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PART ONE— RULE 404(b) UNCHARGED MISCONDUCT EVIDENCE

I. Weighing Probative Value versus Probative Danger—A Slippery Slope.

A. Dealing with Rule 404(b) evidence can indeed be a slippery slope for trial judges.

1. On the one hand, there is the valid argument that logically relevant evidence should be admitted.

2. On the other hand, some logically relevant evidence is so prejudicial that it should be excluded.

3. The responsibility for balancing these competing interests—deciding what comes in and what is kept out—falls squarely upon the trial judge.

4. Ultimately, the trial judge's responsibility is to determine whether the probative danger of the evidence substantially outweighs the probative value and whether some, or all, of the proffered evidence should be excluded because of two primary probative dangers:

   a. The evidence may tempt the jury to decide a case on an improper basis rather than on its historical merits or,

   b. Because the jury may overestimate the probative value of the evidence as a predictor of conduct.

   c. The theory underlying these probative dangers is that the jury will, at least on a subconscious level, focus on the person's character and be tempted to punish, not on the merits of the case the person is being tried for, but on the basis of the uncharged misconduct or give undue value to the evidence as a predictor of a person's guilt or liability in the matter being tried.

B. It is an understatement to say that evidence of other bad acts has a significant impact on juries.

1. Studies have shown that juries are less likely to accord the presumption of innocence and more likely to convict or find liability when such evidence is introduced. See Note, Developments in Evidence of Other Crimes, 7 J L Ref 535, 544 (1974); Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale LJ 763 (1961): Kalven and Zeisel, The American Jury 179 (1966).

2. The North Carolina Supreme Court has recognized the inherent dangers of this kind of evidence. State v. Berry Scott, 331 N.C. 39; 413 S.E.2d 787 (1992); "One of the dangers inherent in the admission of extrinsic offense evidence is that the jury may convict the defendant not for the offense charged but for the extrinsic evidence." (Quoting United States v. Beechum, 582 F2d 898, 914.), See also, United States 493 U.S. at 361062, 107 L.Ed2d at 726.

C. Professor Wigmore has said that **the fundamental problem with uncharged misconduct evidence is not that "it has no appreciable probative value, but [that] it has too much.**" J. Wigmore, Evidence § 194 (3rd ed. 1940). One court defined the issue more pointedly by observing that a "minute peg of relevancy" may be obscured by "the dirty linen hung upon it." State v. Urlacher, 42 Or App 141, 600 P2d 445 (1975).

D. This inherent problem of prejudicial impact is compounded by the fact that there are a myriad of appellate decisions on this issue. The law in this area is complex and, ultimately, the particular facts of each case are determinative, so cases that may appear to be contradictory are really fact driven and dependent upon the purpose for which the evidence was offered and admitted.

1. As a consequence, gleaning through the many appellate decisions for guidance can be a time consuming and frustrating exercise.

2. It has been said, **"The more deeply [one delves] into the subject, the clearer it [becomes] that uncharged misconduct is perhaps the most misunderstood area of evidence law."**

3. Perhaps it is precisely because the law is so complex that confusion and misunderstanding that alleged errors in the admission of uncharged misconduct, evidence are the most common ground for appeal in many jurisdictions. For example:

a. Federal Rule 404(b) has generated more published opinions than any other section of the rules. Courtroom Criminal Evidence, Second Edition. Imwinklereid, Gianelli,Gilligan and Lederer.

b. The erroneous admission of 404(b) evidence is the most frequent basis for reversal in a significant minority of states.

II. The Doctrine—Rule 404(b) provides:

> *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 that he acted 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, accident or entrapment. Admissible evidence may include evidence of an offense committed by a juvenile if it would have been a Class A, B1, B2, C, D, or E felony if committed by an adult.*

A. North Carolina's Rule 404(b) is identical to the Federal rule except for the addition of "entrapment." In the list of permissible purposes.

B. Interestingly, the rule begins with a ***prohibition*** against the use of evidence of "other crimes, wrongs or acts to prove the **character** of a person in order to show that he acted in **conformity** with that character.

   1. **The Rule forbids only one theory**: a proponent can't offer proof of a person's misdeeds to prove subjective character, and, in turn, use of the person's character as a predictor of the person's behavior. Uncharged Misconduct Evidence, Imwinklereid. See State v. Cook, 599 S.E. 2d 67; 2004 N.C. App. LEXIS 1438 (2004); State v. Dunston, 161 N.C. App. 468; 588 S.E.2d 540 (2003).

   2. The commentary to the rule notes that 404(b) "deals with a specialized but important application of the general rule excluding circumstantial use of character evidence."

C. 404(b) is a rule of **inclusion, subject to the above exception that when the only probative value of the evidence is to show that a person has the propensity or disposition to commit an offense of the nature of the crime charged.**

D. **The listed purposes are not exclusive**—so long as evidence is not used for the forbidden purpose, evidence offered for "other" purposes, including but not limited to those listed, may be admissible. See State v. Coffey, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990)

E. **The rule is not limited to other crimes**. It provides that evidence of other "**crimes**, **wrongs** or **acts**" may be admissible "for other purposes," and provides us with a laundry list of such other purposes—more about this later.

F. **The rule does not require a conviction.** All that is required is that the uncharged misconduct, whether it be a crime, a wrong or an act be **logically relevant for some purpose relating to a material fact at issue in the case being tried**.

G. The rule applies to "**a person**," not just a defendant or an accused.

   1. Evidence may be offered by a defendant against an alleged **victim**, **informants**, **and witnesses** or against a **third party** on the theory of third party guilt may be admissible. See State v. Nance, 157 N.C. App. 434; 579 S.E.2d 456; 2003 N.C. App. LEXIS 750 (2003);

   2. **Victim**: The defendant in Nance offered evidence of a prior shooting by victim in his case to show intent, propensity for violence and to show that the victim was the aggressor in charged offense. Testimony of alleged "shootee" in earlier incident excluded by trial judge under 403, but defendant was allowed to offer evidence that he knew of prior shooting by victim.

3. **Third Party**: State v. Cotton, 318 N.C. 663 (1987), (a defendant may introduce evidence of very **similar** crimes of another under 404(b), but such evidence is admissible only when it points directly to the guilt of another specific party and tends both to implicate that party and be inconsistent with the guilt of defendant.)

4. Other cases have upheld exclusion of such evidence on the grounds that the proffered evidence was not sufficiently similar, the identity of the "other" person was not shown, or that the evidence was not inconsistent with the defendant's guilt. See Sate v. Brewer, 325 N.C. 550 (1989); State v. Richardson, 328 N.C. 505 (1991).

H. **The rule applies to civil as well as criminal cases**. See Pelzer v. UPS, Inc. 126 N.C. App. 305, 484 S.E.2d 849 (1997), cert. Denied, 346 N.C. 549, 488 S.E.2d 808 (1997). The civil defendant was properly permitted to cross-examine plaintiff about other factors in her life, including acts of misconduct, bearing on her mental state.

I. The rule provides that uncharged misconduct "**may**" be admissible for other purposes. Whether or not such evidence is admissible depends upon the potential ***logical relevancy*** of the evidence. In order for evidence to be "logically relevant" it must meet two tests:

1. **First**, the evidence must be material on its face—that is, it must have some logical connection with the material facts of consequence in the case. See State v. McMillian, 609 S.E. 2d 265; 2005 N.C. App. LEXIS 544 (2005)

2. **Second**, the evidence must have underlying probative value—it must be properly authenticated. See State v. Austin, 285 N.C. 364; 204 S.E. 2d 675 (1974).

3. Even it proffered evidence meets both of these tests it may still be subject to exclusion if it is legally irrelevant. (I.e., if the probative dangers inherent in the evidence outweigh the evidence's probative value under the balancing test of Rule 403. More about this later.)

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

J. The foundation underlying Rule 403 has been described as "a model of **optimal jury behavior**." Imwinklereid, Evidentiary Foundations, 3d Ed.

1. The jury is to "use admitted items of evidence as proof of only the factual propositions the judge admits the evidence to prove."

2. The jury is to "ascribe the proper probative weight to each item of evidence and concentrate on the historical issues in dispute in the case." Immwinklereid, Evidentiary Foundations, Third Ed.

K. Note that the rule may include offenses committed by a juvenile. It provides that "admissible evidence" may include offenses committed by a **juvenile** is admissible **if** such offense would have been a class A through E felony if committed by an adult.

L. Uncharged misconduct, which occurred both **prior** to and **subsequent** to the charged crimes, may be admissible under 404(b). The courts in other jurisdictions have expressed a number of views regarding the admissibility of evidence of uncharged misconduct that occurred **after** the charged crime.

1. Some courts would exclude all evidence of subsequent uncharged misconduct.

2. A second view is that evidence of subsequent acts is admissible only if there is also evidence or prior acts.

3. A third view is that subsequent acts are admissible so long as they are logically relevant. **This is the majority view and North Carolina apparently subscribes to this view.** See State v. Lemons, 348 N.C. 335; 501 S.E.2d 309; 1998 LEXIS 326, (evidence of unrelated assault committed ten days after double murder for which defendant being tried admitted to show identity, motive and intent.)

4. A fourth view is evidence of subsequent conduct can be admitted, but should be scrutinized more strictly than prior acts.

M. Imwinklereid calls the third view "unquestionably the soundest." He asserts that, like prior acts, the admissibility of subsequent acts depends on the theory of logical relevance and that the acts should be gauged by the same standards. Uncharged Misconduct Evidence.

III. The Listed Purposes

A. There is case law in North Carolina indicating that, where uncharged misconduct is offered for a proper purpose, the **ultimate test of admissibility** is whether they are **sufficiently similar** and **not so remote** as to run afoul of the balancing test between probative value and prejudicial effect as set out in Rule 403. See State v. West, 103 N.C. App. 1, 404 S.E.2d 191 (1991).

1. This suggests that similarity and remoteness are significant factors that apply in **all cases** in which 404(b) evidence is offered.

2. It is respectfully submitted that this is not necessarily true. Similarity and remoteness may or may not be significant factors **depending upon the purpose theory upon which the particular evidence is offered**, but one or both of these factors may not apply or may not be as significant in all cases.

a. **Similarities**—It is true that a high degree of similarity between the uncharged misconduct and the charged act may tend to increase the probative value of 404(b) evidence. But, again, in determining admissibility, the significance of

similarity as a factor depends upon the purpose theory upon which the evidence is offered.

b. Similarity is an important factor where the purpose theory is **modus operandi** and **identity**. Generally, court will require a high degree of similarity between the uncharged misconduct and the charged act before admitting this kind of 404(b) evidence.

c. A lesser degree of similarity is required where the purpose theory is **the doctrine of chances**. The doctrine of chances is based upon the principle that "as the number of incidents increases, the objective probability of accident decreases."

d. Under this purpose theory, the proponent is essentially relying upon probabilities. The proponent is attempting to use "the intermediate inference of objective or statistical unlikelihood rather than subjective character to ultimately establish an inference of action or actus reus." Uncharged Misconduct Evidence, Imwinklereid.

e. The doctrine of chances is "especially probative when the two crimes are similar in nature," but, as noted above, strict similarity is not required. The doctrine of chances has been applied even when the uncharged misconduct is factually similar in all respects. The degree of similarity is only one factor to be considered. It is enough that there is "sufficient similarity" to justify admission and our courts have held that the degree required is "that which results in the jury's 'reasonable inference that the person committed both the prior and present acts.'" See State v. Stevenson, 2005 N.C. App. LEXIS 791, citing Stager, supra. See also, State v. Murillo, 349 N.C. 573, 509 S.E.2d 752 (1998).

f. **Remoteness**—State v. Hipps, 348 N.C. 377; 501 S.E.2d 625; 1998 LEXIS 330 is a good case on point. The court in Hipps said: "Remoteness for purposes of 404(b) must be considered in light of the specific facts of each case and the purposes for which the evidence is being offered. For some 404(b) purposes, remoteness in time is critical to the relevance of the evidence for those purposes; but for other purposes remoteness may not be as important" (Misconduct seventeen years before charged crime.) See also State v. Stager, 329 N.C. 278, 406 S.E.2d 876 (1991).

g. The Hipps court went on to say that, "remoteness in time may be significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan; but remoteness is less significant when the prior conduct is used to show intent, motive, knowledge, lack of accident. (Citing State v. Carter, 338, N.C.569, 588-89, 451 S.E.2d 157, 167-68 (1991). (Remoteness less important when admitted to show modus operandi.)

h. The courts generally hold that, in those cases where remoteness may not be a significant fact, the lapse of time goes to the weight of the evidence, not to its admissibility. See Carter, supra.

B. Included among the "other" purposes listed in Rule 404(b) are proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident. Some of the more problematic listed purposes are discussed below with applicable North Carolina case citations.

1. **Motive**—Although motive is an intermediate rather than an ultimate fact, evidence of motive is generally, admissible to prove that a person committed a charged act.

   a. Proof of motive can be used to identify a person as the perpetrator of the charged crime so long as the uncharged misconduct evidence is logically connected.

   b. However, the word "motive" is not a talisman and uncharged misconduct evidence does not automatically become admissible because the proponent claims that it is somehow evidence of motive for the charged crime. For example, evidence of a person's drug use might be admissible as proof of motive to participate in drug trafficking, but evidence that a person personally used marijuana is less probative of that person's motive to possess a firearm. Compare State v. Quinn, 603 S.E. 2d 886 (2004) with State v. Bush, 164 N.C. App. 254; 595 S.E. 2d 715 (2004).

   c. Also, the Court of Appeals has held that, "in order to admit evidence under the exception of motive, the prior act must pertain to the chain of events explaining the context, motive and set-up of the crime and form and integral and natural part of the account of the crime … necessary to complete the story of the crime for the jury." State v. Alfred Williams, 156 N.C. App. 661; 577 S.E.2d 143 (2003). The defendant in Williams was charged with felony possession of cocaine. The State introduced evidence that defendant had sold five "rocks" of cocaine to an informant during a controlled buy. The Court of Appeals held that the 404(b) evidence had virtually no similarities with the charged offense and "failed to show that it was relevant to the defendant's motive and intent to commit the charged offense of possession of cocaine. The error was prejudicial and a new trial was granted.

2. **Identity and Modus Operandi**—The general rule is that the proponent must show a very high degree of similarity between the uncharged misconduct and the charged crime where the purpose theory is identity or modus operandi. The similarities may include place, time, tools used, clothing worn, character of victims and modus operandi. Generally, the evidence as to modus operandi must be fairly distinctive.

   a. The general rule is relaxed when it comes to similar sex offense cases. See State v. Cotton, 318 N.C. 663, 666; 351 S.E. 2d 277, 279 (1987); State v.

Every, 157 N.C. App. 200; 578 S.E. 2d 642 (2003). "North Carolina's appellate courts have been markedly liberal in admitting evidence of similar sex offenses by a defendant for the purposes now enumerated in Rule 404(b)." This appears to be especially true in cases involving children.

b. Our courts have held that the uncharged misconduct **need not** be "unique or bizarre." The Supreme Court has defined similar to mean " some unusual facts present or 'particularly similar acts' in the prior bad act of the defendant which indicates the same person committed the act at issue." State v. Stager, 329 N.C. 278, 303, 406 S.E.2d 876, 890-91 (1991). The degree of similarity required is "that which results in the jury's 'reasonable inference' that the defendant committed both the prior and present acts." State v. Stevenson, 2005 N.C. App. LEXIS 791.

c. In many of the cases where the purpose theory of **identity** is an issue the question of similarities also goes to the purpose theory of **modus operandi**. Modus also tends to establish the identity of the perpetrator where the same peculiar modus is used.

3. **Intent and Knowledge**—In cases where guilty knowledge or intent is an element of the charged offense the proponent may offer evidence of other acts to prove these elements.

a. Some commentators contend that intent is "**the most frequently invoked basis for admitting uncharged misconduct**. Wright & Graham, Federal Practice & Procedure: Evidence § 5242; Reed, The Development of the Propensity Rule in Federal Criminal Cases 1840-1975, 51 U Cin L Rev 299, 306 (1982). Admission of evidence of uncharged misconduct in drug cases, sexual offenses, robberies, thefts, and homicides are fairly routine. See State v. Dyson, 599 S.E.2d 73 (2004) (Sex Offense, motive, intent and common plan); State v. Ingram, 160 N.C. App. 224; 585 S.E.2d 253 (2003) (armed robbery, motive, opportunity, intent, preparation, plan or knowledge); State v. Hightower, 609 S.E.2d 235; 2005 N.C. App. LEXIS 454 (2005) (first degree felony murder and first-degree burglary, motive, intent, modus operandi).

b. Although there are a number of intent and knowledge cases holding that there must be some degree of similarity between the uncharged act and the charged act in order for evidence of the uncharged act to be admissible, there is authority that even dissimilar uncharged acts are relevant to show intent or knowledge. These authorities view logical relevancy rather than similarity to be the litmus test. Compare State v. Houston, See United States v. Klock, 652 F2d 492 (CA5 1981).

1) Consider a hypothetical involving a drug trafficker. Evidence that a person charged with trafficking in drugs on an earlier occasion possessed a gun at the time of his arrest is some evidence of an intent to distribute drugs or traffic in drugs. Illegal possession of a weapon is not similar to the offense of drug trafficking, but it is logically relevant to prove the

defendant's intent to traffic in drug because drug traffickers often carry weapons to protect their drugs. See United States v. Marino, 658 F2d 1129 (CA6, 1981)

2) Or, consider a defendant, charged with murder, who contends that he was acting in his official capacity as a corrections officer at the time of the killing. The defendant testified that he approached the decedent to question him and was attacked and that the decedent was killed during the ensuing struggle. The court allowed rebuttal evidence that the defendant was carrying the weapon in violation of his license on the theory that this fact was some evidence of defendant's true intent of and capacity. The uncharged act is not similar but is logically relevant. See Government of Virgin Islands v. Felix, 569 F2d. 1274 (CA3 1978).

4. **Common Scheme or Plan**—Intent refers to a state of mind **at the time of the commission of the charged offense**. Plan or design refers to a mental state **before the performance of the act**.

   a. Generally, there are **two kinds of plans** a proponent may try to prove.

   b. A **sequential plan** involves a natural sequence or order to the acts or transactions, e.g., a person steals a gun and later commits a robbery. This kind of plan deals with preparatory acts in a natural sequence or order.

   c. A **chain** plan involves an overall scheme or design. The acts do not have to be committed in any particular order in a chain plan. There is simply a "grand design or overall objective involving the commission of several crimes. This kind of plan is sometimes admitted under the "chain of circumstances," or "context," or "whole story" rubric. A chain plan involves commonality of purpose or objective and no specific order or sequence is necessary. See State v. Eli Alvarez, 608 S.E.2d 371; 2005 N.C. App. LEXIS 342.

   d. A plan theory of logical relevance may also implicate an intent theory. Evidence of common plan or scheme is one means of proving intent.

B. As noted above, the permissible purposes under 404(b) are not limited to those listed. Again, it is a rule of **inclusion** rather than exclusion. Evidence is admissible if it is **logically relevant** on any theory **other** than the theory prohibited. I.e. character. Below are several cases involving non-listed purposes.

   1. In Quinn, supra, the State contended that the defendant used a computer owned by his girlfriend to "meet" the 13 year old alleged victim in a chat room and, later, to set up the victim's running away and meeting him, facilitating his commission of the sexual offenses involved. Evidence obtained from the computer was used to "establish defendant's use of his girlfriend's computer" in the commission of the crimes in addition to motive, preparation and plan.

2. In State v. Carpenter, 147 N.C. App. 386, 392, 556 S.E.2d 316, 321 (2001), the court approved admission of uncharged misconduct to show that the defendant "used ministry and church activities" with his victims and abused them in similar areas in a similar manner.

3. In State v. Santiago Montez Houston, 2005 N.C. App. LEXIS (2002) the court allowed evidence of uncharged misconduct involving prior drug transactions between an informant who was also involved in the charged drug crimes to "explain the relationship between defendant and the informant" in addition to showing intent, knowledge and common scheme or plan.

4. In State v. Smith, 157 N.C. App. 493; 581 S.E.2d 448 (2003), the defendant was charged with second-degree murder, driving while impaired and felonious speeding to elude arrest. Evidence was admitted showing that defendant had outstanding charges and arrest warrants as explanation of why pursuit, which resulted in death of victim in charged offense, occurred. Basis of admission was that "every circumstance that is calculated to throw any light upon the supposed crime is admissible, i.e., chain of circumstances, whole story.)

5. In State v. Boston, 165 N.C. App. 214; 598 S.E.2d 163; 2004 N.C. App. LEXIS 1159, the defendant was charged with possession of a firearm by a felon. Evidence was that his probationary sentence was admitted to prove his status as a convicted felon.

6. But see State v. Cook, 599 S.E.2d 67; 2004 N.C. App. LEXIS 1438 (2004), where the admission of 404(b) evidence during the State's case in chief involving a prior embezzlement by a defendant who was charged with embezzlement on the purpose theory of "credibility" was held to be error. The trial court admitted the evidence "for the limited purpose of contradicting the Defendant's explanations given on three occasions for which he is being tried."

   a. The Court of Appeals held that, "if we were to allow evidence of prior bad acts to be admissible under Rule 404(b) for purposes of attacking credibility, we would undermine the General Assembly's careful design regarding admission of character evidence."

   b. Noting that, "although 404(b) is a rule of inclusion, our Supreme Court has held that evidence of other offenses is admissible only 'so long as it is relevant to any fact or issue other than the character of the accused,'" and that "Rule 404(b) provides that proof of a person's bad acts 'may properly be used as circumstantial proof of a controverted fact at trial."

   c. The court ruled that credibility relates only to the character of a person and that challenges to credibility do not amount to "circumstantial proof of a controverted fact."

C. Also, note that the terms "**similar**" and "**prior**" are not found in the rule. It has been said that the terminology "*similar crimes*" and "*prior bad acts*" is imprecise.

1. Generally speaking, an act does not have to be similar to the charged crime in order to be admissible under 404(b). (Similarities between the uncharged acts and the crime charged are an important factor only when the proponent's theory of relevance assumes similarity such as identity or modus operandi,). See S. v. Willis, 136 N.C.820, (2000); State v. Al-Bayyinah, 356 N.C. 150, (2002).

2. Also, as noted above, the uncharged misconduct does not have to occur prior to the charged crime. Acts that occur subsequent to the charged crime may also be admissible so long as they are logically relevant to a material fact at issue in the case being tried. See State v. Lemons, supra.

IV. When and How The Issue Arises

A. **Pre-trial**.

1. **Motions to Compel Disclosure of Intent to Offer 404(b) Evidence**.

a. Criminal defense lawyers are filing pre-trial Motions to Compel Disclosure of Intent to Use 404(b) evidence in an increasing number of cases. Motions to Exclude are also being filed along with or following the Motion to Compel.

b. A number of courts have held that 404(b) is not a discovery statute. It addresses the admissibility of evidence and does not require the State to disclose evidence it might offer.

1) Almost all jurisdictions limit a defendant's rights to discovery to exculpatory evidence and, since uncharged misconduct is inculpatory, there has been no right to discovery.

2) But See Federal Rule of Criminal Procedure 16, expanding criminal defendant's rights to pre-trial discovery (disagreement in the courts whether the language of the rule relating to "record," includes uncharged misconduct as well as convictions.

3) There is also an argument that, where there is evidence that a third party committed acts of uncharged misconduct, a defendant might have a Constitutional right to discovery of that information under Brady, Agurs and their progeny. Also, where a material witness has allegedly committed acts of uncharged misconduct, the defendant might be entitled to that information under the same authority.

2. A variation of this motion is a **Motion to Compel Pre-trial Notice of Intent to Offer 404(b) evidence**.

a. It may also be made in form of a **motion in limine**, which is usually filed shortly before or at the time the case is called for trial. See State v. Stevenson, 2005 N.C. App. LEXIS 791 (2005) (Issue raised on motion in limine.)

b. The traditional and majority view is that there is **no duty** to give **notice** of intent to introduce 404(b) evidence in discovery or otherwise. **North Carolina follows this view**. See State v. Payne, 337 N.C. 505.

c. There is, however an emerging trend towards requiring notice. A growing number of jurisdictions have **amended** their versions of the rule to require the proponent to give pre-trial notice of intent to offer 404(b) evidence. (Connecticut, Florida, Georgia, Kentucky, Louisiana, Minnesota, Montana, Oklahoma and Texas). These jurisdictions take the position that, without pre-trial notice, the opponent may suffer unfair surprise at trial and the result would be a denial of a meaningful opportunity to prepare for trial and defend against the alleged uncharged misconduct.

d. In some cases these jurisdictions have made notice a requirement **legislatively**, in others it has been done through the exercise of the court's **supervisory** power and, in a few, it has been based on **due process** grounds under the State or Federal Constitutions or both. See United States v Rivera, 874 F2d 754 (CA10, 1989); State v. Acquin, 34 Conn Supp 152, 381 A2d 239 1977); State v. Epps, 18 Crim L Rep (BNA) 2042 (Conn Supp, 1975); See also Reed, Part Three: Admission of Other Criminal Act Evidence After Adoption of the Federal Rules of Evidence, 53 U Cin L Rev 113, 167-169 (1984).

e. The **majority view** is that the due process clause of the fifth or fourteenth amendment does give a defendant the right to fair notice of the charge involved in the trial but not to an evidentiary matter such as 404(b). See United States v. Braasch, 505 R2d 139 (CA7, 1974; Blake v. Morford, 563 F2d 248 (CA6, 1977); United States v. Kendall, 766 F2d 1426, 18 Fed Rules Evid Serv 1355 (CA10 Okla 1985), cert den 474 US 1081, 88 L Ed 2d 889, 106 S Ct 848; Note, Criminal Law: Evidence of Prior Misconduct: Whitty v. State, 51 Marq L Rev 104, 109 (1967).

3. Federal Rule 404(b) was amended in 1991 consistent with the emerging trend towards some kind of notice to add the following concluding clause:

> "*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."*

4. Both the amended Federal Rule and many of the other jurisdictions requiring notice also provide for wide discretion in the trial court for the allowance of exceptions to any notice requirement.

a. Many commentators have hailed the emerging view requiring some notice, as being both "justifiable and salutary." Comment, Developments in Evidence of Other Crimes, 7 JL Ref 549-50 (1974).

b. One argument is that pretrial notice would help in minimizing the "sloppy handling" of 404(b) evidence at trial that is so prevalent. Uncharged Misconduct Evidence, § 9:09, Imwinklereid, (Apparently referring to trial lawyers, their words, not mine!)

a. Another argument is that pretrial notice would help improve the quality of advocacy by both the proponent and opponent of the evidence. Consistent with this argument is the idea that requiring the proponent to specify the purpose theory upon which it relies will force prosecutors to think through their theory of relevance and require opponents of the evidence to be prepared to identify, interview and call witness to rebut the evidence and/or meet their burden under Rule 403.

b. A third argument is that pretrial notice would be helpful to trial judges in terms of giving the judge advance notice of the issue and an opportunity to prepare for the hearing and to think about and prepare clear and concise instructions that might apply.

c. A fourth argument is that, even though there is no right to discovery of bad acts in criminal cases, uncharged misconduct is generally discoverable in civil cases and the policy factors underlying full disclosure and/or pre-trial notice on the civil side would, at a minimum, lead to a greater likelihood of early resolution by guilty pleas in criminal cases. This argument is also based, in part, on a fairness issue.

f. As noted above, wide discretion is given to the trial judge to make exceptions or allowances in recognition of the danger of unduly overburdening the proponent,

5. There are some common denominators in those jurisdictions where notice is required.

a. The proponent must give notice of intent to offer uncharged misconduct evidence at trial.

b. The notice must identify the incident to be proven under the rule. (Identification does not necessarily require a specific date or place).

c. The prevailing view is that notice must be given within a reasonable time before trial (usually 10 days,) and extend this requirement to pre-trial hearings as well.

B. **<u>At Trial</u>**

1. By **Motion in Limine**: when a motion in limine raises the issue, a voir dire hearing is generally required. It is common practice for most trial judges to direct the proponent not to attempt to introduce any 404(b) evidence in the presence of the jury without an opportunity for a hearing on admissibility.

a. There is case law that a party seeking to introduce evidence does not have to state the purpose for which the evidence is offered unless required to by the court or the party objecting to the evidence.

b. The prevailing view is that the proponent has the burden of articulating an admissible purpose theory, or theories, under 404(b). This is consistent with the general common law rule that the party offering evidence has the burden of proving that the evidence is admissible.

c. The opponent is entitled to an opportunity to be heard as to why the evidence should be excluded under Rule 403. The burden is on the opponent to how that there is no proper purpose for which the evidence could be admitted. See State v. Lanier, 165 N.C. App. 337; 598 S.E. 2d 596 (2004)

2. At the conclusion of the voir dire hearing the trial court should enter its findings and ruling on admissibility on the record. This will be discussed in more detail below in section IV.

V. The Foundation for Uncharged Misconduct Evidence.

A. Generally, the foundation for 404(b) evidence includes the following elements,

1. **Where** the other act occurred.

2. **When** the act occurred.

3. **What** the **nature** of the act was.

4. The **defendant** (or other person) **committed** the act. See Huddleston v. United States 485 U.S. 681, infra, defendant's (or other person's identity as perpetrator of act is Rule 104 issue; all proponent needs to do is present sufficient evidence to create permissive inference of defendant's (or other person') identity. Evidentiary Foundations, supra.

B. Summary of Determination of Admissibility 404(b)

1. If evidence of an **act,**

2. Of **uncharged misconduct,**

3. **By** the **defendant** (or **other person** against whom offered),

4. Is **logically relevant,**

5. To **prove a material fact in issue** other than character,

6. And the proponent's **need** for that evidence,

7. **Outweighs** the evidence's **prejudicial character,**

8. And, (where the purpose theory involved requires it,) the act is **sufficiently similar** and **not so remote in time** as to more probative than prejudicial,

9. The evidence is admissible.

C. Note that, as a threshold matter, the evidence of the act or acts the proponent wants to introduce must be logically relevant to prove some material fact at issue, i.e. does the evidence make the desired inference more probable than it would be without the evidence?

D. The litmus test is **logical relevance** and the proponent must also show that evidence is logically relevant to a **material fact in issue** other then character.

E. The proponent must then persuade judge that its **need for evidence outweighs its prejudicial nature**.

F. The burden is on the opponent of the evidence to show under Rule 403 that the probative danger of unfair prejudice substantially outweighs the probative value of the evidence. State v. Lanier, 165 N.C. App. 337, 598 S.E.2d 596, (2004), and citing State v. Williams, 156 N.C. App. 661, 664, 577 S.E.2d 143, 145 (2003).

VI. The Court's Role: Balancing Probative Value versus Probative Danger of Unfair Prejudice Under Rule 403

A. Balancing—the difficult duty. Under rule 403 the trial judge is required to **weigh** the **probative value** of the evidence against the **probative dangers** in Rule 403.

1. This required balancing test is where the greatest difficulty lies. **"[T]he word 'weigh' does not connote a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to the factors"** People v. Farmer, 47 Cal 3d 888, 254 Cal Rptr 508, 538, 765 P2d 940 (1989).

a. First, the balancing process is difficult because the factors, which the court must consider are generally **imprecise policy factors**.

b. Second, it is difficult, if not **impossible to quantify the factors**, which the court must consider. Comment, The Murky Waters Get Murkier—Admissibility of Evidence of Extraneous Misconduct in Child Sexual Abuse Cases: Montgomery v. State, 810 SW2d 372 (Tex Crim Ap 1991), 34 Tex L Rev 181, 202 (1993) (the inherent impossibility of quantifying the factors).

d. Third, **weighing** incremental probative value or prejudice **is not an exact science**; the judge has to essentially rely on intuition and gut instinct. ([T] He test involves comparing intangibles and therefore requires an exercise of judgment rather than computation."

e. Fourth, **each case is different**. What may be true in one case may not necessarily apply in another.

1) ([T] he … standard is inexact, requiring sensitivity on the part of the trial court to the subtleties of the particular situation.")

2) The American Law Institute commented that "[t] he application of this Rule should depend so completely upon the circumstances of the particular case and be so entirely in the discretion of the trial judge that a decision in one case should not be used as precedent in another." Model Penal Code of Evidence Rule 403 comment (1942)

2. The trial judge is given great **discretion** in determining admissibility under Rule 404(b) and the Rule 403 considerations should serve as a guide in the exercise of that discretion. State v. Scott, 331 N.C., "ordinarily, whether the probative value of evidence is 'substantially outweighed by the danger of unfair prejudice,' as Rule 403 provides, is a determination resting in the trial judge's discretion." State v. Scott, 331 N.C. 39; 413 S.E.2d 787 (1992)

3. The North Carolina Supreme Court has held that the "trial court's discretion is **not unlimited**. Sound judicial discretion is 'that [which] is …exercised … with regard to what is right and equitable under the circumstances and the law, and directed by the reason and conscience of the judge to a just result.'" Scott, supra, citing State v. Tolley, 290 N.C. 349, 365; 226 S.E.2d 353, 366 (1976)

4. Under the Federal rule the trial judge errs if the judge **fails** to exercise that discretion, **refuses** to exercise that discretion or **does not ensure that the record reflects** an exercise of discretion.

B. Trial judges should require that 404(b) evidence have **substantial** logical relevance to a material issue in the case before admitting it because the danger of unfair prejudice is so great. See State v. Scott, supra.

1. The "overwhelming potential for prejudice when such [uncharged misconduct] evidence is introduced, with or without limiting instructions, is a factor 'which may undermine the fairness of the fact-finding process and thereby dilute the principle that guilt is to be established by probative evidence and beyond a reasonable doubt. Id.

2. In Scott, the State was allowed to present evidence about an alleged prior act of misconduct for which the defendant had been tried and acquitted. The Supreme Court held that it was prejudicial error to admit this evidence. The court went on to say, "An acquittal so divests the evidence of probative value that as a matter of law, the probative value cannot outweigh the prejudicial character of the evidence."

3. But See State v. Agee, 326 N.C. 542; 391 S.E.2d 171 (1990). The defendant in Agee had been charged with possession of marijuana and LSD, both substances were found at the same time. He was acquitted of the marijuana charge in a District Court trial. Later, at the Superior court trial on felony possession of LSD, evidence of the marijuana possession was admitted for the purpose of establishing the context or "chain of circumstances," a.k.a the "complete story," "same transaction," and "course of conduct" rule. See also State v. Tabatha Joyce Bell, 164 N.C. App. 83; 594 S.E.2d 824, (2004).

    a. The North Carolina Supreme Court found no error in admitting the evidence despite the acquittal. Different case, different facts, different purpose, different outcome.

    b. The Supreme Court also found that double jeopardy and collateral estoppel did not preclude admission because, under Huddleston, supra, the 404(b) evidence only required the jury to "reasonably conclude that the act occurred and that the defendant was the actor whereas a conviction required a finding of guilt beyond a reasonable doubt. See Dowling v. United States, 493 U.S. , 107 L Ed. 2d 708 (1990), (prior acquittal did not determine ultimate issue in case being tried.)

C. Several commentators have suggested a number of steps for trial judges in balancing probative value versus probative danger of unfair prejudice. These steps require a number of considerations.

1. **<u>In the First step</u>: <u>assess the proponent's need for the evidence</u>**.

    a. This factor requires consideration of more than minimal relevance than under Rules 401 and 402. The focus here is the **<u>quantum of probative value of the evidence</u>**—the weight and strength of the evidence, in other words, ***how relevant*** the evidence is to the fact proponent offers the evidence to prove.

    b. "Does the item of evidence increase or decrease the probability of the existence of one of the material facts in the case?"

    c. Here the judge asks four questions and weighs four factors. The first two factors require the trial judge to focus on the proponent's proffered evidence. The third requires the trial judge to focus on the defendant's evidence and the last factor requires the trial judge to consider whether the proponent has alternative, less prejudicial evidence available to prove the material fact

        1) **<u>Factor One</u>**—How clearly has the proponent proven that the defendant committed the uncharged act?

            a) In most cases, this is not a serious problem. Generally, the identity of the person on trial as the perpetrator of the uncharged misconduct is not an issue. However, there are instances where the identity of the perpetrator may be anonymous or the evidence may not solidly link

the person on trial to the uncharged act, but the proponent may offer the evidence on the theory purpose of establishing an actus reus or in reliance on the theory of the doctrine of chances.

b) The majority view on the issue of establishing identity of the perpetrator of the uncharged act is set out in Huddleston v. United States, 485 U.S. 681 (1988). In Huddleston the Supreme Court held that Rule 104(b) controls this question and all that the proponent is required to do is to present sufficient evidence to create a permissive inference of the defendant's identity.

2. **Factor Two**—How probative of the material fact in issue, such, as identity, the actus reus, or the mens rea, is the uncharged act?

a. Is the fact that the uncharged act is being offered to prove an ultimate, essential element of the charged crime or an intermediate fact? E.g. knowledge, identity, intent vs. motive.

b. Is the uncharged act highly similar to the charged crime? A high degree of similarity increases the probative value of the evidence.

c. A modus theory of identifying a person requires the highest degree of similarity while doctrine of chances demands less similarity to prove a guilty state of mind.

d. The doctrine of chances holds that "as the number of incidents increases, the objective probability of accident decreases." Under the doctrine the proponent is essentially relying upon improbability. The proponent is attempting to use the intermediate inference of objective or statistical unlikelihood rather than subjective character to ultimately establish an inference of action or actus reus.

e. Our courts have held that "[t] he doctrine of chances is especially probative when the two crimes are similar in nature." State v. Stager, 329 N.C. 278, 406 S.E.2d 876. But, strict similarity is not required. The doctrine has been applied even when the uncharged misconduct is not factually similar in all respects. The degree of similarity is only one factor to be considered in determining It is enough that there is "sufficient similarity" to justify admission under the doctrine. The degree of similarity required is "that which results in the jury's 'reasonable inference that the person committed both the prior and present acts." See State v. Stevenson, 2005 N. C. App. Lexis 791 citing State v. Stager, supra; State v. Murillo, 349 N. C. 573, 509 S.E.2d 752 (1998).

f. Is the uncharged act remote in time from the charged act?

1) The issue of remoteness, like the issue of similarity, is made on a case- by-case basis. Remoteness in time is more significant when theory purpose is common scheme or plan, less significant when purpose theory is intent, motive, knowledge or lack of accident. See State v. Lanier, 165 N.C. App. 337, 598 S.E. 2d 596 (2004) (six year period); State v. Dyson, 599 S.E. 2d 73; 2004 N.C. App. LEXIS 1424 (2004), (Ten year period).

2) Many courts have held that remoteness goes to weight, not to admissibility, but, again, temporal remoteness can depreciate or decrease probative value depending on the purpose theory. There is a developing trend towards using the time period in Rule 609 as a guidepost in the 404(b) remoteness issue although that is not a hard and fast consideration. For example, time spent in incarceration is generally excluded from consideration, "it is proper to exclude time defendant spent in prison when determining whether prior acts are too remote." State v. Berry, 143 N.C. App. 187, 198, 546 S.E.2d 145, 154, *disc. review denied*, 353 N.C. 729, 551 S.E.2d 439 (2001) See also, State v. Hipps 348 N.C. 377, (seventeen year time period).

3. **Factor Three**—Is the material fact that the uncharged misconduct is being offered to prove in genuine dispute?

   a. If the material fact that the uncharged misconduct is offered to prove is seriously disputed by the defense, then the proponent's need for the evidence is bolstered. See State v. Valladares, 599 S.E.2d 79, 2004 N.C. App. LEXIS 1433 (2004), citing State v. Johnson, 13 N.C. App323, 185 S.E.2d 423 (1971) (defendant charged with possession of marijuana, denied knowledge of marijuana and that he participated, evidence that he sold marijuana two weeks before charged crime admissible on intent, guilty knowledge and motive.)

   b. Some minority courts take the view that a plea of not guilty puts everything in dispute. The majority view is that a bare not guilty plea alone is not sufficient to allow admission of 404(b) evidence. There has to be a genuine dispute as to some material fact of consequence. But see State v. Ted Scott, 2005 N.C. LEXIS 63 (2005) (defendant's plea of not guilty placed in issue every material allegation contained in the indictment, including his identity as the perpetrator.) (Defendant contended that identity was not an issue because he admitted killing victim and other witnesses put him at scene, but defendant had made no pretrial statements, did not admit involvement until his testimony at trial after State's case in chief and insinuated through cross-examination that another person had some involvement in the killing)

4. **Factor Four**—Does the proponent have alternative, less prejudicial evidence available to prove the material fact?

a. The trial judge may consider this factor is evaluating the proponent's need for the uncharged misconduct evidence.

b. If other, less prejudicial evidence is available to prove the material fact or if the proffered evidence is cumulative, the need for the uncharged misconduct evidence is diminished.

2. **In the Second step: identify the probative dangers of the evidence**.

a. How prejudicial is the evidence? Evidence is prejudicial if it would "tempt the jury to decide the case on an improper basis." By its very nature uncharged misconduct evidence invites the jury to decide a case on an improper basis—that is to convict because of a person's character. However, "technically relevant evidence may bring with it the 'unwanted baggage' of probative dangers." **The real issue here is whether the evidence is unfairly prejudicial in light of whatever probative value the evidence may have.**

b. To what extent will the evidence of uncharged misconduct confuse, mislead or distract the jury from the central question of whether the defendant committed the charged crime or tort? Rule 403.

c. How time-consuming will the presentation of the proponent's evidence and defense rebuttal be? Is the proposed evidence going to result in a mini-trial on the uncharged misconduct? Rule 403 provides that this is a factor to be considered in determining admissibility.

d. To what extent will the evidence create a risk that the jury will return a guilty verdict on an improper basis, i.e., because they think the defendant is a bad person, has gotten away with other crimes and should be in jail anyway? This factor, in turn, leads to several other considerations.

1) How reprehensible in the uncharged act?

2) How sympathetic is the victim in the uncharged act?

3) What is the comparative seriousness between the uncharged and the charged offenses?

4) What is the comparative relevance of the uncharged act to the proper and improper inferences that are likely to arise?

5) Did the uncharged act result in a conviction? This cuts both ways. A conviction is strong evidence that the person committed the uncharged act. On the other hand, a lack of conviction may decrease probative value as to whether the person committed the act but may lead to an improper belief that the person "got away" with the uncharged act and needs to be punished now.

D. Note that, if the trial judge preliminarily concludes that all or part of the evidence is logically relevant under 404(b), the burden **may** then shift to opponent under 403 to show that the probative value of the evidence is substantially outweighed by the probative dangers or prejudice inherent in the evidence and that the evidence, although relevant, should be excluded.

   1. Generally the party seeking to exclude logically relevant evidence has the burden.

   2. State v. Lanier, supra; "…the burden is on the defendant to show that there was no proper purpose for which the evidence could be admitted", citing State v. Williams, 156 N.C. App. 661, 664, 577 S.E.2d 143, 145 (2003) *quoting* State v. Willis, 136 N.C. App. 820, 823, 526 S.E.2d 191, 193 (2000).

E. If the proponent meets its burden on the above factors and the opponent fails to persuade the judge that probative value of the evidence is substantially outweighed by the probative dangers, the evidence is admissible.

F. Again, **the ultimate issue** for the trial judge is whether its prejudicial character substantially outweighs the probative value of evidence. After conducting the balancing process the trial judge will make one of three final rulings

   1. The judge may **admit all** of the proponent's evidence.

   2. The judge may **exclude all** the proponent's evidence.

   3. The judge may **admit part** of the proponent's evidence **but exclude the balance**. See State v. Quinn, 603 S.E. 2d 886; 2004 N.C. App. LEXIS 2025

G. If the trial judge determines that some or all of the evidence is admissible, several questions arise.

   1. What should the trial judge tell the jury about the evidence in instructions?

   2. What may the proponent say about the evidence in closing argument? Both of these questions are discussed in part VI below.

   3. Does the trial judge have to enter a written order at the time the evidence is admitted or is a verbal ruling entered on the record sufficient?

      a. I have found no authority requiring a written order upon admission of 404(b) evidence.

      b. It does appear clear that findings and conclusions **should** be entered on the record. The findings should include,

1) A finding that the evidence of the act or transaction **is (or is not)** relevant to a material fact in issue (specifying what the material fact is) and **does** (**or does not**) have probative value.

2) That the court has considered the **probative dangers** of unfair prejudice under Rule 403 and has conducted the required balancing test weighing the probative value of the proffered evidence against the probative dangers of unfair prejudice.

3) Depending **on the purpose theory**, a finding that the evidence is similar in nature (setting out the similarities) and not so remote in time so as to be unfairly prejudicial and that the court finds and concludes that the probative value of the evidence is (or is not) substantially outweighed by the probative dangers or unfair prejudice of the evidence.

4) That, in the discretion of the court, the evidence is admitted (or excluded).

VII. The Evidence Permitted

A. It is clear under the applicable case law some or all of the **facts and circumstances** related to the uncharged act may be admissible if the requirements of 404(b) are otherwise met.

B. However, with a few exceptions, admission of the "**bare fact of conviction**" without evidence of the underlying facts is error. State v. Wilkerson, 356 N.C. 418, (2002); State v. Hairston, 156 N.C. App. 202 (2003). The North Carolina Supreme Court adopted Judge Wynn's dissent in Wilkerson holding that it was error to admit the bare fact of convictions against a non-testifying defendant.

1. As a general rule, the bare fact of conviction is not probative of any 404(b) purpose. **It is the facts and circumstances that may have probative value for 404(b) purposes**.

2. The **exceptions** are where a prior conviction is probative of motive or intent, e.g., an assault on a witness who helped procure a prior conviction, or under applicable case law such as in sex offense cases where a previous conviction might be admitted to show intent or in murder cases where prior traffic related convictions are admitted to prove malice. See Wilkerson; State v. Hall, 85 N.C. App. 447 (1987).

3. The recent North Carolina Court of Appeals case of State v. Edwards, No. COA04-668, filed May 17, 2005, provides for another exception.

a. The defendant in Edwards was charged with driving while impaired (DWI), hit and run, and second-degree murder. The trial judge allowed the State to prove defendant's prior driving record by admitting a certified copy of his DMV driving record listing convictions for DWI and DWLR. The trial court

also allowed testimony by a deputy clerk as to these convictions. As in Wilkerson, supra, the defendant did not testify.

b. The State offered the evidence for the purpose of proving malice as to the second-degree murder charge. On appeal, defendant argued that the admission of the evidence violated Wilkerson.

c. The Court of Appeals held that Wilkerson was "the generally applicable standard in reviewing the admissibility of convictions offered under [404(b)], but that, in cases where there is a traffic death, there was a long line of cases in both the Supreme Court and the Court of Appeals holding that convictions for driving offenses may be offered to show malice. See State v. Goodman, 357 N.C. 43, 577 S.E.2d 619, (2003); (citing numerous other cases).

d. The court held that Wilkerson "did not alter this court's precedent involving traffic convictions in second-degree murder cases."

e. The court also found that defendant's contention that the prior traffic offenses [the DWLR's] were not sufficiently "similar," to the charged crime to be admitted under 404(b) had no merit. "Our appellate courts have held that prior convictions for traffic offenses other than driving while impaired are admissible to establish malice in a prosecution of a defendant for driving while impaired resulting in the death of another person."

VIII. Procedural Issues—Limiting Instructions and Jury Argument

A. Upon request, a trial judge must give a limiting instruction admonishing jurors that they may consider evidence **only** for limited purpose for which it was offered. State v. Brewington, N.C. App. NO. COA03-1654, Filed May 17, 2005, citing State v. Williams, 355 N.C. 501, 562, 565 S.E.2d 609, 645 (2002). See N.C.G.S. 8C-1, Rules of Evidence, Rule 105.

"When evidence which is admissible as to one party or ***for one purpose but not admissible*** *as to another party or* ***for another purpose*** *is admitted, the* ***court, upon request,*** *shall* ***restrict*** *the evidence to its* ***proper scope*** *and instruct the jury accordingly."*

1. There is no error in failing to give a limiting instruction absent a request. "[T]he admission of evidence, competent for a restricted purpose, will not be held error in the absence of a request by defendant for a limiting instruction. State v. Brewington, supra.

2. Such an instruction is not required to be given unless specifically requested by counsel.'" State v. Wade, 155 N.C. App. 1. 573 S.E.2d 643, 2002 N.C. App. LEXIS 1606 (2002); State v. Williams, 355 N.C. 501, 562, 565 S.E.2d 609, 645 (2002); State v. Brewington, N.C. App.. NO. COA03-1654 (Filed 17 May 2005). (See also, N.C.P.I. 104.15, "Evidence of **Similar** Acts and Crimes").

B. Ideally, (and arguably as required by the language of Rule 105,) any limiting instruction given should be tailored to clearly define both the permissible and impermissible uses of the evidence. Fed R Evid. 404(b);

1. It has been said, "[I]t would be naïve to believe that lay jurors always understand and follow limiting instructions." State v. Jeffries, 117 N.C. 727, 23 S.E. 163 (1895), Note, Other Crimes Evidence at Trial: Of Balancing and Other Matters, 70 Yale LJ 763, 765 (1961); Note, Exclusion of Prior Acquittals: An Attack on the Prosecutor's Delight, 21 UCLA L Rev 892, 913 (1974).

2. And, the task has been described as "Herculean," and "heroic."

3. However, there appears to be an emerging trend among commentators and some appellate decisions attacking limiting instructions given by the trial judge on the grounds that the language used is prejudicial or that the instructions are overbroad, inadequate, vague, or insufficient. See State v. Roache, 358 N.C. 243; 595 S.E.2d 381; 2004 N.C. LEXIS 340 (2004) (Defendant raised constitutional argument on appeal but trial counsel failed to object when instruction given so plain error standard applied—no error found)

4. Use of the language "other (or similar) crimes" or "other (or similar) offenses," or words having the same connotations, has been criticized as "heightening" the prejudicial nature of the evidence. The preferred language seems to be "other (or similar) acts or transactions." The instruction should make it clear that the jury may not convict the person of the uncharged misconduct. Any inference or suggestio6n to the contrary may be constitutional error, especially when such instructions constructively amend the indictment on which the person is being tried. See Roache, supra, (limiting instruction that jury could consider uncharged murder "to extent, if any, that he acted *in conformity* with the charge … that the State has lodged against him here." See also, United States v. Pena, 930 F2d 1486 (CA10 NM 1991)

5. Rule 105 of the North Carolina Rules of Evidence requires that, upon request, the court **shall** give limiting instructions **restricting** the evidence to **its proper scope.**

   a. Uncharged misconduct is evidence, which is admissible for one purpose but not admissible for another purpose.

   b. This arguably means that the court must instruct the jury about both the permissible and impermissible use of the evidence.

6. The instruction should also clearly list the purpose or purposes for which the jury may properly consider the evidence.

C. The elements of the limiting instruction should include,

1. A recitation or description of the item of uncharged misconduct evidence, e.g.,

a. **Before admission**

*"You are about to hear evidence that the defendant was allegedly involved in an **act** similar to the offense he is now charged with."*

b. **During final jury charge**

"*During this trial you have heard evidence that the defendant was allegedly involved in an **act** similar to the alleged rape he is now charged with."*

2. A **directive** to the jury **not to use** the evidence **as proof of defendant's bad character**. The trial judge's instruction must tell the jury that they may not use the evidence as general character evidence, e.g.,

"*You **may not use** this evidence **to infer that the defendant is a bad person** and is, **therefore, more likely to have committed the offense(s) he is now on trial for**. That would be an improper use of this evidence and you must not consider this evidence for that purpose."*

Where the earlier bad act did not result in a conviction, an instruction that the jury may not convict the defendant of the uncharged misconduct, e.g.,

*" I further instruct you that **the defendant is not on trial for these alleged acts and you may not convict him (or her) for these alleged acts**.*

3. An **identification of the permissible uses** of the evidence. This part of the limiting instruction tells the jury that they may use the evidence to help them decide a particular fact in dispute in the case, that is that they may use the evidence only in deciding the existence of the fact that the evidence was admitted to prove, e.g., motive, intent or identity, e.g.,

"*If you believe this evidence*, **you may use it only to help you in deciding whether the defendant was the person who committed the rape charged in this case for which the defendant is now on trial**.

4. Some commentators believe that, in addition to the above, it is helpful to the jury to "trace out" the chain of inferences the proponent is relying on in offering the evidence. The argument for this is that it would be helpful to jurors who may not be accustomed to thinking in terms of chain of inferences. This requires the trial judge to clearly and succinctly set out the permissible chain of inferences that they may consider. Consider the following:

"***The prosecution claims that both acts were committed in the same, peculiar and distinctive fashion***. *If you find that the defendant committed the other act and you further find that both acts were committed in the same, distinctive fashion,* ***you may find that this might tend to identify the defendant as the***

person who committed the rape charged in the case now on trial. *I instruct you, however, that what, if anything, this evidence does show is for you, the jury to determine. Again, I instruct you that you may consider this evidence, to the extent that you believe it, only for this limited purpose and for no other purpose."*

5. So-called "**shotgun**" instructions may not be sufficient, i.e., listing all recognized theories for admission whether they are relevant or not.

   a. Current North Carolina law appears to be that so long as one of the purposes for which the evidence was admitted was proper, there is no error.

   b. This arguably gives the trial judge an incentive to list all possible grounds for admission when allowing uncharged misconduct evidence at trial. List as much as possible—hope something is right. See State v. Morgan, 359 N.C. 131, 604 S.E.2d 886; 2004 N.C. LEXIS 1199, (Where at least one of the [other] purposes for which the prior act evidence was admitted was [proper,]" there is no prejudicial error.

6. It should be noted that there is a great deal of criticism and a growing body of law at both the federal and state levels in other jurisdictions regarding overbroad, vague or insufficient limiting instructions.

   a. One of the criticisms is that giving a "laundry list" instruction is tantamount "to giving the jury a multiple-choice test" on the proper use of uncharged misconduct evidence, providing them with virtually no guidance as to how they are to consider and use the evidence in deciding the material issues in the case.

      1) One of the factors considered on appeal in some jurisdiction is "whether the trial judge gave a careful, clear limiting instruction about the uncharged misconduct evidence.

      2) If the judge gave no instruction or a vague instruction, there is a greater risk of jury misuse of the evidence."

   b. See United States v. Kern 12 F3d 122, 125 n 3 (CA 8 Neb 1993) ("[W]e do not countenance the district court's use of this virtual laundry list of permissible Rule 404(b) purposes…"); United States v. Bailey, 957 F2d 439, 442, 35 Fed Rules Evid Serv 418 (CA 7 Ill 1992), cert den 505 US 1229, 120 L Ed 2d 919, 112 S Ct 3053, dismd 37 F3d 1501 (CA7 Ill) (the trial judge must "identify the exception under Rule 404(b) that applies to the evidence in question …"); United States v. Harrison, 942 F2d 751, 759, 34 Fed Rules Evid Serv 202 (CA10 Okla 1991) ("the district court must identify a specific reason for admitting the evidence, rather than merely reciting the language of Rule 404(b).

c. In the view of these authorities, such instructions are technically improper because one or more of the purposes listed in the "laundry list" instructions may be irrelevant and, therefore inadmissible, in that particular case.

d. Another argument is that giving the jury a laundry list of purposes may confuse or mislead them in terms of how they are to consider the evidence, which increases the likelihood that the jury will use the evidence for improper purposes. See United States v. Cortijo-Diaz, 875 F2d 13, 28 Fed Rules Evid Serv 138 (CA1 Puerto Rico 1989) (the court "frowned on "laundry list" instructions, since they are "undecipherable to lay juries"; for that reason, the jurors could well have misused the evidence as proof of the defendant's bad character; the evidence in effect branded the defendant as a violent felon).

e. An appropriate instruction should be clear and crisp and should limit the jury to "**only**" the purpose or purposes for which the evidence is properly admitted.

f. The instruction should be carefully worded so that it does not relieve or excuse the proponent from its burden of proof, create an impermissible legal presumption, or lead the jury to believe that they can convict the defendant for the uncharged misconduct rather than the charged offense.

1) "Whatever else the instruction say or suggest, the instructions should make it clear that the jury cannot convict the defendant of the uncharged misconduct. United States v. Pena, 930 F2d 1486 (CA10 NM 1991); State v. Sohn, 107 Or App 147, 150, 151, 810 P2d 1337 (1991);

2) Such a conviction can constitute constitutional error, especially when the instruction in effect constructively amends the indictment on which the accused is standing trial." United States v. Flynt, 15 F3d 1002, 7 FLW Fed C 1189 (CA11 Ga 1994); Cokely v. Lockhart, 951 F2d 916 (CA8 Ark 1991), reh, en banc, den Feb 25, 1992) and cert den 506 US 904, 121 L Ed 2d 220, 113 S.Ct. 296

D. Also, it is a good idea to give instructions twice, once when evidence is admitted and again during final jury charge. See State. v. Alvarez, 608 S.E. 2d 371; 2005 N.C. App. LEXIS 342 (2005); State v. Houston, 2005 N.C. App. LEXIS 606 (2005); United States v. Randazzo, 80 F3d 623 (CA1 Mass 1996)

1. "Perhaps the safest course for a district court…is…to give a closing instruction that bad character is not a permissible inference."

2. The judge's repetition of the instruction reduces the risk of jury misuse. United States v. Sherrod, 964 F2d 1501, 1514 (CA5 Tex 1992). Cert. denied 506 U.S. 1041, 121 L Ed 2d 701, 113 S Ct 832 and cert. dismd 506 US 1041, 122 L Ed. 2d 111, 113 S Ct 834 and cert den 507 US 953, 122 L Ed 2d 745, 113 S Ct 1367, 93 CDOS 1182, reh den 507 US 1025, 123 L Ed 2d 461.

E. When we consider that the United States Supreme Court and lower courts have "occasionally questioned the [jurors] ability" to "understand and follow limiting instructions," the role that the instructions that we give becomes significantly more important.

1. The argument has been made that the "**refinement of the limiting instruction is the procedure that could be of greatest assistance to the jury**.

2. All other procedures will be for naught if the jury misuses the uncharged misconduct evidence during deliberations." This is a sobering thought for all of us.

F. Examples of pattern or standard limiting instructions can be found in: Saltzburg & Pearlman, Federal Criminal Jury Instructions §2.14A (1985); Sand, Siffert, Laughlin & Reiss, Modern Federal Jury Instructions, Inst 5, 25, 5, 26; Note, Other Crimes Evidence: Relevance Reexamined, 16 J Mar L Rev 371, 388 (1983).

G. Finally, be alert that **during closing arguments the attorneys do not make any argument that are outside of the scope of the limitations upon which the evidence was admitted.**

1. The proponent of uncharged misconduct evidence may "invite" the jury directly or indirectly to misuse the admitted evidence, i.e., make a "character" or "propensity" argument. This is improper argument based upon the limited purpose for which the evidence was admitted.

2. Any argument relating to the evidence should be limited to the purposes for which the evidence was admitted. If counsel argues outside these parameters, the court may be required to give an ex mero motu instruction to cure the error.

IX. The Timing Of Admission—Timing Can Be Everything (And May Bail You Out)

A. The proponent may offer 404(b) evidence during case in chief or during rebuttal.

B. The trial judge may not be able to determine the logical relevance of the proponent's evidence during the case in chief when the other side has not yet presented its evidence and it is not yet clear what matters may be in dispute.

C. The court may be in better position to determine admissibility after determining what matters are controverted.

D. Also, it is not uncommon for the party opposing admission of the evidence to open the door by cross-examination or otherwise.

1. Borderline evidence, which the trial judge may have concerns about admitting during the proponent's case-in-chief, may be less problematic after the opponent's foot is in mouth and the door is open. See State v. Thaggard, 608 S.E. 2d 774;

2005 N.C. App. LEXIS 250 (2/1/2005), (defendant opened door to evidence by his direct examination).

2. Evidence, which may initially be irrelevant, may become relevant during rebuttal. State v. Cotton, 99 N.C. App. 615, 394 S.E2d 95 (1992), aff'd 329 N.C. 764, 407 S.E.2d 456 (1991).

E. Rule 404(b) evidence can be confusing for everyone involved (it certainly has been for me!). Such evidence has a valid purpose but there are also serious implications in terms of the fundamental question of fairness whenever this evidence rears its head. There is hope and help for trial judges in the sources listed below.

Reference Sources: Evidentiary Foundations, 3rd Ed. Edward J. Imwinkelreid, The Michie Company; North Carolina Evidentiary Foundations, Mosteller, Beskind, Ross and Imwinkelreid, 1998, The Michie Company; Courtroom Criminal Evidence, Imwinkelreid, Gianelli, Gilligan and Lederer, 1993, The Michie Company; Uncharged Misconduct Evidence, Imwinkelreid, Clark Boardman, Callahan Publications (1-800-323-1336)