

PACIFIC JUDICIAL COUNCIL 2017 BIENNIAL CONFERENCE



Evidence Presentation by Judge John C. Coughenour

September 26, 2017

1:30 pm–2:30 pm: Relevance and its Limits – Rules 401, 403, 404

Relevance

In order to be admissible, evidence must first be relevant.

What is relevant evidence?

Rule 401: Evidence is relevant if has probative value and is material.

- Probative value: evidence that tends to make the existence of a fact more or less probable (more probably true than not)
- Material: the point or fact established by the evidence matters in the case

This rule is intentionally broad, but not all evidence is relevant and not all relevant evidence is admissible.

Relevance Limitations

There are three important limitations on relevant evidence. Evidence within these limitations is relevant, but excluded for various reasons.

1. Rule 403: Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time

Relevant evidence may be excluded if its probative value is substantially outweighed by a danger of unfair prejudice, misleading the jury, undue delay, or needlessly presenting cumulative evidence. Trial court judges have discretion whether or not to exclude this type of relevant evidence and must balance the probative value with the potential danger.

- Unfair prejudice occurs when evidence prompts a decision to be made with an improper basis, commonly—though not necessarily—an emotional one, *e.g.*, bloody or gory photographs
- An example of misleading the jury would be to present patent evidence in a trademark infringement case.
- Undue delay or cumulative evidence often occurs through presentation of unnecessary evidence.

Sometimes the potential dangers can be remedied with a limiting instruction to the jury.

2. Rule 404(a): Character Evidence

General Rule: Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

- Example: *U.S. v. Bracy*, 67 F.3d 1421, 1432–1433 (9th Cir. 1995). In *Bracy*, a drug trafficking trial, the Government could not suggest that possession of a handgun found in a traffic stop showed how reckless the defendant could be.

However, extrinsic evidence of specific acts may be admissible for another purpose such as proving habit, motive, opportunity, intent, knowledge, identity, absence of mistake, or lack of accident. Additionally, character evidence may be admitted when character is an essential element of the crime (*e.g.*, defamation, entrapment). Rule 403 balancing must be done to evaluate the specific piece of evidence.

Character Evidence Exceptions

- Defendant in a criminal case: Defendants may introduce evidence of a pertinent trait of their own character (*e.g.*, honesty). Once introduced, the Government may offer evidence to rebut it.
 - Only reputation or opinion evidence may be introduced, not extrinsic evidence.
 - Example: *U.S. v. Gillespie*, 852 F.2d 475, 479–81 (9th Cir. 1988): In *Gillespie*, a trial for sexual abuse of minor, it was an error to admit testimony by a clinical psychologist on characteristics of child molesters. Defendant’s description of his childhood offered “general background information,” but did not put his character at issue or amount to proof of traits that rendered him incapable of molesting a child.
- Victim in a criminal case: Defendants may offer evidence of an alleged victim’s pertinent trait (*e.g.*, violence). Once introduced, the Government may (1) offer evidence to rebut it, (2) offer evidence of the defendant’s same trait, and (3) in a homicide case, offer evidence of the alleged victim’s trait of peacefulness to rebut evidence the victim was the first aggressor.
 - Only reputation or opinion evidence may be introduced, not extrinsic evidence.
 - Example: *U.S. v. Saenz*, 179 F.3d 686, 688 (9th Cir. 1999): In *Saenz*, an assault trial where the defendant claimed self-defense, the defendant could prove he knew about the victim’s specific instances of conduct, including the fact that the victim had been carrying brass knuckles and sought to inflict serious injury on a relative.
- Witness: When someone testifies, his or her character for truthfulness can be called into question. A witness’s character may also be supported by evidence of truthful disposition. This evidence is subject to the impeachment rules.
- Sexual Assault cases: Special rules and exceptions (*see* presentation on Special Rules for Sex Offenses).

3. Rule 404(b): Crimes, Wrongs, or Other Acts

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

However, the evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. Rule 403 balancing must be done to evaluate the specific piece of evidence. Similar act evidence is relevant only if the jury can reasonably conclude that the act occurred and the defendant was the actor. *See Huddleston v. US*, 485 U.S. 681 (1988).

In criminal cases, the prosecutor must provide reasonable notice before trial of the intent to introduce Rule 404(b) evidence.