

**Rule 404. Character Evidence Not Admissible to Prove Conduct; Exceptions; Other Crimes**

**(a) Character evidence generally.** Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) *Character of accused.* Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same;

(2) *Character of victim.* Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(3) *Character of witness.* Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

**(b) Other crimes, wrongs, or acts.** (1) Evidence of another crime, wrong, or act is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(2) In a criminal prosecution, such evidence shall not be admitted unless the prosecutor, consistent with the rules of criminal procedure, gives notice of its intent to offer the evidence. The notice must include a summary of the evidence and the specific purpose(s) for which the evidence will be offered. Such evidence shall not be admitted in a criminal prosecution unless (a) the proffered evidence is relevant to an identified material issue other than conduct conforming with a character trait; (b) the other crime, wrong, or act and the participation in it by a relevant person are proven by clear and convincing evidence; and (c) the probative value of the evidence is not outweighed by its potential for unfair prejudice to the defendant. Evidence of past sexual conduct of the victim in prosecutions involving criminal sexual conduct, including attempts or any act of criminal sexual predatory conduct is governed by Rule 412.

(Amended effective January 1, 1990; amended effective September 1, 2006; amended effective January 1, 2019.)

***Committee Comment -1989***

*Rules 404 to 411 give specific treatment to several areas where questions of relevancy commonly arise. To the extent that these rules call for the exclusion of certain offers of evidence, the court's discretion has been limited. All issues of admissibility are ultimately subject to the provisions of Rules 401 and 403, which also serve to limit the court in its exercise of discretion.*

***Rule 404(a)***

*The use of character evidence to prove conduct is subject to the limitations of Rule 404. The rule is generally consistent with the common law doctrine that character evidence is not admissible to prove that an individual acted in conformity with his character on a specific occasion. Certain exceptions to this general doctrine are contained in the rule.*

*The rule recognizes the traditional exception which permits the accused in a criminal case to introduce evidence of his good character as proof of the substantive issue of guilt or innocence. State v. Peery, 224 Minn. 346, 353, 28 N.W.2d 851, 855 (1947); State v. Dolliver, 150 Minn. 155, 184 N.W. 848 (1921). If the accused puts his character in issue the prosecutor may offer evidence in rebuttal. State v. Sharich, 297 Minn. 19, 23, 209 N.W.2d 907, 911 (1973).*

*The former Minnesota practice in civil actions which extended similar rights to a defendant where the cause of action was predicated upon defendant's "(d)epraved conduct or acts involving moral turpitude," State v. Oslund, 199 Minn. 604, 605, 273 N.W. 76 (1937), has been discontinued by this rule.*

*Rule 404(a)(2) continues the existing practice which permits the admission of a pertinent character trait of the victim to be offered by the accused in a criminal case. See State v. Keaton, 258 Minn. 359, 367, 104 N.W.2d, 650, 656, 86 A.L.R.2d 649 (1960). Evidence of this type is most commonly offered in cases involving issues of self-defense. The rule also permits the prosecution in homicide cases to introduce evidence of the character trait of peacefulness of the victim to rebut any evidence that the victim was the first aggressor. Before an accused can introduce evidence of the victim's past sexual conduct in cases involving sexual offenses the provisions of Rule 404(c) must be satisfied.*

#### **Rule 404(b)**

*Subdivision (b) suggests certain purposes for which evidence of other acts or crimes may be admitted subject to the provisions of Rule 403. The list of acceptable purposes is not meant to be exclusive. See Minn. R. Crim. P. 7.02 which provides that the prosecuting attorney must give notice of certain additional offenses that might be offered pursuant to this rule of evidence. See also State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967); State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965).*

*The Committee has revised Rule 404(b) by adding one sentence which codifies Minnesota case law. State v. Billstrom.*

#### **Rule 404(c)**

*The Committee renumbered the rules in Article 4, moving the rule addressing evidence of the victim's past sexual conduct to a new Rule 412 to conform to the numbering in the Federal Rules of Evidence and Uniform Rules of Evidence.*

### **Committee Comment - 2006**

#### **Rule 404(b)**

*Rule 404(b) has been revised to reflect the five part test that trial courts must apply in determining whether to admit other act evidence under the rule. See State v. Ness, 707 N.W.2d 676, 685-86 (Minn. 2006); State v. McLeod, 705 N.W.2d 776, 787 (Minn. 2005); Angus v. State, 695 N.W.2d 109, 119 (Minn. 2005); State v. Asfeld, 662 N.W.2d 534, 542 (Minn. 2003). In applying the test, the court should first determine the precise purpose or fact for which the evidence was offered and the relevance of the proffered evidence to that particular purpose or fact. Only after finding that the proffered evidence is relevant to a pertinent purpose or fact should the trial court apply the fifth prong's balancing test. See Ness, 707 N.W.2d at 686. The Ness opinion further held that the "need" requirement first enunciated in State v. Billstrom, 276 Minn. 174, 178-79, 149 N.W.2d 281, 284 (1967), is not an "independent requirement of admissibility" but is to be addressed in the context of the fifth prong's balancing test. Ness, 707 N.W.2d at 690.*

*The intent of the revision is, in part, to provide a clear balancing test to be applied in determining the admissibility of other acts evidence. The Minnesota Supreme Court has used conflicting language when describing the trial court's task. See generally James A. Morrow, Peter N. Thompson & Alfred C. Holden, Weighing Spreigl Evidence: In Search of a Standard, 60 BENCH & B. OF MINN. 23 (November 2003). Consistent with the Court's longstanding view that because of the great potential for misuse of this evidence, the trial judge should exclude the evidence in the close case, the Court*

*has instructed the trial judge to exclude the evidence if the probative value is outweighed by the potential for unfair prejudice. In some of the same opinions, however, the Court also referred to the Rule 403 balancing test that requires the trial judge to admit the evidence in the close case. Rule 403 requires admission unless the probative value is "substantially" outweighed by the unfair prejudice. Even in Ness, an opinion designed to reconcile inconsistent decisions, the Court stated that other act evidence "may not be introduced if its probative value is substantially outweighed by its tendency to unfairly prejudice the factfinder." Ness, 707 N.W.2d at 685. However, the Ness Court, following Angus, 695 N.W.2d at 119, Asfeld, 662 N.W.2d at 542, and State v. Kennedy, 585 N.W.2d 385, 389 (Minn. 1998), held that the fifth prong as stated in Rule 404(b)(5) is the appropriate balancing test for other acts evidence. Ness, 707 N.W.2d at 689-93. This test focuses on whether the probative value is outweighed by the potential for unfair prejudice. A slight balance in favor of unfair prejudice requires exclusion. Since this test is a more stringent test, evidence that satisfies this balancing test will certainly satisfy Rule 403.*

*Rule 404(b) also changes the description of the cases where Rule 412 is applicable. Consistent with Rule 412, the description is no longer dependent on statute numbers thereby alleviating the need to revise the evidence rule whenever criminal statutes are renumbered, amended, or added.*

*Similar conduct by the accused against a victim of domestic abuse or against other family or household members is governed by Minnesota Statutes 2004, section 634.20. In State v. McCoy, 682 N.W.2d 153, 159-61 (Minn. 2004), the supreme court held that the clear and convincing evidence standard of Rule 404(b) does not apply when evidence is offered under the statute.*