jennifer G. Long, *Introducing Expert Testimony to Explain Victim Behavior in Sexual and Domestic Violence Prosecutions*, NAT'L DISTRICT ATTORNEY'S ASSOC'N (Aug. 2007), http://www.ndaa.org/pdf/pub_introducing_expert_testimony.pdf; *The Blueprint for Safety Appendix 5C: Training Memo—Use of Expert Witnesses in Domestic Violence Cases*, PRAXIS INTERNATIONAL (2016), <http://praxisinternational.org/wp-content/uploads/2016/02/BPSupp5CTrainingMemo-UseofExpertWitnessesinDomesticViolenceCases.pdf>.
- 17 Victims often recant their prior statements or are otherwise unable to participate in a prosecution. Evidence proving a history of violence may help the jury to more accurately assess the victim's credibility. *See, e.g.*, State v. Magers, 189 P.3d 126, 133 (Wash. 2008) (prior acts of domestic violence admissible to assist jury in judging credibility of recanting victim); State v. Nelson, 125 P.3d 1008 (Wash. Ct. App. 2006) (evidence of prior abusive conduct admissible to explain the victim's initial statement to police that nothing had happened); State v. Cook, 129 P.3d 834 (Wash. Ct. App. 2006) (evidence of prior acts of domestic violence admissible, with appropriate jury instruction, to explain recantation on the stand). Recantation is often a product of witness intimidation. For more information on the dynamics of intimidation in these cases and appropriate responses, *see* *Prosecutor's Resource on Witness Intimidation*, AEQUITAS (Mar. 2014), <http://www.aequitasresource.org/The-Prosecutors-Resource-Intimidation.pdf>. For strategies on going forward without a victim-witness *see* Jennifer Gentile Long & Teresa Garvey, *No Victim? Don't Give Up, Creative Strategies in Prosecuting Human Trafficking Cases Using Forfeiture by Wrongdoing*, 7 STRATEGIES (Nov. 2012), available at www.aequitasresource.org/library.cfm. For technical support on how to proceed in cases where recantation occurs, contact AEquitas at info@aequitasresource.org or (202) 558-0040.
- 18 *See, e.g.*, State v. Gillespie, 26 A.3d 397 (N.J. 2011) (evidence of other crime properly admitted on issue of identity where gun used in other crime matched by ballistics to gun used in present crime); State v. Pierro, 809 A.2d 804 (N.J. Sup. Ct. App. Div. 2002) (evidence of second burglary properly admitted to prove identity on first burglary where defendant found to be in possession of items taken during first burglary when arrested for the second).
- 19 MCCORMICK ON EVIDENCE (2 ed. 1972), § 190 at 449.

20 See, e.g., *State v. Jones*, 450 S.W.3d 866, 898-99 (Tenn. 2014) (discussing the distinction between crimes with similar characteristics and “signature” crimes); compare *State v. Sempsey*, 358 A.2d 212 (N.J. Sup. Ct. App. Div. 1977) (allowing evidence of other rape where in both cases the attack occurred at night; the defendant had previously worked in the victim’s apartment; the victim’s eyes were covered with tape; the assailant wore peculiar head gear, a dark jacket and pants; the assailant possessed a gun; the assailant instructed the victims to count when he left or he would shoot; the assailant smelled of grease, was unable to obtain an erection and forced the victims to perform oral sex) with *State v. Thang*, 41 P.3d 1159 (Wash. 2002) (holding that numerous similarities between crimes were insufficiently distinctive to admit evidence on issue of identity).

21 Most jurisdictions require a course of action involving multiple (in most cases, at least two) incidents. See *Responding to Stalking, A Guide for Prosecutors*, STALKING RESOURCE CENTER (2015), available at www.aequitasresource.org/library.cfm.

22 See Jennifer Gentile Long & John Wilkinson, *Stalking: Effective Strategies for Prosecutors*, 11 STRATEGIES IN BRIEF at n. 10 (Apr. 2012); Katrina Baum et al., *Stalking Victimization in the United States – Revised*, BUREAU OF JUSTICE STATISTICS (Sept. 2012) (concluding that three out of four victims are stalked by someone they know, 20% of victims were stalked by a current or former intimate partner, with only 9% of stalking victims stalked by a stranger).

23 See STALKING RESOURCE CENTER, *supra* note 10.

24 *Id.* at 15-16.

25 Trafficking Victims Protection Act of 2000, 22 U.S. CODE §7102 (9)(a), defines sex trafficking as a “severe form of trafficking in persons” in which a commercial sex act is induced by force, fraud, or coercion, or in which the person induced to perform such act has not attained 18 years of age.

26 Sex Trafficking in the U.S.: A Closer Look at U.S. Citizen Victims, POLARIS, <https://polarisproject.org/sites/default/files/us-citizen-sex-trafficking.pdf>; *Human Trafficking Power and Control Wheel*, POLARIS, <https://humantraffickinghotline.org/resources/human-trafficking-power-and-control-wheel> (last visited Feb. 15, 2017).

27 See Stalking Resource Center, *supra* note 11; see also Viktoria Kristiansson and Charlene Whitman-Barr, *Integrating a Trauma-Informed Response in Violence Against Women and Human Trafficking Prosecutions*, 13 STRATEGIES (Feb. 2015), available at www.aequitasresource.org/library.cfm.

28 The “honeymoon phase” is a period of time when the trafficker is cultivating trust and a positive bond with the intended victim. Kathleen YS Davis, *Human Trafficking and Modern Day Slavery in Ohio*, POLARIS 16 (2006), <http://www.ccv.org/wp-content/uploads/2010/04/Ohio-Report-on-Trafficking.pdf>. The “grooming phase” is the period of time when the trafficker changes his behavior or demands of the victim to create fear, control and compliance. Stacey Diane A. Litam, *Human Sex Trafficking in America: What Counselors Need to Know*, 7 THE PROFESSIONAL COUNSELOR 45, 47-48 (2017), <http://tpcjournal.nbcc.org/wp-content/uploads/2017/01/Pages45-61-Litam-HumanSexTrafficking.pdf>. To be “turned out” means that the trafficker has forced the victim into their first act of commercial sexual exploitation and the victim has been trafficked. *Trafficking Terms*, SHARED HOPE INTERNATIONAL, <http://sharedhope.org/the-problem/trafficking-terms/> (last visited Mar. 23, 2017).

29 See *State v. McCoy*, 682 N.W.2d 153 (Minn. 2004) (explaining the distinction between the standard for admissibility under Minn. R. Evid. 404(b) and Minn. Stat. § 634.20).

30 See *Huddleston v. United States*, 485 U.S. 681 (1988) (holding that court need not find, by a preponderance of the evidence, that the prior act occurred; there must be merely sufficient evidence to support a jury’s finding that the defendant committed the act).

31 *Id.*

32 See *Other Acts: Purpose, Theory, and Examples* chart. Most jurisdictions permit purposes other than those explicitly set forth in the rule. The Federal Rule, for example, states that such evidence is “admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” FED. R. EVID. 404(b)(2) (emphasis added).

33 See FED. R. EVID. 401, 402.

34 See FED. R. EVID. 403.

35 In some jurisdictions, materiality may be explicitly required in the Rule. See, e.g., N.J. R. EVID. 404(b) (Evidence of other crimes, wrongs, or acts admissible “for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.”) (emphasis added.) In some, the materiality requirement may be imposed by case law. See, e.g., *State v. Hardy*, 154 So.3d 537, 538 (La. 2014).

36 See, e.g., *State v. Williams*, 983 N.E.2d 1278 (Ohio 2012) (agreeing with Court of Appeals that identity was not at issue but admitting evidence to show how defendant selected vulnerable minor victims and groomed them for assault).

37 See *United States v. Maxwell*, 643 F.3d 1096, 1102 (8th Cir. 2011). The federal rule provides that evidence may be excluded “if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403 (emphasis added).

38 See, e.g., *State v. Jones*, 369 S.E.2d 822 (N.C. 1988) (holding that sexual assaults committed seven years before the charged assaults were too remote to be sufficiently probative on the issue of common scheme or plan to commit similar crimes); cf. *State v. Martin*, 796 P.2d 1007 (Idaho 1990) (prior sexual assaults not too remote where defendant spent most of the intervening years in prison).

39 See, e.g., *Hart v. State*, 57 P.3d 348 (Wyo. 2002) (holding that a 20-year gap between assaults on young female relatives was not too remote, given the generational opportunity to commit such crimes, and citing prior cases holding that remoteness will bar admission of evidence only

if the other act is so remote as to make it irrelevant to the purpose for which it is offered); *cf.* State v. Beckelheimer, 726 S.E.2d 156 (N.C. 2012) (holding that proximity in time is less significant when evidence of prior acts is highly similar to facts of charged case).

40 If the defense feels that a limiting instruction will call undue attention to the evidence, the waiver and the strategic reason for waiver should be placed on the record, so the defense cannot later complain about failure to give the instruction.

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