

EXTRANEOUS OFFENSES AND UNCHARGED CONDUCT

Release No. 11

Everything you need...

New and Updated Case Law on:

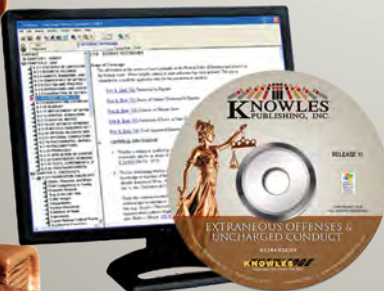
Character as Legal Issue
Context of the Crime
Modus Operandi Evidence
Admission of Other Offenses
Proving Intent or State of Mind
Rule 404(b) Admissibility Test
Admission to Rebut a Defensive Theory

Sample Forms and Briefs
Essential Checklists
General Rules & Exceptions
Probative Value vs. Prejudicial Impact
Limiting Instructions
Proving Identity, Knowledge,
or Intent Objections

Invaluable Information:

Admitting Prior Bad Acts Evidence
Relevance vs. Admissibility
Harmless Error
Admissibility at Sentencing
Impeachment of Witnesses
Clear Abuse of Discretion Standard
Preserving the Error

KNOWLES
KNOWLEDGE
Separates You From the Rest!



Research Taking Too Long? Take advantage of our free software.

Fillable, interactive forms
Access full text of cases and statutes in seconds
Direct links to helpful websites
Powerful search features
View entire contents of the book

EXTRANEOUS OFFENSES & UNCHARGED CONDUCT

by Cliff Roberson

CHAPTER ONE

CHECKLIST TO DETERMINE ADMISSIBILITY

- 1.1 Checklist
- 1.2 The *Luce* Rule
- 1.3 Summary of Checkpoints

CHAPTER TWO

INTRODUCTION AND GENERAL RULES

- 2.1 Scope of Book
- 2.2 Overview
 - a. General Rules
 - b. Reasons
 - c. General Rule—Restated and Clarified
 - d. State Rules on Extraneous Offenses
- 2.3 Definitions
 - a. Uncharged Conduct (Extraneous Offenses)
 - b. Unfair Prejudice
 - c. Relevant Evidence Distinguished From Admissible Evidence
 - d. Probative Value Distinguished From Relevancy
 - e. Balancing
 - f. Constitutional Safeguards
- 2.4 Texas Rule of Evidence 402
- 2.5 Texas Rule of Evidence 403
- 2.6 Texas Rule of Evidence 404
- 2.7 Texas Rule of Evidence 412
- 2.8 Texas Rule of Evidence 609
- 2.9 Texas Code of Criminal Procedure art. 38.37
- 2.10 Uniform Laws
- 2.11 Application of Federal Rule of Evidence 609
- 2.12 Key Cases

CHAPTER THREE

GENERAL RULES AND EXCEPTIONS IN CRIMINAL CASES

- 3.1 General Rule Restated and Clarified
- 3.2 Exception—Character Evidence Rebuttal
- 3.3 Exception—Character as Legal Issue
 - a. Example #1
 - b. Example #2
 - c. Hobbs Act Violation
- 3.4 Exception—Specific Statute Permitting Admission
- 3.5 Reiteration—Relevance vs. Admissibility (Texas Law)
- 3.6 When Rebuttal Evidence May Be Admitted

CHAPTER FOUR

OBSTACLES TO THE ADMISSION OF UNCHARGED CONDUCT IN CRIMINAL CASES

- 4.1 Relevance and Balancing
 - a. Relevance
 - 1. Connection of the Defendant to the Extraneous Offense or Uncharged Conduct
 - 2. Time—Remoteness
 - 3. Relevance to Material Fact
 - (i) Irrelevant Cases
 - (ii) Relevant Cases
 - 4. Special Statute—Texas Penal Code § 31.03(c)(1)
 - 5. Context of Crime
 - b. Balancing of Probative Value and Prejudice
 - 1. Prejudicial Impact of Evidence
 - 2. Tendency of Evidence to Show Material Fact
 - 3. Need of Proponent for This Evidence to Prove the Fact
 - c. Requirement for Jury Instructions

CHAPTER FIVE

SOURCES OF ERROR IN APPLYING THE RULE IN CRIMINAL CASES

- 5.1 Error No. 1—Treating Categories as Automatic “Exceptions”
- 5.2 Error No. 2—Failure to Recognize Actual Relevance of Character Evidence
- 5.3 Standard of Review for Error

**CATEGORIES OF RECURRING RELEVANCE AND
POTENTIAL ADMISSIBILITY IN CRIMINAL CASES**

- 6.1 List Not Exhaustive
- 6.2 Items of Proof—Inference on Inference
- 6.3 Context of the Arrest (*Res Gestae* of Arrest)
 - a. Limiting Admissibility of Irrelevant Evidence From the Scene of the Arrest
 - b. Not Limiting Admissibility of Evidence From the Scene of the Arrest—Complete Story Rationale
 - c. On Context of Arrest
- 6.4 Context of the Crime (*Res Gestae* of Offense)
 - a. Multiple Crimes Admissible
 - 1. Showing Common, Connected, or Inseparable Plan or Scheme
 - 2. Theft
 - 3. Homicide
 - 4. On the Temporal Relationship on Admissibility
 - 5. Admission of Other Offenses
 - 6. To Prove Opportunity
 - b. Multiple Crimes Inadmissible
- 6.5 To Prove Identity
 - a. Signature Theory
 - 1. Requirement for Distinguishing Characteristics
 - 2. Distinguishing Characteristics Must Transcend Predictable Similarities
 - 3. Examples of Distinguishing Characteristics
 - 4. Controverting the Issue of Identity
 - 5. Mere Inconsistencies
 - b. Photographs to Prove Identity
 - c. Handwriting to Prove Identity
 - d. Voice Exemplars That Prove Identity
 - e. Objects Linking Defendant to the Crime
 - f. Eyewitnesses
 - g. Use of Prior Identity
 - h. Crimes of the Same General Type Usually Not Admissible
- 6.6 To Rebut the Defensive Theory
- 6.7 To Prove Intent or State of Mind
 - a. Theory to Rebut Claims of Accident, Mistake, or Involuntariness
 - b. Similarity is Important
 - c. Narcotics Cases
 - d. Subsequent Offenses
 - e. Insanity or Mental Condition
 - f. Fraud, Embezzlement, and Confidence Games
 - g. Felony Theft
 - h. Conspiracy
 - i. Crimes Part of Conspiracy
 - j. To Establish Transferred Intent
- 6.8 To Prove Knowledge
 - a. Knowledge and Intent as Joint Rationales for Admission
 - b. Rebutting Defendant's Claim of No Knowledge
 - c. Showing Defendant Had Notice

- d. Where Knowledge is a Statutory Element of the Crime
 - e. Evidence of Subsequent Crimes is Also Admissible to Show Knowledge
 - f. Forgery
- 6.9 Sex Offenses
- a. Charge to the Jury
 - b. Rape and Sexual Assault
- 6.10 To Prove Motive
- a. Burglary and Robbery
 - b. Violent Offenses
 - c. Arson
 - d. No Motive
 - e. Defenses That Raise Motive
 - f. Animosity Toward a Class
 - g. Use of Extraneous Offenses to Establish Motive
 - 1. Money as a Motive
 - 2. Sex as a Motive
 - 3. Narcotics as a Motive
 - 4. Charged Crime Committed Because Defendant Needed Goods to Sell
 - 5. Hostility as a Motive
 - 6. Concealment of Previous Crime as a Motive
 - 7. Escape or Flight as a Motive
 - 8. Silencing of a Witness as a Motive
- 6.11 To Prove Flight or Consciousness of Guilt
- 6.12 To Prove the Existence of a Larger Plan or Scheme of Which the Crime on Trial is a Part
- a. Plan, Scheme, or System
 - b. Cases With Wider Boundaries for the Scheme
- 6.13 To Corroborate Defendant's Confession
- 6.14 To Rebut Self-Defense Theory
- 6.15 Miscellaneous Theories of Relevance
- a. In General
 - b. Impeachment of Witness
 - c. Corroborating Accomplice Testimony
 - d. Excited Utterances

CHAPTER SEVEN

SPECIAL CONSIDERATIONS FOR CRIMINAL DEFENSE COUNSEL

- 7.1 Practical Suggestion for Defense Counsel
- 7.2 Impeachment
- 7.3 Confessions
- 7.4 Conduct vs. General Character
- 7.5 Acquittal of the Extraneous Offense
- 7.6 Unresponsive Answers
 - a. Rule
 - b. Suggested Protection
 - c. Preserving Error

- 7.7 Defensive Offer of Extraneous Offenses of Third Parties
- 7.8 Mug Shots
- 7.9 Running Objections
- 7.10 Objections to Extraneous Offense Evidence
 - a. Timeliness
 - b. Specificity
 - c. Notice
 - d. Notice Not Required or Failure to Give is Harmless
 - e. Sample Objections
 - 1. General Objections to the Use of Uncharged Bad Acts or Extrinsic Offenses
 - 2. Objections to the Admission of Uncharged Bad Acts or Extrinsic Offenses Offered to Show the Defendant's State of Mind
 - 3. Possible Objections to Use of Uncharged Bad Acts or Extrinsic Offenses Offered to Prove Defendant's Identity
 - 4. Sample Objections to Evidence of Uncharged Bad Acts or Extrinsic Offenses Offered to Prove the Commission of the Criminal Act by the Defendant
 - 5. Objections to Uncharged Bad Acts or Extrinsic Offenses Offered to Rebut Certain Defenses
 - 6. Objections to Uncharged Bad Acts or Extrinsic Offenses of Misconduct Offered to Prove Elements of the Charged Crime Other Than the Identity of the Defendant as a Criminal, Commission of the Criminal Act by the Defendant, or the Defendant's Mental State
 - 7. Objections to Uncharged Bad Acts or Extrinsic Offenses on the Issue of Credibility
 - 8. Objections to Uncharged Bad Acts Offered for Miscellaneous Purposes
 - 9. Suggested Relevance Objections to the Use of Uncharged Bad Acts or Extrinsic Offenses
 - 10. Suggested Procedural Objections to References to Uncharged Bad Acts
 - 11. Suggested Procedural Objections to Questions Dealing With Uncharged Bad Acts or Extrinsic Offenses
 - 12. Objections to the Admission of Uncharged Bad Acts on Constitutional Grounds
- 7.11 Punishment and Enhancement
 - a. Rules
 - 1. Unadjudicated Offenses in Death Penalty Cases
 - 2. Unadjudicated Offenses in Probation Cases
 - 3. Admission of Offenses Committed by Other Persons
 - 4. Unadjudicated Offenses in Other Punishment Hearings
 - 5. Finality of Prior Convictions Must Be Shown
 - b. Pen Packets
 - c. Pictures and Tattoos
- 7.12 Instructions to the Jury
 - a. Preserving Error
 - b. When Limiting Instructions Are Required
 - c. Same-Transaction Evidence
 - d. Waiver
 - e. Incorrect Limiting Instruction
 - f. Time of Limiting Instructions

CHAPTER EIGHT

THE RAPE SHIELD RULE AND FEDERAL RULE OF EVIDENCE 413, EVIDENCE OF DEFENDANT'S PAST SEXUAL MISCONDUCT

- 8.1 General Rules
- 8.2 Federal and State Rape Shield Rules
 - a. Federal Rule of Evidence 412
 - b. Texas Rule of Evidence 412
 - 1. Discussion
 - 2. Annotations
 - 3. Evidence Not Admitted
 - 4. Evidence Admitted
 - 5. Requests for Discovery of Sexual Conduct History
- 8.3 Federal Rule of Evidence 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition
 - a. Discussion
 - b. Right to Confrontation
 - c. Notice Requirement
- 8.4 Federal Rule of Evidence 413. Similar Crimes in Sexual-Assault Cases
 - a. Discussion
 - 1. Background of Federal Rule of Evidence 413
 - 2. Opposition to Federal Rule of Evidence 413
 - 3. Scope of Federal Rule of Evidence 413
 - 4. Proof of Uncharged Sexual Assaults
 - 5. Notice
 - b. Illustrative Cases—Federal

CHAPTER NINE

THE ADMISSIBILITY OF OTHER WRONGS IN TEXAS AND FEDERAL CIVIL CASES

- 9.1 The Rules
- 9.2 Introduction
- 9.3 Definitions
 - a. Uncharged Conduct (Extraneous Offenses)
 - b. Unfair Prejudice
 - c. Relevant Evidence Distinguished From Admissible Evidence
 - d. Probative Value Distinguished From Relevancy
 - e. Balancing
 - f. Immigrant Status
- 9.4 Admissibility of Other Bad Acts in Civil Cases
 - a. Admissibility of Other Bad Acts for Plaintiff or Defendant on the Issues of Motive, Intent, Absence of Mistake or Accident
 - 1. Evidence Properly Admitted
 - 2. Evidence Properly Excluded
 - b. Admissibility of Other Acts on Behalf of the Plaintiff or Defendant to Prove Knowledge or Notice
 - 1. Evidence Properly Admitted
 - 2. Evidence Properly Excluded

- c. Admissibility of Other Bad Act Evidence on Behalf of the Plaintiff or Defendant to Show Plan, Scheme, Design, or Preparation
 - 1. Evidence Properly Admitted
 - 2. Evidence Properly Excluded
 - d. Admissibility of Other Bad Act Evidence on Behalf of the Plaintiff or Defendant to Show Identity
 - e. Civil Commitment Cases
- 9.5 Improper Use of Other Bad Act Evidence by Either the Plaintiff or Defendant to Show Only Bad Character or Propensity
- 9.6 Miscellaneous Issues Relating to the Use of Other Bad Act Evidence: Civil Cases

APPENDIX A

COMMON AVENUES FOR ENTERING EVIDENCE

APPENDIX B

SAMPLE FORMS

- Defendant's Motion in Limine
- Defendant's Motion to Avoid Delay by Notice
- Defendant's Special Requested Charge

APPENDIX C

JURY INSTRUCTIONS

- Suggested Limiting Instructions
- Evidence of Intent—Earlier Offense of Like Nature
- Evidence of Intent—Earlier Act of Like Nature
- Evidence of Intent—Earlier Similar Act
- Evidence of Intent—Contemporaneous and Final Instructions
- Evidence of Uncharged Acts, Not Criminal—Contemporaneous Instructions
- Similar Acts—Intent, Knowledge, and Absence of Mistake
- Similar Acts—Intent, Motive, Plan, and Absence of Mistake
- Intent or State of Mind
- Evidence of Willfulness—Earlier Act of Like Nature
- Similar Acts—Identity, Common Scheme, Plan, or Preparation
- Circumstantial Evidence—Flight, Concealment
- Suppression or Fabrication of Evidence
- Attempted Bribery of Witness—Federal
- Credibility of Defendant

APPENDIX D

SELECTED CASE BRIEFS

Old Chief v. United States

- i) Brief for Petitioner
- ii) Brief of Amicus Curiae
- iii) Respondent's Brief in Opposition
- iv) Reply Brief for Petitioner

Huddleston v. United States

- i) Petition for Writ of Certiorari
- ii) Brief for Petitioner
- iii) Respondent's Brief in Opposition
- iv) Reply Brief for Petitioner
- v) Second Brief for Respondent
- vi) Second Reply for Petitioner

APPENDIX E

In Re Doe; The Rape Shield Rule in A Civil Case

TABLE OF CASES