“EXTRANEOUS OFFENSES”

DEFENDING SEX CRIMES

INVOLVING CHILDREN

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I. SCOPE OF ARTICLE

This Article analyzes the admissibility of extraneous acts of misconduct under Rules 404(b) and 403 of the Texas and Federal Rules of Evidence. In particular, sections will focus on the admissibility of evidence of offenses as it relates to the defense of sexual oriented offenses. Sections will address the admissibility of evidence of offenses that are "intrinsic" to the charged crime and on evidence that shows "consciousness of guilt" are also included to compare and contrast their admissibility to that of extraneous offenses. The article also includes sections on **Tex. Code Crim. Proc.** arts. 37.07 and 37.071 as they relate to extraneous conduct evidence and the admissibility of such evidence at the punishment stage of a Texas criminal trial. This article also includes a short discussion of **Tex. Code Crim. Proc.** arts. 38.36 and 38.37, dealing with the admissibility of uncharged misconduct in murder and child abuse cases. The main focus of the article is on the substantive law of admission and exclusion of uncharged misconduct, but procedural aspects, including the necessity, timing, and content of objections and proffers of evidence, and appellate review standards are discussed as well.

Additionally, this article will suggest means by which the defense can use conduct by a witness or alleged victim to prove the identity of the perpetrator or aggressor depending on the circumstances.

This article focuses primarily upon Texas law and Texas cases. When the Texas rule deviates from the federal interpretation, that fact is noted. Federal cases are supplied to show interesting, unusual, or recurring fact patterns and are balanced, as much as possible, between cases which uphold and reject the admission of other offenses.

II. INTRODUCTION

The admissibility of extraneous offenses in Texas and federal courts was significantly changed by the adoption of Rule 404(b) of the Rules of Evidence. These rules replaced many of the then-existing limited statutory rules of evidence and many common-law rules. When the Rules of Civil Evidence and the Rules of Criminal Evidence were combined into the Texas Rules of Evidence, however, no significant changes were made. Article IV of the Rules defines relevancy and its limits and Rules 403 and 404 specifically address the issue of the admissibility of extraneous offenses.

As its title indicates, Rule 404(b) includes not only other crimes, but also "wrongs or acts." There is "no requirement that the evidence must be that of another criminal offense or even misconduct in order to fall with the preview of Rule 404(b)." **Bishop v.**

State, 869 S.W.2d 342, 345 (Tex. Crim. App. 1993). Although, the accused may have been convicted for the extraneous act, a conviction is not a requirement of the rule. Extraneous "crimes, wrongs or acts" includes any act of misconduct which is not set out in the charging instrument or which is not an integral part of the charged offense. That is, Rule 404(b) itself deals only with "extrinsic," not "intrinsic" acts. See **United States v. Williams**, 900 F.2d 823, 825 (5th Cir. 1990)(noting distinction between 404(b) evidence and intrinsic offense evidence which is "inextricably intertwined with the charged offense," or "is part of a single criminal episode," or "necessary preliminaries" to the crime charged).

The rule also precludes acts committed by someone other than the accused. The issue under the rule is not who committed the act, but whether the act has a logical connection to showing the character of the accused in the context of the charged offense. See **Castaldo v. State**, 78 S.W.3d 345 (Tex. Crim. App. 2002)(stating the rule limiting evidence of other crimes, wrongs, or acts applies not only to the accused, but also to third persons).

In many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against the defendant. It is always harmful to the defendant. There is no mechanical solution to the tension between the prosecution's need for the evidence of extraneous acts and the defendant's right not to be tried as a criminal generally. Thus, the determination must be made on a case-by-case basis as to whether the danger of unfair prejudice outweighs the probative value of the evidence. Since the factual permutations are so great, few absolute caveats can be laid down by appellate courts for the bench and bar to use in the decision to admit or exclude extraneous offense evidence under the rules of evidence.

A. Policy of the Rule. Rule 404(a) and 404(b) explicitly prohibit the use of evidence of other wrongs or acts to prove character or to show conforming conduct, but they allow evidence of other wrongs or acts as circumstantial evidence to show other relevant issues, such as motive, opportunity, identity, lack of accident or any other similar purpose. It is important to remember that the only prohibition against the use of prior bad acts is to show character--i.e., "Once a thief, always a thief," or "This is a bad person, therefore he must have committed this crime." If there is any other logical reason to offer the evidence, Rule 404(b) does not bar its admission.

Bad character evidence concerning the defendant is inadmissible not because it is irrelevant, "on the contrary, it is said to weigh too much with the jury and so to over persuade them as to prejudice one with a bad general record and deny him a fair

opportunity to defend against a particular charge. The overriding policy of excluding such evidence, *despite its admitted probative value*, is the practical experience that its disallowance tends to prevent confusion of the issues, unfair surprise, and undue prejudice." **Michelson v. United States**, 335 U.S. 469, 475-76 (1948)(Jackson, J.); see also **Crank v. State**, 761 S.W.2d 328, 341 (Tex. Crim. App. 1988), *cert. denied*, 493 U.S. 874 (1989); **Albrecht v. State**, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). see also **Latham v. State,** 20 S.W.3d 63 (Tex.App.-Texarkana 2000, pet. ref'd).

B. Constitutional Overtones. Although the rules of evidence themselves do not implicate either the federal or Texas constitutions, the rule does have constitutional overtones as applied to criminal defendants since it is one aspect of the presumption of innocence that a defendant must be tried for what he did, not for who he is. See **United States v. Foskey**, 636 F.2d 517, 523 (D.C. Cir. 1980); see generally **C. McCormick, McCormick on Evidence** § 190 at 557, n. 1 (3d ed. 1984). Another consideration is the right of the accussed to present a defense. The rules often play a vital role in a defendant's right to present a defense as secured by the federal and Texas constitutions. See **Fox v. State**, ___ S.W.3d ____, 2002 WL 122056 (Tex. Crim. App. Jan. 31, 2002)(holding that evidence, in a sexual assault of a child case, that similar allegations of the child-complainants were false and were planted in the minds of the girls by their mother, was admissible); **Miller v. State**, 36 S.W. 3d 503 (Tex. Crim. App. 2001)(stating, in a case where the defendant attempted to present evidence of an assault by a third person, "The dispute in the instant case arises from appellant's testimony in support of her defense of duress and her attempt to testify about Magee's assault on her after the delivery. A defendant has a fundamental right to present evidence of a defense as long as the evidence is relevant and is not excluded by an established evidentiary rule.").

C. Use by the Defendant. On its face, Rule 404(b) prohibits the use of other crimes by the defense as well as the prosecution. See e.g., **United States v. Nedza**, 880 f.2d 896, 903 (7th cir. 1989)(court did not err in excluding defendant's evidence of shady dealings by businessman who accused politician-defendant of taking bribes); **United States v. Wright**, 783 F.2d 1091, 1100 (D.C. Cir. 1986)(evidence that one defendant threatened third person with a gun offered to show duress of other defendant properly excluded under 404(b)); **United States v. Aboumoussallem**, 726 F.2d 906 (2d Cir. 1984)(defendant could not introduce evidence that another person had previously been duped into bringing drugs into country by drug ring when his defense was that he was duped into smuggling heroin into country); compare **United States v. Vaglica**, 720 F.2d 388, 394 (5th Cir. 1983)(suggesting that evidence is not barred under 404(b) when offered on behalf of criminal defendant). Legal scholars, however, have referred to the Rule 404(b) as a rule of inclusion, rather than exclusion, in which evidence of other

crimes, wrongs, or acts is allowed so long as it is not offered to prove character or propensity to act in a certain fashion. See **Tate v. State**, 981 S.W.2d 189, 193 (Tex. Crim. App. 1998)(citations omitted). Furthermore, the standard of admissibility should not be as high when the defense offers such evidence. See **Miller**, supra. The fact is, though, very few trial judges admit such defensive evidence and their discretion to exclude it is virtually always upheld on appeal. Cf. **United States v. Dakins**, 872 F.2d 1061, 1063 (D.C. Cir. 1989)(evidence of other acts of police officer offered to show likelihood he would engage in entrapping behavior was inadmissible as it might prejudice the jury against the police and divert attention from the defendant's own guilt or innocence).

(1). The Doctrine of Chances. The "doctrine of chances" is a theory based on the concept of logical implausibility. The Court of Criminal Appeals describes the doctrine of chances as follows:

> "Without formulating any accurate test, and without attempting by numerous instances to secure absolute certainty of inference, the mind applies this rough and instinctive process of reasoning, namely, that an unusual and abnormal element might perhaps be present in one instance, but that the oftener [*sic*] similar instances occur with similar results, the less likely is the abnormal element likely [*sic*] to be the true explanation of them.
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> . . .
>
> [I]t is at least necessary that prior acts should be *similar*. Since it is the improbability of a like result being repeated by mere chance that carries probative weight, the essence of this probative effect is the likeness of the instance.... In short, there must be a similarity in the various instances in order to give them probative value."

Plante v. State, 692 S.W.2d 487, 491-92 (Tex.Crim.App.1985) (brackets added) (quoting 2 *Wigmore on Evidence* §§ 302 (Chadbourn rev. ed.1979)).

A notable example of the doctrine of chances is the "brides in the bath" case from the United Kingdom. See **Rex v. Smith**, 11 Cr. Rep. 229, 84 L.J.K.B. 2153 (1915). In that case, Smith was convicted of murdering Bessie Mundy. **Smith**, 84 L.J.K.B. at 2154. Although married to another woman, Smith had gone through a marriage ceremony with Mundy, and they had lived together as husband and wife. Id. at 2153-54. Mundy had inherited a significant sum of money. Id. at 2153. Shortly after Mundy and Smith executed mutual wills in each other's favor, Smith had a bath installed in their residence. Id. at 2154. Smith took Mundy to a doctor, saying that she had been having "fits." However, the doctor found no evidence of anything other than a headache. Id. Soon thereafter, Mundy was found drowned in the recently installed bath. Id. In **Smith**, the

appellate court held that evidence of the circumstances surrounding the subsequent deaths of two women was admissible in the prosecution of Smith for Mundy's murder. Id. at 2154-56. This evidence showed that both of these women had the following common characteristics: (1) they went through ceremonies of marriage with Smith and lived with him as his wife; (2) they were found drowned in a bath that Smith had made sure would be available; (3) they insured their lives at Smith's suggestion; and (4) they had been taken to doctors by Smith shortly before their deaths, with Smith asserting that they were in ill health. Id. at 2154.

The evidence of the other brides who drowned in the bath was not offered to show Smith's criminal character or to show that Smith murdered the other two brides. Id. at 2155-56. Rather, this evidence was relevant and admissible under the doctrine of chances because the evidence tended to make it more probable that Smith murdered Mundy. The repetition of similar unusual events over time, involving Smith and different brides, made it possible for the jury to conclude that Mundy's drowning was caused by Smith's intentional act rather than by an accident or by a health problem. See id.

Texas cases have accepted the doctrine of chances. See **Morgan v. State**, 692 S.W.2d 877, 881-82 (Tex. Crim. App. 1985)(under doctrine of chances, it was proper to admit evidence of defendant's touching of the genitals of complainant and her sister on occasions that were not part of the criminal conduct charged in the indictment), *overruled in part on other grounds by* **Gipson v. State**, 844 S.W.2d 738, 741 (Tex. Crim. App. 1992); **Plante**, 692 S.W.2d at 491-93 (under doctrine of chances, defendant's other instances of failing to pay for goods and services were relevant in prosecution for theft by deception because they make it more probable that defendant never intended to pay for the goods in question); **Jones v. State**, 751 S.W.2d 682, 683-85 (Tex. App. -- San Antonio 1988, no pet.)(evidence that a disproportionate number of infant deaths occurred on defendant's shift in the hospital was admissible to show that defendant intentionally caused injury to infant in question).

A defendant may also use the doctrine of chances defensively if the series of unusual events, alone or with other evidence, tends to negate the defendant's guilt of the crime charged. See **Miller v. State**, 36 S.W.3d 503, 507 (Tex. Crim. App. 2001)(holding, in a delivery of a controlled substance case, that evidence of assault by defendant's boyfriend shortly after offense was admissible to substantiate the defense of duress); **Jackson v. State**, 551 S.W.2d 351, 351-53 (Tex. Crim. App.1977)(trial court erroneously excluded evidence that a complainant in another criminal proceeding had erroneously identified defendant as the perpetrator and later identified as the perpetrator an inmate serving five life sentences who had also confessed to the offense with which defendant was charged in this case); **Fox v. State**, ___ S.W.3d ___, 2002 WL 122056 (Tex. Crim.

App. January 31, 2002)(holding, in a sexual assault of a child case, that trial court erred in preventing defendant from presenting evidence that the two child-complainants made false allegations in the recent past; and trial court erred in disallowing evidence of the child complainants' mother's affair with her boss to show motive to encourage the girls to lie); **Renfro v. State**, 822 S.W.2d 757, 758- 59 (Tex.App.-Houston [14th Dist.] 1992, pet. ref'd); **Holt v. United States**, 342 F.2d 163, 165-66 (5th Cir. 1965); see also 2 **Wigmore on Evidence** § 304.

Recently in **Martin v. State**, 173 S.W.3d 463 (Tex.Crim.App.2005) the Court addressed the applicability of the doctrine of chances to the admissibility of an extraneous sexual assault offered to rebut the defensive theories of consent and lack of intent. The Court stated that to be convicted of sexual assault, the defendant must have engaged in the conduct without the complainant's consent, and it is the complainant's lack of consent that is the essence of the offense of sexual assault. See **Rubio v. State**, 607 S.W.2d 498, 501 (Tex. Crim. App. 1980). "When the defensive theory of consent is raised, a defendant necessarily disputes his intent to do the act without the consent of [the complainant]. His intent is thereby placed in issue." Id. The Court pointed out that the applicability of the "doctrine of chances," the principle that evidence of the repetition of similar unusual events over time demonstrate a decreasing probability that those unusual events occurred by chance. In cases decided before the adoption of the Rules of Evidence, we described the doctrine of chances as:

> the instinctive recognition of that logical process which eliminates the element of innocent intent by multiplying instances of the same result until it is perceived that this element cannot explain them all. . . . that an unusual and abnormal element might perhaps be present in one instance, but that the oftener similar instances occur with similar results, the less likely is the abnormal element likely to be the true explanation of them.

Plante v. State, 692 S.W.2d 487, 491-92 (Tex. Crim. App. 1985)(quoting 2 JOHN H. WIGMORE, EVIDENCE, § 302 (Chadbourn rev. ed. 1979)). See also **Robinson v. State**, 701 S.W.2d 895, 898 (Tex. Crim. App. 1985).

In another pre-Rules case, we said, "Before an extraneous offense is admissible to negate the possibility of accident under Wigmore's doctrine of chances, such offense must be sufficiently similar in nature to the charged offense that the inference of improbability of accident logically comes into play." **Morgan v. State**, 692 S.W.2d 877, 881 (Tex. Crim. App. 1985), citing Imwinkelried, *Uncharged Misconduct Evidence*, §§ 5:05, 5:10 (1984). Judge Cochran recently discussed the doctrine of chances and

commented that such evidence may be admissible for a non-character purpose to prove the elements of an offense. **Robbins v. State**, 88 S.W.3d 256, 267-69 (Tex. Crim. App. 2002)(Cochran, J., concurring).

In **Owens v. State**, 827 S.W.2d 911, 915 (Tex. Crim. App. 1992), we pointed out that "evidence of a defendant's particular modus operandi is a recognized exception to the general rule precluding extraneous offense evidence, if the modus operandi evidence tends to prove a material fact at issue, other than propensity." In the context of extraneous offenses, *modus operandi* refers to "a defendant's distinctive and idiosyncratic manner of [**12] committing criminal acts." Id. At 914. The similarities between the charged offense and the extraneous offense in that case were not so unusual or idiosyncratic as to signal conclusively that they were the handiwork of the same person. Id. at 915-16. Both offenses were sexual assaults committed against minor females of approximately the same age, both of whom were Owens' daughters, but "no evidence was revealed at trial concerning any particularized details or unique qualities of the two acts other than these general similarities." Id. at 915 . We also noted several important dissimilarities, including that the charged assaults on one daughter allegedly continued for approximately two years and included acts of intercourse, while the charged assault on the other daughter alleged a single incident of improper touching and penetration with Owens' finger. Id.

In **Martin,** the Court concluded that because the appellant admitted that he falsely claimed to be a law enforcement officer as a ruse to "pick up" both the complainant and the extraneous-offense witness, and both women testified that they agreed to meet appellant in a residential area, that the meeting was the first face-to-face meeting after initial contact, and that they were sexually assaulted by appellant in a residence. We conclude that the facts of the instant case, unlike those in **Owens**, show a *modus operandi* sufficiently distinctive to qualify as an exception to the general rule precluding the admission of extraneous-offense evidence.

(2). The "Dempsey Rule"

The **Dempsey** line of cases stands for the proposition that reputation and specific act evidence is admissible to show a victim's character and demonstrate that either the defendant had a reasonable fear of the victim, or the victim was, in fact, the aggressor. See **Dempsey v. State**, 226 S.W.2d 825 (Tex. Crim. App. 1954). In **Tate v. State**, 981 S.W.2d 189 (Tex. Crim. App. 1998), the Court of Criminal Appeal held that the aggressive behavior of the victim is no longer *per se* admissible in a self-defense case. Such evidence must meet the requirements of Rule 404(b). Id. at 192-93.

The Court noted, however, the language of the rule does not lead to the belief that it is a rule intended solely as a benefit for the State to be applied against the defendant. Federal courts, in fact, have upheld a defendant's ability to use Rule 404(b) to admit evidence for purposes other than to show character. The 5th Circuit Court of Appeals has held that a defendant's "right to present a vigorous defense require[s] the admission of the proffered testimony [under **Fed. R. Evid.** Rule 404(b)]." **United States v. McClure**, 546 F.2d 670, 673 (5th Cir. 1977)(a systematic campaign of threats and intimidation against other persons is admissible Rule 404(b) to show lack of criminal intent on the part of defendant). A jury cannot properly convict or acquit absent the opportunity to hear proffered testimony bearing upon a theory of defense and weigh its credibility along with other evidence in the case. Just as Rule 404(b) helped establish the defendant's defense in **McClure**, Rule 404(b) helps carry out the twin aims of the "**Dempsey Rule**," i.e., to show either the defendant's reasonable apprehension or that the victim was the aggressor.

Notably, the defendant need not have been aware of the complainant's aggressive behavior. For purposes of proving that a murder victim was the first aggressor, the key is that the proffered evidence of violent conduct explains the victim's conduct. As long as the proffered violent acts explain the outward aggressive conduct of the victim, at the time of the killing, and in a manner other than demonstrating character conformity only, prior specific acts of violence may be admitted even though those acts were not directed against the defendant. **Torres v. State**, 71 S.W.3d 758, 761-62 (Tex. Crim. App. 2002).

In **Tate**, the Court of Criminal Appeals stated as follows:

> The issue . . . is whether an uncommunicated threat is admissible under Rule 404 (b) for purposes other than to show the victim's character and his conformity therewith.
> . . .
> Appellant's purpose in offering [his aunt's] testimony was not to prove [the victim's] character, but rather to prove [the victim's] intent or motive to cause him harm on the night in question. Thus, the evidence of this uncommunicated threat by [the victim], allegedly made only a month or two before [the victim's] death, had relevance beyond its tendency to demonstrate [the victim's] character. A reasonable jury could have believed this evidence shed light upon [the victim's] state of mind when he arrived at appellant's house on the night in question, and, as long as it was

otherwise admissible, appellant possess the right to present it for the jury's consideration.

Tate, 981 S.W.2d at 191 and 193. This line of reasoning was followed in **Mozon v. State**, 991 S.W.2d 841, 845-46 (Tex. Crim. App. 1999)(holding that evidence of a victim's character or a specific character trait is admissible to show the victim was the first aggressor or demonstrate the defendant's state of mind at the time of the offense). "Such evidence may be admissible for purposes other than proving character assuming the purpose for which the evidence is proffered is relevant." Id. at 846.

III. THE RULES

A. TEXAS RULES OF CRIMINAL EVIDENCE

TRCE 401: **Definition of "Relevant Evidence."**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

TRE 402: **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.**

All relevant evidence is admissible, except as otherwise provided by constitution, by statute, by these rules or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

TRE 403: **Exclusion of Relevant Evidence on Special Grounds.**

Although relevant, evidence may be excluded if its 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, or needless presentation of cumulative evidence.

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

(b) 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 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, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction.

B. FEDERAL RULES OF EVIDENCE

FRE 401: **Definition of "Relevant Evidence."**

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

FRE 402: **Relevant Evidence Generally Admissible; Irrelevant Evidence Inadmissible.**

All relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, by statute, by Act of Congress, by these rules, or by other rules prescribed by the Supreme Court pursuant to statutory authority. Evidence which is not relevant is inadmissible.

FRE 403: **Exclusion of Relevant Evidence on Special Grounds.**

Although relevant, evidence may be excluded if its 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.

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

(b) 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 or accident, 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.

C. EXPLICIT DIFFERENCES BETWEEN THE RULES

1. Rule 402. The minor language differences in the federal and Texas rules merely reflect the distinctions in hierarchical governance among the two codes. No substantive difference exists in their operation.

2. Rule 403. The federal rule explicitly permits a judge to exclude otherwise probative evidence if its probative value is outweighed by the amount of time it would waste in presenting that evidence. The Texas rule does not explicitly state that "waste of time" is a basis for exclusion, but that is because the Texas drafters recognized that "undue delay" adequately covers the territory. There is no meaningful difference between the two rules. See **Blakely**, Relevancy, **Texas Rules of Evidence Handbook** 315 (2d ed. 1993)

The common law exclusion of evidence because of "unfair surprise" is not an explicit counter factor in either the federal or Texas rules. The federal drafters suggested that for justified claims of unfair surprise, the "granting of a continuance is a more appropriate remedy than exclusion of the evidence." **Fed. R. Evid.** Rule 403 advisory committee's note. However, if the probative value of the surprising evidence is low, trial judges have the discretion to exclude such evidence because it would cause undue delay. See **Blakely**, supra at 314-15; 1 **Weinstein & Berger**, **Weinstein's Evidence** § 403, at 403-100 (1990).

3. Rule 404. For many years, the federal rule did not have a notice provision concerning the use of extraneous offenses. In 1991, the federal courts followed the Texas model requiring advance notice to the defendant to reduce surprise and promote early resolution on the issue of admissibility of such evidence. No specific form of notice is required under either rule. In Texas, however, the rule requires advance notice only of those extraneous offenses that the prosecutor intends to offer in its case-in-chief. **Herring v. State,** 752 S.W.2d 169, 172 (Tex. App. -- Houston [1st Dist.] 1988), remanded on other grounds, 758 S.W.2d 283 (Tex. Crim. App. 1988)(prior notice of intention to use extraneous offenses must be given only for State's case-in-chief, not when used for rebuttal; here extraneous offense became admissible only for impeachment of alibi witness); see also **Yohey v. State**, 801 S.W.2d 232 (Tex. App. -- San Antonio 1990, pet. ref'd).

The notice requirement is triggered by the defendant's request for notice. However, defense counsel should be wary of relying on a request for notice in a motion. If the request for notice is in the form of a motion, counsel must get a ruling on the

motion in order to trigger the notice requirement. See **Espinosa v. State**, 853 S.W.2d 36, 39 (Tex. Crim. App. 1993). To be effective, the request for notice must be in writing and served on the prosecution. A certificate of service creates a presumption that the request for notice was properly sent and received by the addressee and, absent proof of non-receipt, the presumption has the force of a rule of law. See **Webb v. State**, 36 S.W.3d 164, 177 (Tex. App. – Houston [14th Dist.] 2000, pet. ref'd).

Recently in **McDonald v. State**, 179 S.W.3d 571 (Tex.Crim.App), the Court addressed the notice required by Texas Rule of Evidence 404(b)The appellant argues that the uncharged sexual misconduct involving the complainant's cousin at a later time should not have been admitted without notice as required by Rule 404(b). McDonald asserted that, although he asked for notice of uncharged misconduct, the State provided notice of only some of the acts toward the complainant's cousin, the State did not provide notice of its intent to introduce evidence of all of the extraneous acts that the State intended to introduce. .The court s upheld that the conviction and life sentence because the admission of the evidence arose from the same transaction and was therefore admissible under Rule 404(b) without reasonable notice by the State because the evidence was "closely related in time, location, and subject matter with the charged offense." The Court of Criminal Appeals stated that Rule 404(b) requires the State to provide notice, upon the defendant's timely request, of its intent to introduce evidence of other crimes, wrongs, or acts. An exception to the notice requirement is when the evidence arises from the same transaction. Under Rule 404(b), however, same transaction contextual evidence is admissible "only to the extent that it is necessary to the jury's understanding of the offense." It is admissible "only when the offense would make little or no sense without also bringing in the same transaction evidence." That is, it is admissible when several offenses are "so intermixed or connected as to form a single, indivisible criminal transaction, such that in narrating the one, it is impracticable to avoid."

Extrinsic offense evidence offered during the rebuttal stage or at the punishment stage is not subject to the notice proviso in Texas. It has been held that Rule 404(b) does not apply to the penalty or punishment phase of a bifurcated trial. See **Patton v. State**, 25 S.W.3d 387, 392 (Tex. App. – Austin 2002, pet. ref'd); **Ramirez v. State**, 967 S.W.2d 919, 923 (Tex. App. -- Beaumont 1998, no pet.).

The federal rule, however, requires the government to provide notice regardless of how or when it intends to use the uncharged misconduct. However, the federal rule allows notice to be given during trial if pretrial notice was not practicable--i.e., the government did not discover the evidence earlier or did not contemplate its use. For example, the government might not anticipate that the defendant's defensive theory might

raise an issue of mistake or accident or that he might hotly contest the issue of intent or even identity.

> Practice Tip: Counsel is well advised to prepare a request for notice directed to the district or county attorney, instead of the court, and file a copy with the clerk of the court to create a record of the request for notice.

IV. THE ROLE OF RULE 104

A. Rule 104 (TRE & FRE)

(a) **Questions of Admissibility Generally**. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) **Relevancy Conditioned on Fact.** When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

B. The Interplay Between Rules 104(a) & 104(b).

Rule 104(a) summarizes the broad common law discretion that both federal and Texas trial judges had in determining issues concerning the competence, capacity, and qualifications of a witness and in ruling on preliminary questions concerning the general admissibility of evidence. Under the rule, the judge may consider public policy issues which might exclude relevant evidence and he is not bound by the rules of evidence, except with regard to privileges, in making his determination.

Rule 104(b) allows the trial court to admit evidence conditionally upon counsel's offer to demonstrate its relevancy by subsequent fulfillment of a condition of fact. Under Rule 104(b), a trial judge has no discretion to exclude a piece of evidence that is conditionally relevant. Once the proponent has produced sufficient admissible evidence to "support a finding" of the fulfillment of the condition, the evidence must be admitted for the jury to decide whether it is relevant. Public policy favors having these relevancy issues resolved by the jury because the factfinder is charged with the duty of weighing the credibility of witnesses and assessing the probative value of evidence. The federal

advisory committee's note to Rule 104(b) explains: "[i]f preliminary questions of conditional relevancy were determined solely by the judge, as provided in subdivision (a), the functioning of the jury as a trier of fact would be greatly restricted and in some cases virtually destroyed. These are appropriate questions for juries."

Although 104(b) explicitly sets out a burden of proof by the proponent of the conditionally relevant evidence as "sufficient to support a finding," Rule 104(a) does not specify any burden of proof concerning the general admissibility of evidence.

C. The Applicable Standard of Proof in Admitting Extraneous Offenses.

1. The federal interpretation. The Supreme Court has stated that the admissibility of extraneous offenses is determined under Rule 104(a) and that the government need prove its admissibility only by a preponderance of the evidence. **Dowling v. United States**, 493 U.S. 342 (1990)(defendant was acquitted of a residential robbery, then tried for a bank robbery; evidence of the victim of the residential robbery was admissible offered to show identity in the bank robbery; "beyond a reasonable doubt" standard for conviction is inappropriate for determining the admissibility of evidence); **Huddleston v. United States**, 485 U.S. 681 (1988)(admission of extraneous offenses under Rule 404(b) is proof by a preponderance of the evidence); **United States v. Beechum**, 582 F.2d 898, 913 & n. 16 (5th Cir. 1978).

2. The Texas interpretation. The Court of Criminal Appeals has held that the general standard of proof for admissibility of evidence under Rule 104(a) is a preponderance of evidence. See **Alvarado v. State**, 912 S.W.2d 199, 211 (Tex. Crim. App. 1995). The Court, however, rejected the federal standard under the identical rule in **George v. State**, 890 S.W.2d 73, 76 (Tex. Crim. App. 1994), and **Harrell v. State**, 884 S.W.2d 154, 159-60 (Tex. Crim. App. 1994). In those cases, the Court held that the burden of proof for the admission of extraneous offenses is "beyond a reasonable doubt" under Rule 104. The Court relied on common law Texas precedent which had stated that the prosecution must show "clear" proof that the defendant had committed the offense. What constituted "clear" proof was all too frequently unclear.

According to **Harrell**, when the trial court is deciding whether to admit extraneous offense evidence in the guilt/innocence stage of the trial, he must make an initial determination under rule 104(b) that "a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense." **Harrell**, 884 S.W.2d at 160. Compare **Harrell**, 884 S.W.2d at 165 (Clinton, J. concurring)(noting the distinction between 104(a) & 104(b), and stating that conditional relevancy is determined by

evidence "sufficient to support a finding," not beyond a reasonable doubt); see also **Mann v. State**, 13 S.W.3d 89, 94 (Tex. App. -- Austin 2000) *aff'd* 58 S.W.3d 132 (Tex. Crim. App. 2001)(stating that although trial court has the responsibility of determining the threshold admissibility of extraneous offense evidence at the punishment phase; that is, the court must make an initial determination at the proffer of the evidence that a jury could reasonably find beyond a reasonable doubt that the defendant committed the extraneous offense, no Rule 104 hearing is required for admissibility).

Regardless of the particular burden of proof standard, both Texas and federal courts require that the prosecution show that it was the defendant himself who did the extraneous act. Guilt by association or proximity is not sufficient. See e.g., **United States v. Parada-Talamantes**, 32 F.3d 168, 169-70 (5th Cir. 1994)(evidence that co-defendant had purchased van in which marijuana was hidden from defendant's brother was reversible error; no "guilt by association" theory); **United States v. Veltmann**, 6 F.3d 1483, 1499 (11th Cir. 1993)(reversible error to admit certain evidence of prior fires in arson case when the genesis of those fires was unknown and they were not similar; only parallel between the two prior fires and present one was that they occurred on property owned by the defendant; evidence failed to meet threshold relevancy under 404(b)); **United States v. Gilan**, 967 F.2d 776, 780-81 (2d Cir. 1992)(although there were striking similarities between two shoe thefts, nothing linked defendant to prior one, thus irrelevant in proving his theft in charged offense; must be some link between defendant and uncharged act to be relevant under 404(b)).

As an exception to that general caveat, evidence of "amazing coincidences" not directly tied to the defendant may be admissible to prove the actus reus--the criminal act itself. See, e.g., **Jones v. State**, 751 S.W.2d 682, 683-87 (Tex. App. -- San Antonio 1988, no pet.)(admission of evidence that disproportionate number of infant deaths occurred during defendant's nursing shift at hospital admissible under 404(b); little explanation but relevant under Wigmore's "doctrine of chances;" hospital statistics could be offered to prove this baby died as a result of a criminal act, not natural causes because one death is a tragedy, two deaths is weird, and three deaths is murder. See E. Imwinkelried, **Uncharged Misconduct Evidence**, § 4.02 et. seq. (1984)). Note that this applicable both as a theory of prosecution or defense.

V. RULE 404(b)

A. General.

Rule 404 is the first of several Article IV provisions that outline specific applications of the Rule 403 balancing test. The same problems of unfair prejudice, confusion of the issues, and misleading the jury have arisen in so many instances of character evidence, offers to compromise, plea discussions, liability insurance, and so forth, that the drafters of the federal and Texas rules enacted specific rules regarding the balance of probative value and prejudicial effect. The structure of these Article IV rules is the same throughout. The rules begin with a statement that evidence is excluded when offered for a specific prohibited purpose. However, when the evidence is offered for some other purpose, it may be admissible under Rules 401-403 which deal with general relevancy.

The first sentence of both Rule 404(a) and 404(b) specify that evidence of other crimes, wrongs, or acts is not admissible to prove character when the purpose of showing character is to prove conforming conduct. The extraneous offense must be relevant apart from proving character conformity to be admissible under Rule 404(b). **Alba v. State**, 905 S.W.2d 581, 585 (Tex. Crim. App. 1995), *cert. denied*, 116 S.Ct. 783 (1996). A defendant is to be tried for the crime alleged in his indictment and not for being a criminal generally. **Abdnor v. State**, 871 S.W.2d 726, 738 (Tex. Crim. App. 1994). "Thus, evidence of extraneous offenses or bad acts committed by a defendant may not be introduced during the guilt/innocence portion of the trial to show that the defendant acted in conformity with his criminal nature." Id.

Rule 404(b) embodies the established principle that a defendant is not to be tried for collateral crimes or for being a criminal generally. TEX. R. EVID. 404(b)**; Nobles v. State**, 843 S.W.2d 503, 514 (Tex. Crim. App. 1992); **Booker v. State**, 103 S.W.3d 521, 530 (Tex. App.--Fort Worth 2003, pet. filed) (op. on reh'g); Curtis v. State, 89 S.W.3d 163, 170 (Tex. [**6] App.--Fort Worth 2002, pet. ref'd). Consequently, extraneous offenses are not admissible at the guilt-innocence phase of trial to prove that a defendant acted in conformity with his character by committing the charged offense. TEX. R. EVID. 404(b); **Booker**, 103 S.W.3d at 529; **Martin v. State**, 42 S.W.3d 196, 201 n.2 (Tex. App.--Fort Worth 2001, pet. ref'd). An extraneous offense, however, has noncharacter-conformity relevance where it has any tendency to make the existence of a fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. TEX. R. EVID. 401; **Powell v. State**, 63 S.W.3d 435, 438 (Tex. Crim. App. 2001). That is, extraneous offense evidence that tends to make more or less

probable an elemental or evidentiary fact or tends to rebut some defensive theory is relevant beyond its tendency to prove a person's character or that he acted in conformity therewith. **Montgomery v. State**, 810 S.W.2d 372, 386-87 (Tex. Crim. App. 1991) (op. on reh'g); **Johnson v. State**, 932 S.W.2d 296, 301 (Tex. App.--Austin 1996, pet. ref'd). Consequently, evidence [**7] of other crimes or extraneous misconduct may be admissible to prove motive, opportunity, intent, preparation, plan, knowledge, or absence of mistake or accident. TEX. R. EVID. 404(b); **Booker**, 103 S.W.3d at 529-30. The State, as the proponent of extraneous offense evidence, bears the burden of showing admissibility. See **Rankin v. State**, 974 S.W.2d 707, 718 (Tex. Crim. App. 1998) (op. on reh'g).

Frequently, the State offers very damaging evidence of prior misconduct by the defendant but cannot, or does not, articulate any specific elemental or evidentiary fact--besides the forbidden conduct in conformity with bad character--that the evidence tends to prove. For example, in **Booker v. State**, 929 S.W.2d 57, 65 (Tex. App. --Beaumont 1996, n. pet .h.), the court held that it was error for the State to introduce evidence in the attempted capital murder trial that the defendant admitted he had previously shot someone, since that evidence was not admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Evidence that Booker at some unspecified previous point in time used a gun to shoot someone did not make any elemental, evidentiary, or defensive fact more or less probable. Consequently, the extraneous offense evidence was not relevant apart from supporting an inference of character conformity and, thus, was inadmissible under Rule 404(b).

The second sentence qualifies the first by allowing the admission of such evidence for "other purposes," when character is not a link in the logical chain of proof. These "other purposes" include, but are not limited to, mental states such as motive, intent, and knowledge, as well as items such as opportunity, preparation, plan, identity, and absence of mistake or accident. See **Dickerson v. State**, 745 S.W.2d 401, 403 (Tex. App. --Houston [14th Dist.] 1987, no pet.)(list of permissible purposes for introduction of extraneous offenses is exemplary, not exhaustive, citing McCormick & Black, Evidence, 18 **Tex. Tech. L. Rev.** 491, 514-19 (1987)).

The exceptions to the "rule" prohibiting proof of extraneous offenses are probably endless, for several reasons. First, the federal and Texas rules of evidence favor admissibility. See **United States v. Day**, 591 F.2d 861, 879 (D.C. Cir. 1978); **United States v. Beechum**, 582 F.2d 898, 910 & n. 13 (5th Cir. 1978), *cert. denied*, 440 U.S. 920 (1979); **McFarland v. State**, 845 S.W.2d 824 (Tex. Crim. App. 1992)(presumption that

evidence that passes 404(b) hurdles has probative value that is not substantially outweighed by unfair prejudice); **Montgomery v. State**, 810 S.W.2d 372, 389 (Tex. Crim. App. 1990)(op. on reh'g); **Crank v. State**, 761 S.W.2d 328, 342, n. 5 (Tex. Crim. App. 1988).

Second, Rule 404(b) itself offers up a laundry list of possible exceptions to the general rule prohibiting evidence of other crimes, wrongs, or acts. The rule clearly states that the list is not exhaustive, suggesting exceptions are "admissible for other purposes, such as . . . motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. . . ." (Emphasis added). The Court of Criminal Appeals has stated that the "other purposes" listed in the Rule are neither exclusive nor exhaustive. **Banda v. State**, 768 S.W.2d 294 (Tex. Crim. App. 1989), *cert. denied*, 493 U.S. 923 (1989). For example, the conduct of an accused showing a "consciousness of guilt" is an exception which is "alive and well in Texas." **Torres v. State**, 794 S.W.2d 596, 599 (Tex. App. -- Austin 1990, no pet.).

Third, Article 37.07 of the Texas Code of Criminal Procedure opens the door at the punishment stage to "any matter the court deems relevant to sentencing," and Articles 38.36 and 38.37 admit evidence of extraneous offenses in murder cases and child abuse cases, respectively. Thus, the Texas Legislature has voiced its approval of the use of uncharged misconduct on various relevant issues.

Fourth, and perhaps most important, is the fact that the question of admissibility must be examined in the context of each individual case. What is proper evidence in one case may be improper in another. "The circumstances which justify the admission of evidence of extraneous offenses are as varied as the factual contexts of the cases in which the question of admissibility of such evidence arises. Each case must be determined on its own merits." **Albrecht v. State**, 486 S.W.2d 97 (Tex. Crim. App. 1972). Is the case one of direct or circumstantial evidence? What facts establish modus operandi? Are the facts of such similarity as to assist the jury in resolving a material issue or do they only serve to confuse and divert the jury's attention? Has defense counsel by some means "opened the door" to the evidence? This analysis, which is "always to be conducted in the framework provided by the unique facts and circumstances of each particular case," is in the first instance the responsibility of the trial court. Absent a clear abuse of discretion that judgment will not be disturbed on appeal. **Montgomery**, 810 S.W.2d at 390; **Templin v. State**, 711 S.W.2d 30, 33 (Tex. Crim. App. 1986). The same is true in the federal courts. **United States v. Anderson**, 976 F.2d 927, 929 (5th cir. 1993)("we apply a highly deferential standard to a trial court's evidentiary rulings and will reverse only for an abuse of discretion").

B. The "True" Test of the Admissibility of Extraneous Offenses

This "true" test of extraneous offense admissibility is a two-part balancing test:

1. Is the extraneous misconduct evidence relevant to a material issue in the case?

2. Is the probative value of the evidence substantially outweighed by unfair prejudice?

if "YES", to both, then the evidence is admitted.

if "NO", to either, then the evidence is excluded.

Beechum, 582 F.2d at 911; **Montgomery v. State**, 810 S.W.2d at 388; see also **Williams v. State**, 662 S.W.2d 344 (Tex. Crim. App. 1983). The first question refers to Rule 404(b). The second refers to the balancing test outlined in Rule 403. Thus, a prosecutor must be prepared to demonstrate why the answer to both questions is "Yes," while the defendant must object under both Rule 404 and 403 to preserve and address the second question. If the defendant fails to object under Rule 403, neither the trial court nor the appellate court will consider the prejudicial effect of the extraneous offense. **Montgomery**, 810 S.W.2d at 388; **Lum v. State**, 903 S.W.2d 365, 371 (Tex. App. -- Texarkana 1995, pet. ref'd).

> Practice Tip: If you read only two cases on the admissibility of extraneous offenses, they should be **Beechum** and **Montgomery**. Everything else is lagniappe.

The obligation imposed on the trial court has been to exclude the evidence unless the prosecution met this two-part test, satisfactorily demonstrating why the evidence should be admitted. In other words, **Williams** imposed a burden on the State to overcome the "presumption" of inadmissibility. TRE 403 imposes the burden on the opponent to overcome the "presumption" of admissibility. Consequently the evidence is admitted unless the opponent can successfully demonstrate that the prejudicial effect substantially outweighs the probative value. See **Montgomery**, 810 S.W.2d at 389.

Defense attorneys, prosecutors, and trial judges should articulate on the record the relevance, probative value, and prejudicial effect of uncharged misconduct in deciding its admissibility. In **United States v. Sampson**, 980 F.2d 883, 888 (3d Cir. 1992), the court reversed and remanded for a new trial, stating:

> The district court, if it admits the evidence, must in the first instance, rather than the appellate court in retrospect, articulate reasons why the evidence also goes to show something other than character. Unless the reason is apparent from the record, a mere list of the purposes found in Rule 404(b) is insufficient. The district court must put a chain of inferences into the record, none of which is the inference that the defendant has a propensity to commit this crime. . . . By simply repeating the entire litany of permissible theories under 404(b), the judge's instruction gave the jury inadequate guidance.

See also **Nolen v. State**, 872 S.W.2d 807, 812 (Tex. App. -- Fort Worth 1994, pet. ref'd)(once defendant objects under Rule 403, prosecutor must articulate probative value and trial judge must balance probative worth against possible unfair prejudicial effect; although trial judge did not specifically articulate his balancing on the record, the fact that he did so could be inferred from the record); **McFarland v. State**, 845 S.W.2d 824, 837 (Tex. Crim. App. 1992)(setting out necessity for defense precise objections, prosecution's articulated rationale, and trial judge's duty to articulate balance under rule 403).

> Practice Tip: Neither prosecutors nor judges should use a "scattershot" approach urging or upholding the admission of extraneous offenses as probative of "motive, opportunity, intent, preparation, plan, knowledge, or identity." Instead, prosecutors and judges should carefully analyze the relevancy of the particular item of extraneous evidence to the disputed issues and articulate how this piece of evidence alters the probability of the disputed issue in a manner unrelated to the general character of the defendant.
>
> Defense counsel **MUST ALWAYS** object both on the basis of Rule 404 **and** 403. You are much more likely to exclude the evidence, either at trial or on appeal, under Rule 403 than you are under 404. Most 404(b) evidence is going to be relevant for a non-propensity purpose, the real issue is whether it is worth the prejudicial price, especially since the jury may misuse it for the prohibited purpose.
>
> Both prosecutors and defense attorneys should be prepared to argue: 1) the need or lack of need for shoring up the prosecution position; 2) the degree to which this issue is disputed; 3) the time it will require to put on this evidence; 4) the likelihood that it will distract from the real issues in this case; 5) the likelihood that the jury will misuse this evidence as "bad person" evidence.

C. The Explicit Exceptions.

At first blush, it might appear odd after the **Beechum** and **Montgomery** decisions which discusses general relevance principles instead of specific pigeonholes to approach Rule 404(b) in terms of "exceptions." The answer is that these examples and cases can provide guidance as to why evidence should be admitted or excluded. Remember that the proponent must initially satisfy the court as to the relevance of the evidence under 404(b). If relevant, the parties may wish to articulate their respective objections and needs under 403. These exceptions and cases will help with those arguments.

The list of exceptions is not exhaustive. Additionally, the list itself should not be considered to be a test of admissibility. It is not. The six categories are nothing more than a list of examples, albeit a good list. Merely because the proffered evidence fits an exception specified in the rule, does not guarantee admissibility. These categories are often not clear and distinct. Sometimes more than one theory may apply to an act. For example, a claim of self-defense may justify introduction of extraneous matters under either a motive theory, or as rebuttal of a defensive theory.

Nonetheless, the exceptions set out in Rule 404(b) include:

1. Identity. Here the theory of relevance is usually that of modus operandi in which the pattern and characteristics of the crimes are so distinctively similar that they constitute a signature. See e.g., **Beets v. State**, 767 S.W.2d 711, 740-41 (Tex. Crim. App. 1987), *cert. denied*, 492 U.S. 912 (1989)(noting the defendant's "signature" use of the same weapon, the same motive, the same time of day, and the same means of disposing of her husbands' bodies in two different murders). The likeness of the offenses and the similarity of the offender characteristics are crucial. **Bishop v. State,** 869 S.W.2d 342, 346 (Tex. Crim. App. 1993)(evidence of defendant's sexual practices with his wife were not shown to be particularly unique, unusual or distinctive to amount to his "signature").

In **Avila v. State**, 18 S.W.3d 736, 741 (Tex. App. – San Antonio 2000, no pet.), a sexual assault case, the court of appeals held that "what must be shown to make the evidence of the extraneous crime admissible is something that sets it apart from its class or type of crime in general, and marks it distinctively in the same manner as the principal crime." However, nothing in the case showed it was the "signature" of the perpetrator and affirmatively link the charged offense to the extraneous offense. Both rapes occurred within the city limits of Crystal City during the early morning hours while both victims were sleeping. The assailant entered the premises without the consent of the

victims and raped each victim in a common sexual position. The court held that none of these similarities would marked both offenses as the "handiwork of the accused." Instead, the similarities were "more in the nature of the similarities common to the type of crime itself, [rape], rather than similarities peculiar to both offenses" involved in the case. **Avila**, 18 S.W.3d at 741.

No rigid rules dictate what constitutes sufficient similarities. The common characteristic may be proximity in time and place, mode of committing the offense, the defendant's mode of dress, or any other element which marks both crimes as having been committed by the same person.

For example, in **Bevers v. State**, 811 S.W.2d 657, 660-64 (Tex. App. -- Fort Worth 1991, pet. ref'd), the defendant's prior rape conviction of this victim was admissible to show he raped her again seven years later. It proved both identity and motive. The victim did not see her attacker in the charged incident, but he had previously raped her in same manner. Nor was it error to show that he was convicted for the first rape, particularly when the victim was questioned about variances between her testimony at the first trial. Further, the fact of conviction and the jail sentence were admissible to show his motive for the second rape since, during the first rape, he had threatened to "punish" her if she went to the police. The trial court also properly admitted evidence that the defendant had made threatening calls to the victim after the second rape. This evidence helped to establish rapist's identity. In **Pena v. State**, 867 S.W.2d 97, 99 (Tex. App. -- Corpus Christi 1993, pet. ref'd), the court held that the defendant's extraneous residential burglary was not particularly distinctive--taking place during the day, in a rural rather than urban area, parking close to the front of the home of elderly individuals, stealing televisions and jewelry--and would not justify admission of the uncharged misconduct. However, the defendant used the very same car, which belonged to his wife, for both burglaries. That was unique and a "signature" characteristic. The extraneous evidence was admissible; see also **Morales v. State**, 745 S.W.2d 483, 487 (Tex. App. -- Corpus Christi 1988, no pet.)(defendant's possession of murder weapon shortly before offense, plus use of red bandana, sufficient to admit evidence of prior shooting shortly before primary offense).

In **Taylor v. State**, 920 S.W.2d 319 (Tex. Crim. App.1996), the Court held that a prior murder committed just ten days before the charged robbery-murder was sufficiently similar to be a "signature crime." The first robbery-murder occurred just a few blocks from the second, and both elderly victims were found with some cloth and a wire coat hanger wrapped around their necks. The defendant had admitted his complicity in the robbery, but stated that his co-defendant committed the murders. The extraneous offense

to prove identity would not have been relevant but for the fact that defendant bragged to two other witnesses (as crack using prostitutes, their credibility was not high) on the nights of both murders that he had strangled the two elderly men and described how he had done so with coat hangers. Thus, the extraneous was relevant to prove defendant did the killing and to rebut his trial theory that he did not know his co-defendant had killed the first victim until it was over and that he never saw it happen. **Taylor**, 920 S.W.2d at 321-22.

On the other hand, the court found insufficient distinctive characteristics in **Lazcano v. State**, 836 S.W.2d 654, 658 (Tex. App. -- El Paso 1992, pet. ref'd), in which both the deceased and the extraneous offense witness were young females who were 1) choked, 2) sexually assaulted; 3) in the El Paso area; 4) within a 6 week time frame; 5) allegedly by the defendant; 6) after they met him at social gatherings. The court noted that while a single sufficiently distinguishing common characteristic may suffice, this evidence was not so idiosyncratic to create the defendant's "signature." See also **Lanf v. State**, 698 S.W.2d 735, 737 (Tex. App. -- El Paso 1985, no pet.). Compare **Pleasant v. State**, 755 S.W.2d 204, 206 (Tex. App. -- Houston [14th dist.] 1988, no pet.)(admitting evidence of an extraneous robbery committed one week after the charged offense despite minimal similarities) with **Ethington v. State**, 750 S.W.2d 14, 16 (Tex. App. -- Fort Worth 1988)(holding that it was error to admit evidence of an extraneous robbery when insufficient similarities were show), *rev'd on other grounds*, 819 S.W.2d 854 (Tex. Crim. App. 1991).

a. Identity must be disputed. Evidence of modus operandi or a "signature" do not alone justify admission of an extraneous offense. Identity must be disputed. For example, if ten eyewitnesses saw the defendant shoot the victim, the probative value of a prior or subsequent murder is minuscule. Similarly, if the defendant admits he is the person involved, but that no offense occurred, identity is not disputed. See **Owens v. State**, 827 S.W.2d 911, 916 (Tex. Crim. App. 1992)(error to admit evidence of defendant's prior sexual conduct with his elder daughter at age 11 in prosecution for sexual assault of younger daughter at age 11 even though defendant testified and denied that event occurred and implied that he was a victim of "frame-up" by daughters who lied); **Cooper v. State**, 901 S.W.2d 757, 761 (Tex. App. -- Beaumont 1995, no pet.)(evidence of anal intercourse with mother of minor victim, even if a "signature," was inadmissible when identity was not disputed); **Wells v. State**, 730 S.W.2d 781 (Tex. App. -- Dallas 1987, no pet.)(despite remarkable similarities between charged and uncharged offenses, extraneous not admissible when complainant had met defendant on seven or eight occasions, had identified him in line-up and never wavered in identification).

In some instances, however, the courts appear to conclude that if the defendant disputes identity, other similar acts of uncharged misconduct are presumptively admissible without analysis of the degree of similarity between the charged and uncharged acts. For example, in **Turner v. State**, 924 S.W.2d 180, 182 (Tex. App. -- Eastland 1996, n. pet. h.), the court held that extraneous acts of the defendant sexually molesting the victim, his adoptive daughter, were admissible when the defense was that the real abuser was the child's biological father. Although the defense clearly put identity into issue, and thus would make extraneous offenses probative of the disputed identity issue, there was no discussion concerning the degree of similarity between the acts. However, under Article 38.37, of the Texas Code of Criminal Procedure, there is no longer a need to conduct an extensive analysis of the similarities between the charged and uncharged acts in a child abuse prosecution.

In discussing the improper admission of extraneous offense evidence of a pure "modus operandi," "pattern" or "system" theory, the Seventh Circuit cautioned:

> The inference from "pattern" by itself is exactly the forbidden inference that one who violated the [laws] on one occasion must have violated them on the occasion charged in the incident. Unless something more than pattern and temporal proximity is required, the fundamental rule is gone. That is why "pattern" is not listed in Rule 404(b) as an exception. Patterns of acts may show identity, intent, plan, absence of mistake, or one of the other listed grounds, but a pattern is not itself a reason to admit the evidence.

United States v. Beasley, 809 F.2d 1273, 1278 (7th Cir. 1987).

b. Remoteness. The factor of remoteness of the extraneous offense is important not in itself, but only as it bears on the relevancy and probative value of the offered evidence. Thus, remoteness does not per se render an extraneous offense inadmissible. See **Lavarry v. State**, 936 S.W.2d 690, 695 (Tex. App. -- Dallas 1996, n. pet. h.)(in aggravated kidnaping trial, when defendant denied committing any offense, State could introduce evidence of him, ten years earlier, pulling a pistol on his former wife and blocking the door so that she felt trapped); **Linder v. State**, 828 S.W.2d 290, 296 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd)(seven years between extraneous and charged offenses not so remote to automatically exclude evidence); **Stringer v. State**, 845 S.W.2d 400, 402 (Tex. App. -- Houston [1st Dist.] 1992, pet. ref'd)(two other rapes five and five and one-half years earlier at same apartment complex and with same modus operandi admissible to prove identity; defendant had been released from prison just 68 days before charged rape; extraneous not too remote because defendant was in prison in interim);

Clarke v. State, 785 S.W.2d 860, 864-66 (Tex. App. -- Fort Worth 1990)(when State's evidence on identity was circumstantial, proper to use extraneous offense in which identity evidence was also circumstantial; "Common element may be the mode of commission of the crimes, or the mode of dress of the perpetrator, or any other element which marks both crimes as having been committed by the same person." 11 month interval not too remote), *aff'd per curiam*, 811 S.W.2d 99 (Tex. Crim. App. 1991). But see **Bachhofer v. State**, 633 S.W.2d 869, 872 (Tex. Crim. App. 1982)(four years and four months too remote in particular case); **James v. State**, 554 S.W.2d 680, 683 (Tex. Crim. App. 1977)(two years and nine months too remote, absent intervening offenses, to show a continuing course of conduct).

In sum, when it comes to exclusion of uncharged misconduct on the basis of remoteness, it all depends. If a husband is on trial for killing his wife with a silver cross-bow, evidence that he killed his first wife with a silver cross-bow 20 years earlier is very probative in proving he was the murderer. However, evidence that he poisoned his girlfriend with arsenic 30 years ago is much less so. See, e.g., **United States v. Bradley**, 5 F.3d 1317, 1320-21 (9th Cir. 1993)(evidence of prior murder was "vague," loosely linked to defendant, motive dissimilar in present attempted murder conspiracy case; "noting could be more unfairly prejudicial than the suggestive innuendo that [co-defendants] were incompetent hired guns who could not even kill the right person").

c. Cross-examination can raise issue of identity. When it completely undermines the identification testimony of a witness, cross-examination will controvert the issue of identity sufficiently to allow admission of extraneous offenses. See **Siqueiros v. State**, 685 S.W.2d 68 (Tex. Crim. App. 1985). In **Beets v. State**, 767 S.W.2d at 739, for example, the cross-examination of the State's witnesses with an eye toward suggesting that the defendant's son actually committed the murder was sufficient to dispute identity and permit the admission of testimony from 19 different witnesses concerning how the defendant had killed a prior husband. **Id.** However, mere inconsistencies in the prosecution witnesses' descriptions of the defendant, whom each had seen on various occasions, is not sufficient to justify the admission of extraneous offenses. **Redd v. State**, 522 S.W.2d 708 (Tex. Crim. App. 1975).

d. Alibi can raise issue of identity. When the defendant raises an issue of alibi--"I was not there"-- an extraneous offense may be relevant to prove identity. See **Elkins v. State**, 647 S.W.2d 663 (Tex. Crim. App. 1983); **Dickey v. State**, 646 S.W.2d 232 (Tex. Crim. App. 1983)(when defendant asserted alibi, state could offer extraneous rape in which both victims were A&M coeds, rapist wore sunglasses, both victims were near their residences, and rapist used a sharp object).

e. Federal cases. **United States v. Clemons**, 32 F.3d 1504, 1508 (11th Cir. 1994)("[w]hen extrinsic offense evidence is introduced to prove identity, the likeness of the offenses is the crucial consideration. The physical similarity must be such that it marks the offense as the handiwork of the accused;" three prior carjackings by defendant during three weeks before charged carjacking were sufficiently similar in nature and style); **United States v. Sandez**, 988 F.2d 1384, 1393-94 (5th Cir. 1993)(defendant's subsequent heroin transaction -- which took place in front of same house where heroin was also found in pink balloons and defendant was using same distinctive VW with same license plate number -- admissible to show identity in rebuttal when defense was misidentification); **United States v. Tai**, 994 F.2d 1204, 1209-11 (7th Cir, 1993)(defendant's threats toward persons other than victim of alleged extortion were admissible to show identity as he was the moving force behind his cohort's attack on victim; no need to show "signature" similarity because evidence went to puppeteer not perpetrator); **United States v. Carrillo**, 981 F.2d 772, 775 (5th Cir. 1993)(evidence of other heroin sales in the vicinity of the tavern where defendant charged with selling heroin to undercover officer not so unusual or so similar to constitute proof of identity under 404(b)); **United States v. Torres-Flores**, 827 F.2d 1031 (5th Cir. 1987)(defendant, charged with assault of border patrolman; government's evidence that he was apprehended by border patrol agents before and after the charged assault, offered to prove identity, was not sufficiently similar to charged conduct to allow admission);

> Practice Tip. When extraneous offense evidence is offered to show identity, both the prosecutor and the defense attorney should tally up all of the similarities or dissimilarities between the two events, noting the degree to which each is unusual or distinctive, alone or in combination with other facts. Time, place, mode, dress, type of conduct, type of victim, are all possible points of similarity or dissimilarity. A silver cross-bow or the "Mark of Zorro" is always distinctive and sufficient. Most bank robberies or Stop 'N Robs are depressingly alike.

In **Lane v. State**, 933 S.W.2d 504 (Tex. Crim. App. 1996), the Court of Criminal Appeals set out a step-by-step analysis for how prosecutors, defense attorneys and trial judges should approach the admission or exclusion of extraneous offenses. In this capital murder trial, the State offered evidence of defendant's confession to another murder, the Nancy murder, offered to prove his identity as murderer in the charged "Bertha" murder. A significant problem was that the "Nancy" murder occurred ten years earlier and in a different state. Particularly with extraneous offenses dealing with identity, courts normally require a reasonable proximity of time and place. The defendant had originally confessed to the "Bertha" murder, but by trial he claimed that the

confession was coerced, and his confession was the only evidence to prove the charged capital murder.

In **Lane**, the Court set out two columns listing all the similarities between the two murders: the similarities between the victim profiles; the underlying kidnapping of both; the defendant's nexus to the location of the abductions; the similarities between the physical and sexual assaults and murders; both were strangled, both dumped; both murders were committed with a co-actor; the defendant was involved with a search for both; and the defendant took a Atrophy from each victim. These similarities approached a "Mark of Zorro" modus operandi which obviated the need for temporal or spatial proximity.

Next, the Court set out the State's need to use the extraneous murder to show identity: there was no physical evidence to connect the defendant to the charged murder; DNA was inconclusive; there were no eyewitnesses; the defendant claimed his confession was coerced and untrue. Further, the value of the evidence of the extraneous murder was strong: it was contained within the defendant's own confession, and was corroborated by his accomplice in the "Nancy" murder. Although the defendant claimed his confession to both crimes was coerced, the police didn't know anything about the Nancy murder until he told them about it. The court noted with approval that the trial judge made written findings of fact and conclusions of law, setting out the importance of State's need for the evidence, and he had specified the precise reason for admitting it--to prove identity.

Finally, the court addressed the balancing of probative value versus prejudicial effect under Rule 403. In this case, the first factor -- how compelling was the evidence of the extraneous in proving the disputed issue of identity -- strongly favored admissibility since there were striking similarities between he two offenses. The second factor -- the potential for the extraneous offense to impress the jury in an irrational way -- was ameliorated by giving a limiting instruction both orally and in the written charge. The third factor--how much trial time would be needed to prove the extraneous--also tilted toward admission since the evidence was contained in the defendant's written confession, thus no other witnesses were necessary to prove it. And the final factor--how great is the proponent's need -- also tilted toward admissibility since, without the extraneous murder, the State did not have sufficient evidence to prove the charged murder.

In sum, the **Lane** case is the trial practitioners single best practical "cheat sheet" for outlining on the record why you are offering, opposing, admitting or excluding evidence of a particular extraneous offense.

2. Intent. In the trial of a criminal case when the defendant does not dispute that the conduct in question occurred, but he does claim that the act was free from criminal intent, i.e., it was the result of mistake, accident, or inadvertence, extraneous offenses are relevant to prove guilty intent. As previously discussed, the theory is that of Wigmore's "Doctrine of Chances," stating that the more often that an act has occurred, the less likely it occurred unintentionally. See **Plante v. State**, 692 S.W.2d 487, 491-92 (Tex. Crim. App. 1985). In **Plante**, the defendant was charged with theft by deception in ordering $10,000 worth of Mexican tile with no intent to pay for them, but intent cannot be inferred solely from the failure to pay. Discussing the "Doctrine of Chances," the Court held evidence of 28 other non-payments for goods or services within an 18 month period was admissible to show the defendant's intent to commit theft. See **Fox v. State**, ___ S.W.3d ___, 2002 WL 122056 (Tex. Crim. App. January 31, 2002)(holding, in a sexual assault of a child case, that trial court erred in preventing defendant from presenting evidence that the two child-complainants made false allegations in the recent past; and trial court erred in disallowing evidence of the child complainants' mother's affair with her boss to show motive to encourage the girls to lie); see also **Smith v. State**, 838 S.W.2d 838, 842 (Tex. Crim. App. 1995)(evidence that capital murder defendant had just committed robbery was admissible to show his intent and motive to commit murder and steal victim's truck to make his getaway from the robbery scene); **Suarez v. State**, 901 S.W.2d 712, 721 (Tex. App. -- Corpus Christi 1995, pet. ref'd)(extraneous offense that midwife had improperly conducted pelvic examination of another patient admissible in sexual assault trial to show criminal intent in charged offense).

a. When intent cannot be inferred from the conduct. In those instances in which intent cannot be easily inferred from the conduct itself, extraneous offenses are "almost always admissible." **Parks v. State**, 746 S.W.2d 738, 740 (Tex. Crim. App. 1987)(noting the difficulty of proving intent to defraud in a forgery prosecution); see also **Payton v. State**, 830 S.W.2d 722, 730 (Tex. App. -- Houston [14th Dist.] 1992, no pet.)(defendant's previous sale of cocaine was admissible to show that his possession of narcotics was with the intent to deliver; State was not required to attempt to prove that specific intent with other evidence, such as the amount possessed).

b. When intent is obvious from the conduct. However, if intent is obvious from the conduct, i.e., the intent to kill is easily inferred from pointing a gun and shooting another in the heart, or if the defendant admits his intent but poses some other defense,

the extraneous offense is not admissible. See **Montgomery v. State**, 810 S.W.2d 372, 397 (Tex. Crim. App. 1990)(when defendant claimed that he had not committed acts of sexual indecency, the State could not offer evidence of extraneous lewd conduct to prove his specific intent to arouse or gratify his sexual desire because the defendant was disputing not the intent but the conduct itself); **Hargraves v. State**, 738 S.W.2d 743, 747-49 (Tex. App. -- Dallas 1987, pet. ref'd)(intent was obvious from the circumstances surrounding the aggravated sexual assault and thus it was error to admit extraneous offense); but see **Wiggins v. State**, 778 S.W.2d 877, 881-85 (Tex. App. -- Dallas 1989, pet. ref'd)(extraneous offense offered to show lack of consent was admissible even though defendant denied the act of intercourse).

c. Intent and relevancy vs. admissibility. Some Texas cases have held that extraneous offenses are relevant to show intent only if intent or guilty knowledge cannot be inferred from the act itself. See e.g. **Castillo v. State**, 910 S.W.2d 124, 127 (Tex. App. -- El Paso 1995, pet. ref'd). This may be too broad a statement. Instead, the extraneous offense is relevant if its presence makes a defendant's criminal intent more likely than would be assumed in its absence. **Prieto v. State**, 879 S.W.2d 295, 298 (Tex. App. -- Houston [14th Dist.] 1994, pet. ref'd)(citing **Plante**). Instead, the question of whether intent can or cannot be inferred from the act itself is part of the 403 balancing test under **Montgomery** which listed the following factors under 403 when addressing the admissibility (not relevancy) of an extraneous offense to show intent:

1. whether intent was not seriously contested by the defendant;
2. whether the State had other convincing evidence to establish intent;
3. whether the probative value of the extraneous act was not particular compelling, either alone or in combination with other evidence; and
4. whether the misconduct was of such a nature that a jury instruction to use the evidence only for its permissible purpose would not be likely to be followed.

Montgomery, 810 S.W.2d at 392-93.

For example, in an indecency with a child prosecution, the defendant's intent to molest the victim by touching her in the genital area might be inferred from the conduct itself. Extraneous offenses, though relevant, are not necessary to prove the element of intent. Suppose, however, that the defendant testifies in his own defense and states that he unintentionally touched the little girl's genital area when he swung her up on his shoulder. This is a plausible explanation of an otherwise seemingly unambiguous instance of sexual molestation. The intent issue is now disputed in a serious way. Evidence of other occasions in which he had similarly fondled neighborhood children

tend to make it more probable that this conduct was intentional and not inadvertent. **Morgan v. State**, 692 S.W.2d 877, 882 (Tex. Crim. App. 1985). The court explained the rationale underlying admissibility in this instance:

> The inference to be drawn from the extraneous acts is not that the appellant is a child molester by nature, and therefore more than likely molested complainant. This would indeed be to infer guilt impermissibly from the accused's subjective character. Rather what is sought is an objective inference; that the more often appellant touched the genitals of these neighborhood children, however briefly, the less likely it is that each touching occurred accidentally, and consequently, the more likely that in touching complainant in the instant offense, appellant harbored a guilty intent.

Morgan, 692 S.W.2d at 882; see also **Mares v. State**, 758 S.W.2d 932, 936 (Tex. App. -- El Paso 1988, pet. ref'd)(defendant's concession that he may have inadvertently touched students in a non-sexual way created the opportunity to present extraneous offense rebuttal evidence to prove his intent); **Baldonado v. State**, 745 S.W.2d 491, 496 (Tex. App. -- Corpus Christi 1988, pet. ref'd)(State permitted to call witnesses to testify that the defendant had committed similar acts in the past once the defendant claimed that any contact with the complainant was accidental).

Many of the child sexual assault cases discussing the admissibility of extraneous acts committed on the child victim which were previously addressed under Rule 404(b) and the issue of intent, will now be addressed under Article 38.37. See infra.

In some instances, intent may be readily inferred from the conduct itself, but the defendant contests his intent, claiming that he did not, in fact, intend any unlawful result or conduct. In that case, extraneous offense evidence may be admitted to prove the defendant's culpable state of mind. For example, in **Williams v. State**, 927 S.W.2d 752, 758 (Tex. App. -- El Paso 1996, n. pet. h.), the court held that evidence that the murder defendant had physically assaulted the victim on numerous occasions in the past and had threatened to shoot her reflected an ongoing course of violent conduct toward the victim and tended to make it more probable that it was his conscious objective or desire to cause her death. Id. Further, that same evidence shed light on the defendant's state of mind at the time of the offense and tended to rebut the defensive theories that the victim was the aggressor and that the defendant acted under the immediate influence of sudden passion. See **Sattiewhite v. State**, 786 S.W.2d 271, 284-85 (Tex. Crim. App.1989)(evidence showing defendant's prior assaults of victim and threats to shoot victim in head were

relevant to issue of defendant's intent and refuted defendant's claim that he acted under sudden passion); **Hernandez v. State**, 914 S.W.2d 226, 232-33 (Tex. App.--Waco 1996, no pet.)(evidence that defendant hit the victim in the stomach during an argument two weeks before her death is probative of defendant's intent and rebutted defendant's assertion that he accidentally caused her death); **Pena v. State**, 864 S.W.2d 147, 150 (Tex. App.--Waco 1993, no pet.) (in prosecution of defendant for killing wife by cutting her throat, evidence of two prior assaults and threats to cut wife's throat were relevant to show the defendant's previous relationship with the victim as well as his state of mind at the time of the offense); **Posey v. State**, 840 S.W.2d 34, 37-38 (Tex. App.--Dallas 1992, pet. ref'd)(in prosecution for murder of wife, prosecutor was properly allowed to cross-examine defendant as to whether defendant tried to rape his wife several days before she was killed; evidence of alleged rape and defendant's resulting black eye were relevant to refute defendant's argument that he acted under sudden passion when he killed wife, to show relevant facts and circumstances surrounding killing, to show relationship between defendant and wife, and to show wife's condition at time of offense); **Burton v. State**, 762 S.W.2d 724, 727 (Tex. App.--Houston [1st Dist.] 1988, no pet.)(in prosecution of defendant for attempted murder of wife, evidence showing numerous prior assaults and threats directed at wife and children were admissible to refute defendant's assertions that he went armed to see his wife at her workplace because he feared her lover, that wife "lunged" at him, and that shooting was accidental).

d. The required degree of similarity. While great similarity is required between the extraneous and charged offense when proving identity, that same degree of similarity is not needed when intent is the disputed issue. See **Plante**, 692 S.W.2d at 492-93. That the extraneous offense "derives from the defendant's indulging himself in the same state of mind in the perpetration of both the extrinsic and charged offenses" is sufficient. **Beechum**, 582 F.2d at 911; **Dabney v. State**, 816 S.W.2d 525, 528-29 (Tex. App. --Houston [1st Dist.] 1991, pet. ref'd)(upholding, in a theft of real estate prosecution, the admission of evidence of 150 other property transactions under the doctrine of chances to prove that the defendant never intended to make mortgage payments).

e. Conspiracy cases. The general policy of excluding extraneous offenses when intent is not actively contested is relaxed in conspiracy cases because of the difficulty in proving conspiratorial intent and the risk that the government's case may not withstand a directed verdict. **United States v. Roberts**, 619 F.2d 379, 382-83 (5th Cir, 1980)("[i]f the evidence linking a defendant to a conspiracy is subject to an innocent interpretation, the government may be forced to present some independent evidence of intent to withstand a motion for directed verdict"; unless the defendant "affirmatively takes the issue of intent out of the case"--promising not to actively contest the issue is

insufficient--the government may always offer extraneous offenses to prove intent in the case in chief); see also **United States v. Mounts**, 35 F.3d 1208, 1214 (7th Cir. 1994)(defendant claimed she was only co-defendant's girlfriend, not drug conspirator; government could prove that she had unsuccessfully attempted to buy one kilo of cocaine seven years earlier); **United States v. Wallace**, 32 F.3d 921, 927-28 (5th Cir, 1994).

f. Specific intent crimes. When a crime requires both intentional or knowing conduct plus a specific intent, e.g., possession of drugs with intent to distribute, evidence of uncharged misconduct is automatically relevant and likely admissible in the case in chief. See **United States v. Gruttadauro**, 818 F.2d 1323, 1327-28 & n. 5 (7th Cir. 1987)(in general intent crimes, intent is only a "formal" element and not an "essential element" of the crime so that the mental state can be inferred from the surrounding circumstances; defendant union business agent found guilty of wilfully receiving money from an employer; holding that "wilfulness" is not a specific intent, thus extraneous offense is not automatically relevant; error, but harmless, to admit it); see also **United States v. Brown**, 34 F.3d 569, 573 (7th Cir. 1994)(even though defendant was willing to stipulate to intent, evidence of prior drug crimes admissible because he made a general denial of all charges in pleading not guilty); **United States v. Maxwell**, 34 F.3d 1006, 1009 (11th Cir. 1994)("evidence of prior drug dealings is highly probative of intent to distribute a controlled substance, as well as involvement in a conspiracy").

g. Fraud offenses. Very often this type of evidence is critical in fraud offenses involving checks, confidence games, and financial transactions. For example, in the case of **Alarid v. State**, 762 S.W.2d 659 (Tex.App. - Houston [14th Dist.] 1988, no pet.), in which evidence of 71 separate and extraneous real estate transactions entered into by the defendant -- presumably none of which was above-board -- were admitted for the jury's consideration. See also **Plante v. State**, 692 S.W.2d at 491-92.

> Practice tip. Both the prosecutor and the defense should be prepared to demonstrate that intent is or is not: 1) easily inferable from the conduct itself; 2) in dispute through some defensive evidence or cross-examination of the State's witnesses, remembering that, in Texas, denial of the conduct does not place intent in issue, but conceding the conduct and providing an innocent explanation usually does.

3. Motive. While proof of motive is not a required element in criminal cases, it is always relevant and admissible to prove that the accused committed the offense. While intent (or knowledge, recklessness, or negligence) is the legal element which accompanies the proscribed conduct, motive is the cause which comes into being before

the act itself. Thus, motive is an intermediate material fact which is often offered to prove identity. Also, while it is not an element of proof, motive is a relevant circumstance, potentially either aggravating or mitigating, as to the issue of punishment, and therefore relevant. Motive also helps the jury place the conduct in its proper context, a consideration the courts deem worthwhile. **Crane v. State**, 786 S.W.2d 338, 349-50 (Tex. Crim. App. 1990)("the prosecution may always offer evidence to show motive for the commission of the offense because it is relevant as a circumstance to prove the commission of the offense").

Sometimes the extraneous act is the cause for the offense. For example, when a robber for whom an arrest warrant is outstanding is stopped by a police officer, his motive for shooting the officer is to escape arrest. See **Grider v. State**, 69 S.W.3d 681, 689 (Tex. App. -- Texarkana 2002, no pet.)(holding prior assault on another girlfriend admissible to show motive, because of prior conviction, to prohibit victim from seeking medical treatment and to fabricate story regarding cause of injuries). **Valdez v. State,** 776 S.W.2d 162, 168 (Tex. Crim. App. 1989)(evidence of defendant's parole and his knowledge of outstanding arrest warrant admissible to prove his motive in shooting police officer), *cert. denied*, 495 U.S. 963 (1990); **DeLeon v. State**, 937 S.W.2d 129, 135 (Tex. App. -- Waco 1996, n. pet. h.)(in trial for assault on police officer, fact that defendant was driving a stolen car was admissible to show motive for initiating attack on police officer who stopped him for speeding; "[t]his evidence helps the jury understand why DeLeon would have brutally attacked Childs at a simple traffic stop for speeding"); **Sypniewski v. State**, 799 S.W.2d 432, 434 (Tex. App. -- Texarkana 1990, pet. ref'd)(defendant's commission of a previous robbery admissible to show motive in stealing a policeman's gun and keys); **Turner v. State**, 715 S.W.2d 847, 852 (Tex. App. -- Houston [14th dist.] 1986, no pet.). In **Etheridge v. State**, 903 S.W.2d 1, 10 (Tex. Crim. App. 1994), evidence that the capital murder defendant had needle tracks on his arms and that he had confessed that he robbed the victims to get money to buy drugs was admissible to show his motive for the crime. See also **Smith v. State,** 898 S.W.2d 838, 842 (Tex. Crim. App. 1995); **Peterson v. State**, 836 S.W.2d 760, 762-63 (Tex. App. -- El Paso 1992, pet. ref'd); **Gosch v. State**, 829 S.W.2d 775, 783 (Tex. Crim. App. 1991), *cert. denied*, 113 S.Ct. 3035 (1993).

At other times, a single motive produces both the uncharged conduct and the charged offense. For example, in **Jones v. State**, 751 S.W.2d 682, 685-86 (Tex. App. -- San Antonio 1988, no pet.), the defendant was a nurse charged with injury to a child by injecting a baby with a massive overdose of Heparin. Two witnesses testified that an abnormally high number of babies died during the defendant's hospital shift. The prosecution offered evidence of the deaths of other children to demonstrate the defendant's motive that she wanted the hospital to establish a special pediatric care unit

and that she possessed the necessary skills to care for this type of patient. In **Bisby v. State**, 907 S.W.2d 949, 958-59 (Tex. App. -- Fort Worth 1995, pet. ref'd), evidence of threatening telephone calls to the victim, made by the defendant's wife with the defendant audible in the background (it was essential that the defendant was present and in agreement with his wife's statements), were admissible to show the defendant's motive to kill, ill will, and hostility in a murder case.

Some cases have suggested that the admissibility of extraneous offenses to show motive are usually required to relate to other acts by the defendant against the victim of the crime for which the accused is presently being prosecuted. See **Zuliani v. State**, 903 S.W.2d 812, 827 (Tex. App. -- Austin 1995, pet. ref'd); **Foy v. State**, 593 S.W.2d 707, 708-09 (Tex. Crim. App. 1980); **Lazcano v. State**, 836 S.W.2d 654, 660 (Tex. App. -- El Paso 1990, pet. ref'd). What these cases really stand for, however, is the simple fact that the motive to commit assaults, thefts, and the like cannot be used as a backdoor pigeonhole to admit pure character evidence. For example, in **Zuliani**, the prosecution offered evidence that the defendant repeatedly assaulted his teen-age girlfriend over a two year period, offered to show his motive to intentionally injure a two year old child. This evidence merely showed the defendant's propensity to commit assaults, there was no showing that his motive in beating up his former girlfriend was in any way related to the subsequent mistreatment of the two year child. The underlying logic was that the defendant has a violent character; that he assaults people and he did it again.

On the other hand, when the accused has threatened or shown a feeling of ill will and animosity toward all persons of one class, then these threats may be admitted into evidence even though they show extraneous offenses. See **Dillard v. State**, 477 S.W.2d 47 (Tex. Crim. App. 1971). This is akin to motive, but because it is evidence of a more generalized attitude, it is also dangerously close to character and propensity evidence, and thus especially susceptible of failing the balancing test of 403. Obviously when the State is attempting to prove a "hate" crime, such evidence would be highly probative despite its prejudicial effect.

a. Murder. Murder is a crime which often provides an opportunity for the State to establish motive by means of extraneous offenses. Therefore, evidence that demonstrated that a defendant was in debt because he had "fronted too many drugs" was probative of his motive in a trial alleging capital murder during the course of a robbery. **Stoker v. State**, 788 S.W.2d 1 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 951 (1990). In addition to the Rules of Evidence, the Code of Criminal Procedure specifically allows for the offer of all relevant facts and circumstances surrounding a killing, the previous relationship between the parties, and all facts and circumstances

going to show the condition (i.e., state) of mind of the accused at the time of a killing. **Tex. Code Crim. Proc.** art. 38.36 (1995); **Washington v. State**, 318 S.W.2d 627 (Tex. Crim. App. 1958). See also **Burton v. State**, 762 S.W.2d 724 (Tex.App.-- Houston [lst Dist.] 1988, no pet.); **McKay v. State**, 707 S.W.2d 23 (Tex. Crim. App. 1985).

Do not make the mistake of assuming that raising self-defense automatically allows the introduction of an extraneous offense. There is still the balancing test to be considered, as well as whether the issue arises in a direct evidence case or a circumstantial evidence case. **Escort v. State**, 713 S.W.2d 733 (Tex.App.-- Corpus Christi 1986, no pet.), demonstrates that danger. Charged with the stabbing death of her second husband, the defendant claimed self-defense. The prosecution, in this direct evidence case, proved up that the defendant had also stabbed her first husband to death. The State's theory was that this extraneous offense tended to show the defendant's motive, i.e., her tendency to kill a class of persons - namely husbands. Not so, said the Court. The extraneous offense evidence was "overkill." **Escort**, 713 S.W.2d at 737. It did not help the jury resolve the issue of self-defense. Compare the case which the State relied upon, **Lolmaugh v. State**, 514 S.W.2d 758 (Tex. Crim. App. 1974); see also **Johnosn v. State**, 963 S.W.2d 140, 289 (Tex. App. – Texarkana, 1998, no pet.)(stating that in raising issue of self-defense, defendant must offer some evidence of aggression by victim before victim's general reputation for violence or specific acts of violence are admissible to show that victim was first aggressor or to show defendant's reasonable belief that defendant was endangered).

b. Sexual assault cases. Early on, Professor Wigmore stated that uncharged sexual misconduct evidence is admissible to prove the motive of the defendant to commit the charged offense. Wigmore explained that: "The prior or subsequent existence of a sexual passion in A for B is relevant ... to show its existence at the time in issue." 2 **Wigmore, Evidence** § 398, 445 (Chadbourn rev. 1979). For many years, the Court of Criminal Appeals agreed:

> The sexual passion or desire of X for Y is relevant to show the probability that X did an act realizing that desire. On the principle set out above, this desire at the time in question may be evidenced by proof of its existence at a prior or subsequent time. Its existence at such other time may, of course, be shown by an conduct which is the natural expression of such desire.

Brown v. State, 657 S.W.2d 117, 118 (Tex. Crim. App. 1983). As the court noted in **Montgomery v. State**, 810 S.W.2d 372, 394 (Tex. Crim. App. 1990):

> In prosecutions for sexual abuse of children by those in loco parentis, evidence of motive may be critical because it helps counteract jurors' "aversion to the notion that parents or others in loco parentis would actually commit sexual crimes against their own children."

See also **Hernandez v. State**, 900 S.W.2d 835, 837-38 (Tex. App. -- Corpus Christi 1995, no pet.).

However, the Court of Criminal Appeals has held that when the only source of evidence of the extraneous misconduct is the complainant, that evidence of misconduct is not admissible to rehabilitate the impeached victim. **Pavlacka v. State**, 892 S.W.2d 897, 902-03 (Tex. Crim. App. 1994). The court did not address whether this evidence was admissible to show the defendant's motive because the State did not advance this theory until filing its petition for discretionary review. The Legislature responded to **Pavlacka** by passing **Tex. Code Crim. Proc.** art. 38.37 (Vernon 1995), which rejects **Pavlacka** and broadens the admissibility of extraneous offenses in child assault and sexual assault cases considerably. That statute is discussed in a later section.

c. Drugs and motive. There seems to be an unwritten special exception to Rule 404(b) dealing with drug use. See **United States v. Record**, 873 F.2d 1363, 1375 (10th Cir. 1989)(noting, with dismay, a special standard of relevance of other crimes in narcotics prosecutions). A special favorite is to offer evidence of the defendant's drug use to provide a motive to explain an economic crime such as robbery, burglary, or fraud. The theory that underlies the introduction of evidence regarding drug use in a bank robbery prosecution, for example, is not that drug users are bad people and since this fellow is a drug user he must be the person who committed the charged crime. That is precisely the inference prohibited by Rule 404(b). Instead, the logic by which such evidence is properly admissible is that people who rob banks, burglarize homes, or commit fraud to obtain money, and that they do so because of some financial need that they have. Obviously, drug use or drug addiction may provide a logical motivation to commit robbery to generate the cash needed to support the habit. However, it is not drug use itself that supports the underlying inference of financial need, but rather a two-step showing that: 1) the defendant has a significant drug habit; and 2) he did not have legal financial resources to support it. The rich do not rob to finance an occasional snort of cocaine. **United States v. Madden**, 38 F.3d 747, 751-53 (4th cir. 1994)(reversing bank robbery conviction because government introduced "highly imprecise" evidence of drug usage without corresponding evidence of financial need; "[j]ust as the need to buy a pocket radio would not be admitted to establish motive to commit a bank robbery, so too we do not believe that evidence of occasional drug use should be admitted; financial need

is the key element to establish motive"); compare **United States v. Saniti**, 604 F.2d 603 (9th Cir.), *cert. denied*, 444 U.S. 969 (1979)(bank robbery defendant had a heroin and morphine addiction at $250 a day).

d. Federal cases. For the single best case on why some evidence should be excluded under rule 403, every defense attorney should read **United States v. Ridlehuber**, 11 F.3d 516, 520-24 (5th Cir. 1993)(admission of extrinsic evidence concerning existence of clandestine drug lab in defendant's basement was reversible error when defendant was charged with possession of unregistered short-barreled shotgun; government had "dual focus: drugs and guns" and spent all of its time on the drugs; "proof of defendant's motive for possessing the gun took center stage at trial; the gun itself, like a corpse that opens a detective story, served more as a prop around which the government's theory of the case revolved"); **United States v. Anderson**, 976 F.2d 927, 928 (5th Cir, 1992)(evidence of four prior fires set by defendant at his business and his $1.5 million insurance proceeds were admissible to prove his motive to commit conspiracy to burn down his entire business and warehouse contents); **United States v. Kenny**, 973 F.2d 339 (4th Cir, 1992)(harmless error to admit evidence of defendant's endorsement of checks payable to national cathedral as evidence of his motive for committing obstruction of justice; no showing checks were stolen or that defendant wasn't authorized to endorse them or that he could be indicted for endorsing them); **United States v. Franklin**, 704 F.2d 1183, 1187-88 (10th Cir. 1983)(in a prosecution for killing blacks because of racial animus, government was required to prove that racial motive; thus, it was permitted to offer evidence of four year old extraneous assault when defendant refused to give pretrial binding assurance that he would not contest racial issue); **Bruinsma v, United States**, 402 F.2d 261 (5th Cir. 1968)(in a prosecution for burglary of a bank and conspiracy to commit burglary, statements made by defendant that he had been arrested for previously burglarizing a post office and that he proposed to find a place to burglarize because he needed money was properly admitted to show motive);

4. Preparation, plan, scheme or design. Extraneous offenses may be used to prove the existence of a larger plan, scheme or conspiracy, of which the charged crime is a part. The common plan exception includes crimes committed in preparation for the offense charged. For example, if the defendant steals an armored truck on Monday, buys an Uzi on Tuesday, obtains a false driver's license on Wednesday, steals candy from a baby on Thursday while casing out the local bank, and then finally on Friday robs the bank using the Uzi and drives off in the stolen armored truck, all of these extraneous offenses are relevant to prove each step in the defendant's plan to rob the bank. See **United States v. Cepulonis**, 530 F.2d 238 (1st Cir. 1976)(testimony that bank robbers shot at police officer and a passing motorist and evidence of a shotgun not used in the robbery properly

admitted to show that defendants' plan was to distract police by firing and that they had assembled weapons for that purpose), *cert. denied*, 426 U.S. 922 (1976); **United States v. Carroll**, 510 F.2d 507, 509 (2d Cir. 1975)(other crimes done to determine if conspirators were capable of handling mail truck robbery admissible in prosecution for attempted robbery of the mail truck), *cert. denied*, 426 U.S. 923 (1976).

A plan may also be shown by escalating events, such as, in an official oppression case, an initial touching that leads to pinching that leads to fondling, that leads to an outright proposition for sexual favors. Each step along the way may be viewed as a deliberate execution of a previously formulated plan to achieve the final goal of sexual gratification. See **Bryson v. State**, 820 S.W.2d 197, 199 (Tex. App. -- Corpus Christi 1991, no pet.); see also **Mares v. State**, 758 S.W.2d 932, 936-37 (Tex. App. -- El Paso 1988, pet. ref'd)(when it was apparent that accused progressively exploited his authority and dominion as the teacher of elementary schoolgirls to obtain sexual gratification, extraneous offenses admissible as proof of a common criminal scheme to use his students' requests for tutorial assistance to become progressively more intimate with them); **Rankin v. State**, 974 S.W.2d 707, 712 (Tex. Crim. App. 1996)(evidence that defendant used children's requests to ride his horse as a tool to fondle them and satisfy his sexual desires; "he progressively exploited his authority and dominion over the girls with each passing ride"); compare **Lazcano v. State**, 836 S.W.2d 654, 660 (Tex. App. -- El Paso 1992, pet. ref'd)(in sexual murder case, State could not offer one other extraneous offense of attempted rape committed in a similar manner to demonstrate a scheme or plan; this was mere repetition of same offense offered to show bad character).

In **Rankin**, the Court of Criminal Appeals remanded the case back to the intermediate court to determine how, if at all, evidence of the defendant's "plan" of fondling two other small girls related to intent or any other fact of consequence in the aggravated sexual assault case. **Rankin**, 974 S.W.2d at 712. The message to all trial participants is clear: explain the entire chain of logical relevancy of this evidence on the record at the time it is offered or objected to. Similarly, neither the trial court nor the court of appeals explained why the probative value of the uncharged misconduct outweighed its possible prejudicial effect. The court stated that a Rule 403 balancing test demands an inquiry into all of the factors set out in **Montgomery.**

a. Plan vs. propensity evidence. Separate and distinct offenses which are independent crimes do not necessarily constitute a plan or scheme despite their proximity in time and place. They may be mere repetition of the same offense offered to show "He's done it before, he's doing it again. He's that type of guy." This is pure propensity evidence prohibited by the rule. See **United States v. Krezdorn**, 639 F.2d

1327, 1331-32 (5th Cir, 1981), *cert. denied*, 465 U.S. 826 (1983). In this case, Krezdorn was charged with forging the signature of an immigration inspector. The government introduced evidence of 32 extraneous forgeries under the theory that these demonstrated that Krezdorn had a scheme to forge entry cards permitting the entry of illegal aliens. But these forgeries did not show the existence of any larger goal of which the charged forgeries were some aspect. They were simply a lot of forgeries in a short period of time. "The plan exception to Rule 404(b) applies when the evidence helps explain how the charged offense unfolded or developed, not where the evidence merely indicates that the defendant committed the same crime on other occasions." **United States v. Tai**, 994 F.2d 1204, 1211 (7th Cir, 1993); see also **United States v. Fountain**, 2 F.3d 656, 667 (6th Cir. 1993)(court erred in admitting testimony by defendant's former girlfriend about selling crack out of pill bottles and using firearms while dealing drugs on other occasions; "Rule 404(b) allows the admission of other acts evidence in order to prove "plan" if the purpose is to establish the doing of a criminal act as a step toward completing a larger criminal plan. The gateway requirement is that proof of a larger criminal plan is made."), *cert. denied*, 114 S.Ct. 608 (1994).

The common scheme or plan exception has often been employed as a "subterfuge for the admission of propensity-type evidence." **Boutwell v. State**, 719 S.W.2d 164, 180 (Tex. Crim. App. 1985). For example, proof of a number of similar burglaries or drug transactions may be probative of the defendant's status as a professional burglar or drug dealer, but that is precisely the prohibited purpose under rule 404. Only if the commission of each drug sale is linked to some greater or overarching goal -- such as an ongoing conspiracy by the Cali cartel to infiltrate the Houston market -- is this evidence admissible.

b. Conspiracy cases. The existence of a plan or scheme is almost always relevant in a conspiracy case and this is the primary area in which extraneous offenses are legitimately admissible under a plan or common scheme theory. See **United States v. Boone**, 951 F.2d 1526, 1540 (9th Cir. 1991)(tape recording of fraudulent sales pitch admissible as direct proof of conspiracy as well as plan under 404(b)); **United States v. Eufraso**, 935 F.2d 553, 571-73 (3d Cir. 1991)(uncharged Mafia crimes evidence admissible to show "the history, structure and internal discipline of the Scarfo enterprise, and the regular means by which it conducted unlawful business;" this was probative of defendants' respective roles within "the enterprise's larger organization, history and operations" when defendants charged with RICO), *cert. denied*, 112 S.Ct. 340 (1992); **United States v. Angelilli**, 660 F.2d 23, 39 (2d Cir. 1981), *cert. denied*, 455 U.S. 945 (1981); **United States v. De La Torre**, 639 F.2d 245, 250 (5th Cir. 1981)("the guns were partial payment for the drugs and thus were an integral part of the conspiracy" and thus

admissible "to show common plan or scheme"); **United States v. Lewis**, 693 F.2d 189 (D.C. Cir. 1982)(testimony concerning stolen money not charged in indictment admissible to show that defendant was the mastermind of a common scheme).

> Practice Tip. Both the prosecutor and the defense should be prepared to explain how the extraneous offense does or does not show an individual step toward a larger goal or plan. Is the evidence mere repetition of the same offense or does it demonstrate a natural progression toward some final goal?

5. Knowledge or opportunity. Prior acts of misconduct, such as a defendant's prior drug possession and use, may be admissible to show the likelihood that the defendant knew a nearby bag contained drugs, even though the defendant made no movements toward the bag and was not under the influence of drugs. **Patterson v. State**, 723 S.W.2d 308 (Tex. App. -- Austin 1987, no pet.); see also **Kemp v. State**, 861 S.W.2d 44, 46 (Tex. App. -- Houston [14th Dist.] 1993, pet. ref'd)(prior convictions for cocaine offenses admissible to prove defendant knowingly possessed cocaine in charged offense when he had testified that he was unaware that there was cocaine in the bedroom); **Marable v. State**, 840 S.W.2d 88, 94 (Tex. App. -- Texarkana 1992, pet. ref'd)(extraneous offense that defendant had previously brought a sack of marijuana to the jail admissible to prove that he was growing marijuana and that he knew the nature of the substance).

a. Must be a disputed issue. Some of these cases tend to forget that knowledge must be a disputed issue before evidence of an extraneous is admissible to prove it. See **United States v. Simpson**, 992 F.2d 1224, 1228-29 (D.C. Cir. 1993)(plain error to allow government to impeach drug defendant's cross-examination answer that he did not know how Dilaudid is commonly packaged with prior arrest for possession of Dilaudid; defense was that he was "framed," not that he didn't know that it was a drug that he possessed); **United States v. Alessi**, 638 F.2d 466, 477 (2d Cir. 1980)("We have instructed that normally evidence of a defendant's prior conviction introduced to show knowledge or intent should not be admitted until the conclusion of the defendant's case, since by that time the court is in a better position to determine whether knowledge or intent is truly a disputed issue and whether the probative value of the evidence outweighs the risk of unfair prejudice."); See also **United States v. Corona**, 34 F.3d 876, 881 (9th cir, 1994)(defendant's possession of a list of drug customers 11 months after his arrest on charged offense relevant to show knowledge when defendant claimed ignorance about charged drug possession).

For example, suppose that the defendant is stopped for speeding and the officer smells the odor of marijuana from the back of the van that the defendant is driving. The odor is wafting down the highway and there are several large brown bags in plain view. He searches, finds 100 kilos of marijuana, and arrests the defendant for possession of marijuana. This is the State's case. It needs nothing more to prove the defendant knowingly possessed the marijuana. But suppose the defendant borrowed the van from his friend to drive it to San Antonio and that the defendant knew nothing about those smelly brown bags. Now knowledge is disputed and the State may offer extraneous offenses, such as the prior week's drive to Dallas with a load of marijuana, or his prior conviction for possession of marijuana, to show the defendant knows it when he smells it and knows the packaging when he sees it. See, e.g. **Murdock v. State**, 840 S.W.2d 558, 567 (Tex. App. -- Texarkana 1992), *remanded on other grounds*, 845 S.W.2d 915 (Tex. Crim. App. 1993)(when defendant claimed that he was completely unaware of drug-related activities at time of his arrest for illegal investment, State could offer "mule's" testimony that defendant was a drug dealer and mule had worked for him as a runner; helped prove mule delivered money for defendant); see also **United States v. Soyland**, 3 F.3d 1312, 1315 (9th Cir. 1993)(evidence of defendant's prior arrests admissible because both, like charged offense, involved the odor of illicit drugs emanating from his car and the finding of methamphetamine together with large amounts of cash); but see **United States v. Garcia-Orozco**, 997 F.2d 1302 (9th Cir. 1993).

b. Or not readily inferred from conduct. If knowledge concerning the circumstances of an offense is not apparent from the conduct itself, then an extraneous offense may be admissible in the case in chief. See e.g., **State v. Louis**, 672 P.2d 708 (Or. 1983)(during trial of defendant for public indecency by allegedly exposing himself on four occasions in his living room window, evidence admissible, on issue of defendant's knowledge of exposure to the public, that police had spoken to him one or two years previously regarding neighbors' complaints that he was exposing himself); **United States v. Rubin**, 37 F.3d 49, 52 (2d Cir. 1994)(admission of nine nonindictment checks relevant to bank fraud defendant's capability to commit crime since they tended to prove he must have known checks he deposited were stolen and fraudulently endorsed and that in cashing them he would defraud bank).

However, this theory may become too attenuated. In **Nolen v. State**, 872 S.W.2d 807, 812 (Tex. App. -- Fort Worth 1994, pet. ref'd), for example, the State offered evidence of an extraneous burglary in a possession of amphetamine case. Its theory was that the defendant had stolen not only a chain saw, stereo speakers, VCR's and a television set, but that he had also taken glassware of a type commonly used in the manufacture of illicit drugs. The State argued that the fact that he took otherwise

ordinary glassware "makes it highly unlikely that [Nolen] coincidentally selected these items by random chance" and thus "a strong inference is raised that [Nolen] had knowledge of the contraband amphetamine and its production." Id. at 812. The appeals court correctly concluded that absent a showing that Nolen actually had experience with amphetamine itself, the prior burglary offense was not relevant too prove he had knowledge that the substance being produced in another person's bathroom was amphetamine.

c. Access or special skills. Extraneous offense evidence may also be admissible to establish opportunity in the sense of access to or presence at the scene of the crime or in the sense of possessing distinctive or unusual skills or abilities employed in the commission of the crime charged. See **United States v. Hamilton**, 992 F.2d 1126, 1131 (10th Cir. 1993)(testimony that defendant burglarized witness' house and stole his .38 revolver admissible to prove defendant had access to working firearm when he testified that he was using a carved wooden replica not a real gun during aggravated robbery); **United States v. Dejohn**, 638 F.2d 1048, 1053 (7th Cir. 1981)(testimony of YMCA security guard and city police officer revealing that on other occasions defendant had obtained checks from a mailbox at YMCA was "highly probative of defendant's opportunity to gain access to the mailboxes and obtain the checks that he cashed" with forged endorsements); **United States v. Barrett**, 539 F.2d 244 (1st Cir. 1976)(evidence admissible to show familiarity with sophisticated means of neutralizing burglar alarms).

In **Willis v. State**, 932 S.W.2d 690, 697 (Tex. App. -- Houston [14th Dist.] 1996, n.p.h.), the appellate court upheld the admission of an extraneous offense of theft that occurred two years after the charged theft offense when offered to show that: (1) the defendant had the opportunity and knowledge to commit the offense; and (2) his hospital time-keeping records were not the result of a mistake. During the rebuttal stage, the witness testified that he worked for M.D. Anderson Cancer Center during the time appellant was employed by the hospital. He stated he performed work on State time for the defendant by mowing his yard and running his personal errands. He also testified that the defendant instructed him to fill out his time sheets to reflect that he had worked overtime when he had not actually worked. The extraneous witness admitted he had stolen thousands of dollars from M.D. Anderson and hoped he would receive his job back due to his testimony. This evidence was crucial to the State since the defendant disputed the ultimate issue of guilt by testifying that he had not stolen from M.D. Anderson Cancer Center and that all checks the employee in the charged offense received had been earned. That employee supported the defendant's version and testified that she had not received any salary for work she had not performed. The evidence of the extraneous offense was compelling because of the similar way in which work records were falsified. Without

the extraneous offense evidence, the State had little to tie appellant to falsification of the work records. The greater the State's need to resort to extraneous offenses to prove a material issue in the case, the higher their probative value in relation to their potential for prejudice. Id.

d. "Consciousness of guilt"? Sometimes the courts have held that extraneous evidence indicating a "consciousness of guilt" is admissible as demonstrating, under 404(b) knowledge. See **Felder v. State**, 848 S.W.2d 85, 97 (Tex. Crim. App. 1992)(evidence that defendant produced false identification to arresting officer indicated a "consciousness of guilt" and was admissible to show proof of knowledge). Although evidence of "consciousness of guilt" is admissible under Rule 404(b), the "knowledge" that the rule refers to is normally considered knowledge of a particular and discrete fact, not a generalized consciousness of guilt. This theory is discussed in a later section.

e. Federal cases. **United States v. Gonzales**, 936 F.2d 184, 191 (5th Cir. 1991)(evidence that defendant owned a tractor-trailer rig used in a prior smuggling attempt admissible to show the source of funds used to purchase the trailer or used in charged offense); **United States v. Marceo**, 947 F.2d 1191, 1199 (5th Cir. 1991)(a defendant's personal use of cocaine is admissible to show he knew about the drug trafficking conspiracy and knowingly participated), *cert. denied*, 112 S.Ct. 1510 (1992); **United States v. Parziale**, 947 F.2d 123 (5th Cir. 1991)(knowledge of involvement in the charged conspiracy may be shown by proof of a previous smuggling apprehension; mere entry of a guilty plea raises issue sufficiently to justify 404(b) evidence); **United States v. Flores-Perez**, 849 F.2d 1 (1st Cir. 1988)(defendant charged with aiding and abetting another in violating federal firearms laws; government could not introduce evidence of a prior possession of handgun and ammunition and violation of state law by defendant to undermine defendant's explanation of innocence in the charged offense; lack of similarity between the two offenses; did not tend to show specialized knowledge associated with assisting another in trafficking altered firearms; "even had the government established the illegal character of the gun discarded from Flores' car on [the prior occasion] the relationship between Flores' prior bad act and the charged crime is attenuated and of questionable relevance to defendant's intent to commit the alleged crime").

6. Absence of mistake or accident. There are numerous instances in which the State proves its case-in-chief, but defense cross-examination or the defendant's testimony or the testimony of a defense witnesses raises the issue of accident or inadvertence or lack of intent. In that case, the State may rebut the defense with evidence of an extraneous offense to show the conduct was not mistaken, inadvertent, or unintentional. "When the accused claims self-defense or accident, the State, in order to show the accused's intent,

may show other violent acts where the defendant was an aggressor." **Robinson v. State,** 844 S.W.2d 925, 929 (Tex.App.--Houston [1st Dist.] 1992, no pet.). Furthermore, it is well-established that extraneous offenses are admissible to negate or rebut the possibility of accident. **Bryson v. State**, 820 S.W.2d 197, 199 (Tex.App.--Corpus Christi 1991, no pet.). In **Baldonado v. State**, 745 S.W.2d 491, 496 (Tex.App.--Corpus Christi 1988, pet. ref'd), the court found testimony to be admissible that on the same night as the charged offense, the defendant had used a gun in the commission of a robbery. The evidence was admissible to negate the claim of accident.

In **Booker v. State**, 929 S.W.2d 57, 63 (Tex. App. -- Beaumont 1996, n. pet. h.), the defendant was on trial for attempted capital murder with a deadly weapon. The State was allowed to introduce evidence of an aggravated robbery extraneous offense to refute the defendant's defense of accident and to correct the false impression he left on direct examination that the gun found in a stolen car was not his and that he noticed it for the first time in the car when the police were chasing him in that stolen car.

For example, in **Hernandez v. State**, 914 S.W.2d 226, 232-33 (Tex. App. -- Waco 1996, n. pet. h.), evidence that the defendant had hit the 17 month old victim in the stomach two weeks before was admissible to disprove defendant's theory of accident--that he improperly performed a Heimlich maneuver to dislodge a piece of food in the child's throat. This evidence negated that innocent mistake and proved intent to injure the child.

Similarly, in **Logan v. State**, 840 S.W.2d 490, 497 (Tex. App. -- Tyler 1992, pet. ref'd), the felony murder defendant vigorously contended that the fire in which the victim died was an accident, not arson The State was entitled to offer evidence showing the defendant's role in helping to burn a relative's mobile home, also for insurance proceeds.

This situation frequently arises in child sexual assault case. In **Baldonado v. State**, 745 S.W.2d 491 (Tex.App. -- Corpus Christi 1988, pet ref'd), an indecency with a child case, the defendant claimed that any contact with the victim was accidental, thereby raising the question of intent -- a specific aspect of his defense. In rebuttal, the prosecution called two witnesses to testify that the defendant had previously committed similar extraneous acts. The evidence was properly admitted.

Numerous federal cases have permitted this type of rebuttal evidence as well. See e.g., **United States v. DeLoach**, 654 F.2d 763, 768-69 (D.C. Cir. 1980), *cert. denied*, 450 U.S. 1004 (1981)(prosecution for submission of false information to obtain a labor certificate for an alien; when defendant disavowed knowledge of codefendant's false submissions, government could offer testimony of other aliens that defendant swindled

them by falsely promising to secure labor certificates as this undercut "his defense of mistake"); **United States v. Johnson**, 634 F.2d 735 (4th Cir. 1980), *cert. denied*, 451 U.S. 907 (1981)(evidence that physician accused of tax evasion submitted fraudulent Medicaid billing properly admitted to rebut her claim that she was too devoted to patients to worry about finances); **United States v. Harris**, 661 F.2d 138, 142 (10th Cir. 1981)(where father accused of murdering eight year old son claimed that fatal injuries occurred because he tripped while carrying child on his shoulder, evidence of many bone fractures sustained by the infant months before were admissible since "particularly in child abuse cases," the "admissibility of other crimes, wrongs or acts to establish intent and an absence of mistake or accident is well established").

> Practice tip: Patience is a virtue. Prosecutors should sit quietly on their uncharged misconduct evidence and await the defense strategy. If that strategy clearly raises an issue of accident, mistake, or inadvertence, extraneous offenses which would otherwise not surmount the Rule 403 hurdle will gain in probative value. Caution is a virtue. Defense attorneys should be careful in raising an issue of accident, mistake, or inadvertence which would open the door to the admissibility of uncharged misconduct that would otherwise be excluded under rule 403. Before offering such a defense, question whether there is a plausible response to the uncharged misconduct as well.

D. IMPLICIT EXCEPTIONS TO 404(B)

The list of exceptions specifically mentioned in Rule 404(b) does not include all of those recognized under the common law, nor all of those now used by federal courts. Both before and after the adoption of the rules of evidence, courts recognized exceptions for corroboration or impeachment of testimony, rebuttal of an entrapment defense, proof of guilty knowledge through evidence of spoliation, and to prove the existence of a conspiracy. See generally 22 **Wright & Graham, Federal Procedure** § 5248. The specific exceptions listed are nothing more than examples of permissible uses of uncharged misconduct.

While Rule 404(b) does not prohibit the use of uncharged misconduct for other reasons than those set out in the rule, it does require that any such use is governed by the standards of the rule. That is, the use of the evidence cannot involve an inference of bad character or propensity and the evidence must satisfy the Rule 403 balancing test.

1. "Background" Evidence, **NOT** Res Gestae.

The term "res gestae", literally translated "things done," has been the source of considerable confusion in the law. The phrase has long been employed as a catch-all, justifying the admission of virtually unlimited evidence in a purported effort to show the context or circumstances surrounding an offense or an arrest. To add to the confusion, "*res gestae* statements" have come to mean spontaneous exclamations, often inculpatory.

The Court of Criminal Appeals has, however, taken steps to clarify and, perhaps, narrow this very broad doctrine. The first thing the Court has done is re-name the doctrine: it is now called "background evidence" and it may be one of two types:

a) "Same transaction contextual evidence" or

b) "Background contextual evidence."

Mayes v. State, 816 S.W.2d 79, 86 (Tex. Crim. App. 1991); see also **United States v. Weeks**, 716 F.2d 830, 832 (11th Cir. 1983).

In the federal system, such evidence is not considered extrinsic under rule 404(b) if:

a) it is an uncharged offense which arose out of the same transaction or series of transactions as the charged offense; **United States v. Kloock**, 652 F.2d 492, 494 (5th Cir. 1981);

b) it was inextricably intertwined with the evidence regarding the charged offense; **United States v. Killian**, 639 F.2d 206, 211 (5th Cir. 1981), *cert. denied*, 451 U.S. 1021 (1982); or

c) it is necessary to complete the story of the crime on trial; **United States v. Wilson**, 578 F.2d 67, 72-73 (5th Cir. 1978).

a. Same transaction evidence. "Same transaction contextual evidence" is what used to be called "res gestae," that is, the intertwined, inseparable parts of an event which, if viewed in isolation, would make no sense at all. Under Texas common law, such background evidence was admitted "[t]o show the context in which the criminal act occurred . . . under the reasoning that events do not occur in a vacuum and that the jury has a right to hear what occurred immediately prior and subsequent to the commission of the act so that they may realistically evaluate the evidence." **Albrecht v. State**, 486 S.W.2d 97, 100 (Tex. Crim. App. 1972). It is of a sort where "several crimes are

intermixed or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony, whether direct or circumstantial, of any one of them cannot be given without showing the others." **Nichols v. State**, 260 S.W. 1050 (Tex. Crim. App. 1924). The reason for the admission of this type of evidence is "simply because in narrating the one it is impracticable to avoid describing the other. . . Only if the facts and circumstances of the instant offense would make little or no sense without also bringing in the same transaction contextual evidence, should the same transaction contextual evidence be admitted." 2 **Wigmore, Evidence**, § 365 (Chadbourn rev. 1979). Necessity may be the reason for the introduction of this type of evidence. **Mayes** correctly held that the common law theory is imbedded in Rule 404. See also **Lockhart v. State**, 847 S.W.2d 568, 570 (Tex. Crim. App. 1992), *cert. denied*, 114 S.Ct. 146 (1993); **Blakeney v. State**, 911 S.W.2d 508, 514-15 (Tex. App. -- Austin 1995, n. pet. h.).

In **Nelson v. State**, 864 S.W.2d 496, 498 (Tex. Crim. App. 1993), the Court held that the surviving capital murder victim could testify that the defendant stabbed and raped her as well as the deceased. Both crimes occurred during the same transaction and at the same location. "The facts and circumstances of the charged offense would make little or no sense without also admitting the same transaction contextual evidence as it related to the second victim." Id.; see also **Lockhart v. State**, 847 S.W.2d 568, 571 (Tex. Crim. App. 1992)(extraneous offenses indivisibly connected to charged offense and necessary to State's case may be admissible to explain context; here, evidence that defendant attempted drug purchase and drove car with stolen license plates relevant to capital murder trial).

In **Santellan v. State**, 939 S.W.2d 155, 169 (Tex. Crim. App. 1997), the Court of Criminal Appeals upheld the admission of portions of the defendant's confession concerning the abuse of the corpse of his murder victim, both as evidence of part of the same transaction and to prove the defendant's intent to kidnap her. As the court noted:

> In the case at bar, the abuse of corpse incidents occurred in the two days immediately following the offense for which appellant was indicted, and involved the body of the same victim. Appellant's account of his actions with the victim's body after the murder and his statements about these actions give valuable insight into appellant's motive, plan, and intent in perpetrating the crime. This information was crucial to the State's argument that appellant had the specific intent necessary for attempted kidnaping, and, therefore, for capital murder. Although a legally separate offense, appellant's sexual abuse of the victim's corpse was "blended or

> interwoven" with the indicted offense, and was "essential to understanding the context and circumstances" of the crime charged. . . . Thus, this evidence was part of the same transaction as the capital murder for which appellant was being tried, and was relevant to the State's proof of the elements of the crime charged.

One of the most frequent examples of "same transaction contextual evidence" is that which shows the commission of a "crime spree." For example, in **Sparks v. State**, 935 S.W.2d 462, 466 (Tex. App. C Tyler 1996, n. pet. h.), the court held that in a prosecution involving theft of a car, "crime spree" evidence describing the circumstances culminating in the wreck of the stolen car, the apprehension of a co-defendant, and the subsequent arrest of the defendant, as well as the theft of another car on the same evening, was all admissible because the two car thefts and two car chases were inextricably interwoven with the evidence of the primary offense.

However, not all events and circumstances that surround the charged offense or arrest are automatically admissible as being part of the same transaction. To the extent that **Albrecht** implied that anything that happened immediately before or after the offense was, *ipso facto*, admissible, it painted with too broad a brush. For example, in **Couret v. State**, 792 S.W.2d 106, 108 (Tex. Crim. App. 1990), the defendant was arrested for burglary and the arresting officer found a hypodermic syringe in his pocket. In this major case, the Court of Criminal Appeals held that evidence of that hypodermic syringe did not prove any material fact in the burglary case and was not independently relevant. Therefore, it was error to admit it. The test of admissibility of "same transaction contextual evidence" is whether the extraneous offense sheds light on the charged offense or is so entwined with it that evidence of one cannot be logically separated from the other. Since there was no evidentiary contention between the syringe and the burglary, possession of the syringe was irrelevant and inadmissible. See also **Garcia v. State**, 871 S.W.2d 769, 771-72 (Tex. App. -- Corpus Christi 1994, pet. ref'd)(evidence of marihuana stuffed in back seat of patrol car along with cocaine inadmissible in trial for possession of cocaine); **Castillo v. State**, 865 S.W.2d 89, 92-93 (Tex. App. -- Corpus Christi 1993, no pet.)(in robbery trial, State offered testimony that after robbing victim and running off, defendant robbed a bar patron while victim and police were looking for him; victim saw defendant coming out of second bar; appeals court holds that this evidence was not essential to any issue at trial; reversed, not harmless. Old rule suggesting that events that occur immediately before and after offense are automatically admissible is no longer valid); **Peterson v. State**, 836 S.W.2d 760, 763 (Tex. App. -- El Paso 1992, pet. ref'd)(State offered evidence of threats defendant made to police officer one hour after arrest for aggravated assault on police officer that he would come back and kill first white

officer he could; offered to show defendant's intent/state of mind; held to be improperly admitted because threats were made after arrest and, therefore, was propensity evidence and prejudicial because it showed racial animosity, desire for killing police officers in general, and feelings of retribution and revenge toward police. Compare **Lum v. State**, 903 S.W.2d 365, 372 (Tex. App. -- Texarkana 1995, pet. ref'd)(State could offer evidence that defendant had guns in his truck as "same transaction" contextual evidence when defendant was charged with murder and found guilty of involuntary manslaughter for running deceased passenger and driver off road, causing their car to overturn and crash; apparently, possession of the guns helped to show defendant's murderous intent although there was no evidence he ever touched, used, or even referred to them during the crime).

Federal courts frequently admit such intrinsic offense evidence to show the relationship between conspirators or codefendants. See e.g., **United States v. Royal**, 972 F.2d 643, 647 (5th Cir. 1992)(evidence of defendant's prior arrest and imprisonment inextricably intertwined with conspiracy charge that he conspired with "X" to take over his drug business while he was in prison; government could not have proved its case without showing that defendant had an ongoing drug business at time he entered prison); **United States v. Weeks**, 716 F.2d 830, 832 (11th Cir. 1983)(government could introduce evidence that federal agent was investigating stolen motor vehicles at time of charged assault; that evidence explained the agent's presence with defendant and his associates as well as their animosity toward agent).

b. Contextual background evidence. This evidence is not strictly related to the criminal offense. It is admitted not out of necessity but out of judicial grace. "[C]onsiderable leeway is allowed even on direct examination for proof of facts that do not bear directly on the purely legal issues, but merely fill in the background of the narrative and give it interest, color, and lifelikeness." **C. McCormick, McCormick on Evidence** § 185 (3d ed. 1984). It helps the jury place the people and events within an appropriate context. In **Mayes**, for example, while the State was entitled to place the defendant and witnesses in their environment, it was not entitled to place him behind the bars in Administrative Segregation in a prison unit where he committed the aggravated kidnaping. It is one thing to prove that the Mayor of Houston was arrested for littering on a downtown street. It is quite another to say that he was arrested for littering as he walked out from a brothel with two loose women on each arm.

Thus, while either side is normally entitled to offer background evidence to set the stage for the events that occurred, if that background evidence also possesses a character component which would be barred under Rule 404, the State must show that this evidence is somehow relevant to proving the offense itself.

c. Test for admissibility. The admissibility of either type of background evidence is to be determined by another of our apparently inexhaustible two-part rules:

1) whether the background evidence is relevant under TRE 401? if so,

2) whether the evidence should be admitted as an "exception" under TRE 404(b)?

Mayes v. State, 816 S.W.2d 79 (Tex. Crim. App. 1991). As to the first of the questions set out above, the Court has acknowledged that "(r)easonable men may disagree whether in common experience, a particular inference is available." A reviewing court will not disturb a trial court's ruling as to relevance as long as it is "within the zone of reasonable disagreement." **Montgomery**, 810 S.W.2d at 391.

Accordingly, in a prosecution charging two burglaries and a possession of methamphetamine, the Court of Criminal Appeals recognized that evidence of the defendant's extraneous use and sale of marijuana could arguably be relevant, in that the use and sale of one illegal substance (marijuana) renders more probable the possession of another illegal substance (methamphetamine). The appellate court did not have to subscribe to that argument and indeed the Court noted that it was "not necessarily convinced of the relevancy of the marijuana evidence under that argument." The appeals court could "superimpose [its] own judgment as to relevance over that of the trial court." **Rogers v. State**, 853 S.W.2d 29 (Tex. Crim. App. 1993).

Assuming an affirmative answer to question one, the next step under **Mayes** is to determine whether the background evidence is admissible as an exception under TRE 404(b). As is clear from **Camacho v. State**, 864 S.W.2d 524 (Tex.Cr.App. 1993), the mere passage of time between the primary and the extraneous offense may not serve to exclude evidence of the latter. In that case, a defendant committed murder in the course of a burglary and then, as he was leaving, kidnaped two other persons. Four days later, in Oklahoma, he killed the two. The court, under the theory that the later killings were evidence of the defendant's specific intent to commit burglary, found the evidence to be admissible. This case appears to take "same transaction" evidence about as far as its logical limits will allow.

It appears that the **Camacho - same transaction** exception has been expanded as an additional exception to Rule 404(b). An extraneous offense evidence may be admissible as contextual evidence. **Wyatt v. State**, 23 S.W.3d 18, 25 (Tex. Crim. App. 2000) wherein the Court recognized that there were two types of contextual evidence: (1)

evidence of other offenses connected with the primary offense, referred to as same transaction contextual evidence; and (2) general background evidence, referred to as background contextual evidence. **Mayes v. State**, 816 S.W.2d 79, 86-87 (Tex. Crim. App. 1991). Same transaction contextual evidence is admissible as an exception under Rule 404(b) when such evidence is necessary to the jury's understanding of the charged offense. **See Wyatt**, 23 S.W.3d at 25;**Rogers v. State**, 853 S.W.2d 29, 33 (Tex. Crim. App. 1993). Extraneous conduct is considered to be same transaction contextual evidence when the charged offense would make little or no sense without also bringing in the same transaction evidence. **Rogers**,853 S.W.2d at 33. Such evidence provides the jury information essential to understanding the context and circumstances of events that are blended or interwoven. **Camacho v. State**, 864 S.W.2d 524, 532 (Tex. Crim. App. 1993).

In **Blakeney v. State**, 911 S.W.2d 508, 514-15 (Tex. App. -- Austin 1995, n. pet. h.), the Austin court of appeals examined several different "same transaction" items of evidence, upholding some and rejecting others. First, the defendant's admission to an investigating officer that he was bisexual was not permissible background evidence since it had an impermissible character content and thus was barred by Rule 404. The trial court abused its discretion in admitting this evidence. Id. at 515. Second, the investigating officer's observation that the defendant had an erection while being questioned about the victim was also background evidence but was relevant to show that the defendant had feelings of sexual attraction and desire for his child victim, and hence a motive for sexually assaulting the child (or at least such an inference was within the zone of reasonable disagreement). The trial court did not abuse his discretion in admitting this evidence. Id. Third, the investigating officer testified that the defendant told him that the child had grabbed the defendant's penis, had disrobed and jumped in a wheelbarrow, and was at fault because he was being "forward." These statements did not relate to bad acts by the defendant at all, but even assuming that they reflected negatively on him, they were admissible background evidence because they filled in the gaps in the overall context of the case--the relationship between victim and the accused. The trial court did not abuse his discretion in admitting this evidence. Id. Since the trial court improperly admitted the evidence of bisexuality, the defendant's conviction was ultimately reversed because the error was not harmless.

d. How much evidence? **Wilkerson v. State**, 736 S.W.2d 656 (Tex. Crim. App. 1987), affirmed the line of reasoning which held that one jury should be able to consider the entire context of the arrest. The case then goes on to consider how much evidence should be admitted, a more important consideration in light of **Mayes**. In **Wilkerson**, testimony as to the street value of pills the defendant possessed at the time of his arrest

was admitted, as well as the number of doses and their uses. In affirming the conviction, the Court once again fell back on the general rule of "determining each case on its own merits." When an arrest is made during or immediately after the commission of an offense, it is usually permissible to admit testimony pertaining to the defendant's acts and possessions. Id.; but see **Couret v. State**, 792 S.W.2d 106 (Tex. Crim. App. 1990). Even if the evidence is improperly admitted, the reviewing court may well take the position that the evidence in question did not contribute to the conviction or the punishment. **Harris v. State**, 790 S.W.2d 568 (Tex. Crim. App. 1989)(setting forth factors to weigh in determining error under Rule 81(b)(2)); **Sanford v. State**, 21 S.W.3d 337, 346 (Tex. App. -- El Paso 2000, no pet. h.)(stating that the factors enunciated in **Harris** are consistent with the State's burden to show harmlessness under Rule 44.2(a)); **Tex. R. App. Proc**. Rule 44.2(a).

2. Rule in sexual abuse of children cases. Texas has long subscribed to the common law rule regarding the admission of extraneous act evidence in sex offense cases, particularly those involving sexual abuse of children. The extraneous acts must be between the defendant and the victim. **Battles v. State**, 140 S.W. 783 (Tex. Crim. App. 1911). **Alvarado v. State**, 775 S.W.2d 851 (Tex.App. - San Antonio 1989, pet. ref'd). The principle was followed in the 1985 **Boutwell** case, in which the Texas Court of Criminal Appeals noted that such rule permits:

> [T]he admission of acts which occurred between the minor complainant and the defendant so as to explain the charged act and view such an unnatural act in light of the relationship of the parties as well as to make a child's accusation more plausible. A jury would otherwise hear essentially an incomplete version of the charged offense, as though it had occurred in a vacuum as a one-time act. Such evidence, standing alone, might be considered implausible or incredible. [This] narrow exception seeks to alleviate some of that problem.

Boutwell v. State, 719 S.W.2d 164 (Tex. Crim. App. 1985).

In **Vernon v. State**, 841 S.W.2d 407 (Tex. Crim. App. 1992), the Court pointed out that after **Montgomery**, the rule of **Boutwell** must be considered in conjunction with 404(b). The appeals court's analysis of the case was found to be flawed inasmuch as it offered no ". . . plausible reason for thinking that proof of the prior extraneous offenses actually made any fact of consequence to the prosecution in this cause more or less likely. . . ." See also **Pavlacka v. State**, 892 S.W.2d 897, 902 (Tex. Crim. App. 1994)(holding, following the dictates of **Montgomery**, that the victim in a child sexual assault trial who

is impeached cannot be rehabilitated by testifying to other acts of the defendant's sexual misconduct against him). Because of these decisions, the Legislature enacted **Tex. Code Crim. Proc.** art. 38.37 which explicitly admits the type of evidence rejected in **Pavlacka** and **Vernon**.

3. Rebut Defensive Theory.

a. In General. If the defense stakes out a strategy which raises the relevancy of extraneous offenses, the uncharged misconduct may be admissible to directly or indirectly rebut that defense. The defendant has "opened the door" to the admission of uncharged misconduct. See, e.g. **Logan v. State**, 840 S.W.2d 490, 497 (Tex. App. -- Tyler 1992, pet. ref'd)(when defense to felony murder was accidental fire, State could show defendant's role in helping burn a relative's mobile home, also for insurance proceeds); **Wiggins v. State**, 778 S.W.2d 877, 881-87 (Tex. App. -- Dallas 1989, pet. ref'd)(extraneous offense admissible to refute a defensive theory or strategy; when defendant in rape case testified both that he did not have intercourse with victim and that the victim consented to any acts that he did commit, he raised defensive issue of consent, thereby making evidence of other nonconsensual sexual acts admissible); **Pleasant v. State**, 755 S.W.2d 204, 205-06 (Tex. App. -- Houston [14th Dist.] 1988, no pet.)(extraneous offense admissible to rebut alibi defense); **Yarbough v. State**, 753 S.W.2d 489, 490 (Tex. App. -- Beaumont 1988, no pet.)(when defendant claimed self-defense, he could be cross-examined on two extraneous knifings in which he was the aggressor and State could bring on witnesses to prove them up when defendant denied their commission). See also Martin v. State, 173 S.W.3d 463(Tex. Crim. App.2005)(State can introduce extraneous offense of sexual assault to rebut defense of consent).

This exception does not justify the wholesale introduction of extraneous offenses. The evidence sought to be introduced must contradict or show improbable some specific aspect of the defensive theory. **Williams v. State**, 481 S.W.2d 815 (Tex. Crim. App. 1972). For example, in **Gale v. State**, 747 S.W.2d 564, 567 (Tex.App. - Fort Worth 1988, no pet.) the defendant, on trial for injury to a child, claimed that he himself had been abused as a boy. The State took that as an invitation to prove that the defendant had also assaulted the victim's mother, claiming that the evidence was justified by the "defensive theory." The court noted that a defensive theory "is one which, if believed, negates the culpability of the accused." It then found that this claim by the defendant could not "by any twist of logic be termed as a defensive theory" and reversed. Id.

b. Child abuse cases. This is an area in which appellate courts have frequently addressed the admissibility of uncharged misconduct to rebut a defensive theory - usually that of fabrication by the victim or manipulation of the victim by others. In **Wheeler v. State**, 67 S.W.3d 879, 884-84 (Tex. Crim. App. 2002), the Court of Criminal Appeals held that the State was entitled to cross-examine a defense witness concerning a prior allegation of sexual abuse and offer specific evidence of the prior act. The defensive theory was that the defendant was not the kind of person who would commit such an act and that he had no opportunity to commit the offense because of the close proximity to other people at the time. The defendant called a children's protective services worker to testify that there was no risk of abuse or neglect found in defendant's home. The Court held the State could inquire into the witness' opinion and the basis thereof, as well as question the witness about information of which she was aware, but upon which she did not rely, ie., the allegation of a prior assault. Id. at 883. Additionally, the State was entitled to offer testimony, during rebuttal, regarding the facts of the extraneous act because, like the case at bar, it involved an allegation of abuse which took place in close proximity to other people. Id. at 886.

In **Waddell v. State**, 873 S.W.2d 130, 132-38 (Tex. App. -- Beaumont 1994, pet. ref'd), the trial court properly admitted evidence of an extraneous offense in an indecency with a child trial when the defendant's theory was recent fabrication and that the victim's parents were engaged in a scheme to discredit the defendant's reputation.

Similarly, in **Creekmore v. State**, 860 S.W.2d 880, 883 (Tex. App. -- San Antonio 1993, pet. ref'd), the State was permitted to offer, during rebuttal, testimony of three other victims who were near the age of the victim in an indecency with a child prosecution. Here the victim's testimony was challenged by suggesting that: 1) she was jealous; 2) she told lies; 3) her testimony was contradicted by defendant's witnesses; 4) her mother was a lesbian; 5) she and her mother watched X rated movies; and 6) she and her mother touched each other in sexually suggestive ways. The defense attempted to show that the child's testimony was all a plot against the defendant because he was a strict disciplinarian.

In **Silva v. State**, 831 S.W.2d 819, 822 (Tex. App. -- Corpus Christi 1992, no pet.) the court held that evidence of defendant's prior sexual conduct with the child-victim was admissible once the defendant testified denying the event occurred and implying the child was lying. The trial court allowed the extraneous acts during the State's case-in-chief. The court of appeals, however, held that the error was cured when defendant testified. Id.; but see **Owens v. State**, 827 S.W.2d 911, 917 (Tex. Crim. App. 1992)(error to admit evidence of defendant's prior sexual conduct with his elder daughter at age 11 in

prosecution for sexual assault of younger daughter at age 11 even though defendant testified and denied that event occurred and implied that he was a victim of "frame-up" by daughters who lied; here trial court admitted evidence to prove defendant's "system," but it was only at appellate level that rebuttal of defensive theory was raised).

c. Entrapment. Extraneous offenses are not admissible in Texas to show the defendant's predisposition to commit the charged offense. To that extent, Texas uses an "objective" test of entrapment, unlike the "subjective" federal test. However, the Court of Criminal Appeals has held that the defense of entrapment automatically raises an issue of improper inducement by law enforcement, and thus extraneous offenses may, in some instances, be admissible to show that the police did not induce the defendant to commit the crime. He volunteered or was ready to commit the offense as soon as the suggestion was made. **England v. State**, 887 S.W.2d 902, 909-12 (Tex. Crim. App. 1994). In this case, the defendant's earlier drug transactions with a police informer were relevant to show that he was not "induced in fact" by the informer's conduct to deliver LSD to the undercover officer. Id. at 909. As the Court stated:

> That appellant readily agreed to sell LSD to [officer] at [informer's] instigation on two occasions in the months before the charged offense would indeed tend to make more probable that when he agreed to do so again on June 1, it was not "because" of the persuasive aspect of [informer's] conduct. Evidence to that effect was therefore relevant under Rule 401 and admissible under rule 402. . . . Moreover, the trial court could reasonably have concluded that the evidence was admissible under Rule 404(b) because it was relevant to rebut the actual inducement element of the defense and, therefore, served an evidentiary function other than character conformity.

This case is important not only because it upholds the admissibility of extraneous offenses to rebut "inducement" in entrapment cases, but also because it reaffirms that evidence which is probative in rebutting any defensive issue or strategy may be admissible, if offered on a non-character propensity basis.

Prosecutors should be wary, however, about taking the "extraneous offenses may be admissible in entrapment cases" doctrine too far. Such evidence is admissible only to rebut inducement. In **England,** the State also urged that the evidence was admissible to show the context of the offense. This theory was rejected. Similarly, uncharged misconduct is not admissible to show the defendant's predisposition to commit the offense (as it is in federal trials), since the Texas entrapment defense is still largely an

objective one and predisposition is pure propensity. Once the trial court determines that there has been an inducement, "the focus shifts to the nature of the State agency activity involved, without reference to the predisposition of the particular defendant." **Houston v. State**, 735 S.W.2d 903 (Tex.App. Houston [14th Dist.] 1987, pet. ref'd). It is simply not relevant that the defendant had a predisposition to commit the primary offense. See **Johnson v. State**, 650 S.W.2d 784 (Tex. Crim. App. 1983).

> Practice Tip: Both the prosecutor and the defense should clearly articulate how the offered uncharged misconduct does or does not rebut a specific defense theory or strategy which is in dispute. Prosecutors should take notes of how and when the defense has raised this issue--e.g. did the defense attorney question potential jurors on the issue, did he mention it and evidence to support the theory in his opening statement? What was the precise language used? Did cross-examination of the State's witnesses raise it? What were the precise questions asked? Conversely, defense attorneys should be wary of "opening the door" to such extraneous offenses. Be prepared to articulate how the voir dire, opening statement, or cross-examination did not raise the specific issue or defense that the State is claiming it did. Be wary of the State attempting to set up a "strawman" by its own questioning to raise the rebuttal theory itself and then bring in evidence to knock it down.

4. No limiting instructions necessary. Because "same transaction contextual evidence" is not an extraneous offense, it is evidence that is intrinsic to the charged crime, it is not offered for a limited purpose, but rather for the jury's full consideration. Thus, it is not necessary to give a limiting jury instruction on this evidence. **Castaldo v. State**, 78 S.W.3d 345, 352 (Tex. Crim. App. 2002); **Wesbrook v. State**, 29 S.W.2d 103, 114-15 (Tex. Crim. App. 2000); **Camacho v. State**, 864 S.W.2d 524, 533-34 (Tex. Crim. App. 1993). That is not to say, however, that a limiting instruction need not be given when admitting evidence of uncharged misconduct for limited purposes under rule 404(b) as well as showing the context of the charged crime.

VI. "CONSCIOUSNESS OF GUILT"

Any acts by the defendant that are designed to reduce the likelihood of detection, apprehension, prosecution, or conviction are relevant to show his "consciousness of guilt." **Ransom v. State**, 920 S.W.2d 288, 302 (Tex. Crim. App. 1996). Other obvious examples include:

1. fleeing the scene of a crime or from arrest, **Bigby v. State,** 892 S.W.2d 864, 883 (Tex. Crim. App. 1995); **Burks v. State**, 876 S.W.2d 877, 903 (Tex. Crim. App. 1994);

2. using an alias, **Felder v. State**, 848 S.W.2d 85, 97-98 (Tex. Crim. App. 1992)(giving false identification cards to police); **Page v. State**, 690 S.W.2d 102, 105 (Tex. App. -- Houston [14th Dist.] 1985, pet. ref'd)(defendant's use of alias names after murder);

3. escaping from custody, **Rumbaugh v. State**, 629 S.W.2d 747, 752 (Tex. Crim. App. 1982);

4. resisting arrest, **Fletcher v. State**, 852 S.W.2d 271 (Tex. App. -- Dallas 1993, pet. ref'd)(defendant assumed a "fighting position" when officers arrived and then struggled with them);

5. jumping bail, **Cantrell v. State**, 731 S.W.2d 84, 93 (Tex. Crim. App. 1987).

6. destroying or concealing evidence, **Billings v. State**, 725 S.W.2d 757, 767 (Tex. App. -- Houston [14th Dist.] 1987, no pet.)(destruction of incriminating tape recording);

7. threatening or bribing a witness, juror or judge, **Rodriguez v. State**, 577 S.W.2d 491, 493 (Tex. Crim. App. 1979)(intimidation of State's witness to drop charges); **Maddox v. State**, 288 S.W.2d 780, 782 (Tex. Crim. App. 1956)(physical violence against a witness); **Greene v. State**, 928 S.W.2d 119, 123 (Tex. App. -- San Antonio 1996)(threats and violence toward witness).

The refusal to provide evidence, such as handwriting exemplars, which could exculpate an innocent person, is admissible under the same theory. See **United States v. Jackson**, 886 F.2d 838, 846 (7th Cir. 1989)(refusal to submit handwriting exemplar); **United States v. Terry**, 702 F.2d 299, 314 (2d Cir. 1982)(refusal to provide palm print), *cert. denied*, 461 U.S. 931 (1983); **United States v. McKinley**, 485 F.2d 1059, 1060-61 (D.C. Cir. 1973)(failure to comply with court order not to shave prior to line-up). Such acts are not those of an innocent accused. See generally, **Wright & Graham**, § 5240; **C. McCormick, Evidence** § 190; 2 **Wigmore, Evidence** § 278.

Similarly, evidence of the thoughts that a defendant expresses to others concerning his desire to harm another person is admissible to show his intent to carry through on those thoughts. This is not evidence of an extraneous offense, since there is no conduct involved. Instead it is an expression of his guilty intent. For example, in **Moreno v.**

State, 858 S.W.2d 453, 463 (Tex. Crim. App. 1992), *cert. denied*, 510 U.S. 966 (1993), the defendant argued that Rule 404(b) was violated by admission of testimony that, prior to the kidnapping and murder of the victim, he told several people that he planned to kidnap and kill another individual. The Court of Criminal Appeals rejected the defendant's contention that Rule 404(b) required exclusion of that testimony:

> . . . the statements concerning [the defendant's] thoughts . . . were just that, inchoate thoughts. There is no conduct involved which alone or in combination with these thoughts could constitute a bad act or wrong, much less a crime. Absent this, [the defendant's] statements concerning his desire to kidnap and kill [the other individual] did not establish prior misconduct and thus were not expressly excludable under Rule 404(b).

Moreno, 858 S.W.2d at 463; see also **Massey v. State**, 933 S.W.2d 141, 153 (Tex. Crim. App. 1996)(witnesses' testimony that defendant said he would like to kill, rape, and mutilate a woman were statements of his thoughts, not extraneous conduct governed by Rule 404(b); admission is governed by Rules 401-403; testimony that it was defendant's stated desire to carry out an offense remarkably like the charged offense tended to prove identity, motive, and intent).

Such acts are admissible as an admission by conduct and are direct evidence of the defendant's guilt, not as extraneous offenses under Rule 404(b). To this extent they are similar to "same transaction contextual evidence." This evidence, however, must be admitted or excluded by the same standard as that set out in Rule 404(b): the logical chain of inferences cannot include bad character or propensity. As with intrinsic evidence, no limiting instruction is necessary.

VII. THE CHILD MOLESTATION EXCEPTIONS

A. Texas Code of Criminal Procedure Article 38.37

Article 38.37 of the Texas Code of Criminal Procedure governs the admissibility of uncharged misconduct in child abuse cases. That provision reads:

> **Art. 38.37. Evidence of Extraneous Offenses or Acts**
>
> **Sec. 1.** This article applies to a proceeding in the prosecution of a defendant for an offense under the following provisions of the Penal Code, if committed against a child under 17 years of age:

(1) Chapter 21 (Sexual Offenses);
(2) Chapter 22 (Assaultive Offenses);
(3) Section 25.02 (Prohibited Sexual Conduct);
(4) Section 43.25 (Sexual Performance by a Child); or
(5) an attempt or conspiracy to commit an offense listed in this section.

Sec. 2. Notwithstanding Rules 404 and 405, Texas Rules of Criminal (sic) Evidence, evidence of other crimes, wrongs, or acts committed by the defendant against the child who is the victim of the alleged offense shall be admitted for its bearing on relevant matters, including:

(1) the state of mind of the defendant and the child; and
(2) the previous and subsequent relationship between the defendant and the child.

Sec. 3. On timely request by the defendant, the state shall give the defendant notice of the state's intent to introduce in the case in chief evidence described by Section 2 in the same manner as the state is required to give notice under Rule 404(b), Texas Rules of Criminal (sic) Evidence.

Sec. 4. This article does not limit the admissibility of evidence of extraneous crimes, wrongs, or acts under any other applicable law.

Overview. The legislative intent is to make the admission of extraneous acts committed by the defendant with or upon the child complainant broadly admissible. The provision applies not only to sexual assault trials, but also to assaultive offenses, including injury to a child. It applies not only to the trial of completed offenses, but the inchoate crimes of conspiracy and attempt as well. The statute makes evidence of uncharged misconduct admissible for any relevant purpose, and then lists two such purposes: the state of mind of either the defendant or the child and the relationship between the two.

Significantly, because of its explicit rejection of Rules 404 and 405, the statute does not bar the use of extraneous offenses offered to show bad character or propensity. That is, bad character is a permissible inference in the chain of logical relevance. It is limited, however, only to conduct that occurs between the alleged victim and the defendant, not between the defendant and third persons.

The statute does require the State to give notice of its intent to use such evidence in its case in chief when requested by the defendant. Although not explicitly stated, it would also require an appropriate limiting instruction.

This statute basically returns Texas law to the pre-**Pavlacka** and pre-**Vernon** days of **Battles v. State**, 63 Tex. Crim. 147, 140 S.W. 783 (1911), in which extraneous offenses in child abuse cases were freely admissible. The restrictions on the use of extraneous offenses that involve other children or other conduct not between the complainant and the victim that as discussed in **Boutwell v. State**, 719 S.W.2d 164 (Tex. Crim. App. 1985), continue to apply under Rule 404(b).

B. Federal Rule 414

Rule 414 of the Federal Rules of Evidence deals with evidence of prior similar acts of misconduct in child abuse cases. It reads:

> Rule 414. Evidence of Similar Crimes in Child Molestation Cases
>
> (a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses if child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.
>
> (b) In a case in which the Government intends to offer evidence under this rule, the attorney for the government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.
>
> (c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.
>
> (d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--
>
> (1) any conduct proscribed by chapter 109A of title 18, Untied States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code;

(3) contact between any part of the defendant=s body or an object and the genitals or anus of a child;

(4) contact between the genitals or anus of the defendant and any part of the body of a child;

(5) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on a child; or

(6) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(5).

Overview. Rule 414 is part of the same Omnibus Crime Bill legislative package as Rule 413, dealing with the admission of uncharged misconduct in sexual assault offenses generally. Both of these "are reform measures" mark a return to the common law rule that allowed the prosecution to prove the guilt of the defendant in sexual offenses by showing his character as a "sex offender" or one having a "lustful disposition." See 1A **Wigmore, Evidence** ' 62.2, at 1334-35 (Tillers rev. 1983).

The Congressional sponsors of the legislative rule argue that a sexual assault cases are distinctive and often turn on difficult credibility determinations. 140 Cong. Rec. H8991, daily ed. Aug. 21, 1994; 140 Cong. Rec. S12990, daily ed. Sept. 20, 1994. They note that consent is seldom a defense in other crimes but the defendant in a rape case often contends that the victim engaged in consensual sex and then falsely accused him. Id. Especially in the case with sexual abuse of children, determining when and if such abuse has occurred is especially difficult. Since the acts are almost always done in secret and frequently by one who has legitimate access to or custody of the child, the truth can only be determined by the statements of the child and the accused.

As a practical matter, very few prosecutions of child sexual abuse take place in federal courts. Thus, the enactment of Rule 414 was probably intended more as a model for the states than an actual, practical rule of evidence in federal prosecutions. See 137 Cong. Rec. S3239, daily ed. March 13, 1991.

The rule itself seems very broadly written, employing, as it does the amorphous phrase child molestation, both in reference to the charged offense and the uncharged

misconduct. However, one of the Congressional sponsors states that the rule should apply only to evidence of a pattern of sexual misconduct. That is:

> Usually rapists develop a pattern among their victims. Their assaults show striking similarities as they move from victim to victim. When these patterns are outstanding, these patterns can be helpful in determining true guilt or innocence.

140 Cong. Rec. H2433, daily ed. April 19, 1994 (Ms. Molinari). This sounds rather like the familiar "Mark of Zorro" modus operandi evidence offered to prove identity under Rule 404(b).

VIII. RULE 403 CONSIDERATIONS

A. General Considerations.

Only after the trial judge determines that evidence of an extraneous offense is relevant under Rule 404(b)(or is an intrinsic act, shows consciousness of guilt, or is some other non-Rule 404(b) evidence) and IF the defendant has objected on the basis of Rule 403, then the court must balance the probative value of the offered evidence against its risk of unfair prejudicial effect. **Montgomery** supra.

If the defendant neglects to object on the basis of Rule 403 (or that the probative value of the evidence is substantially outweighed by unfair prejudice), then the trial court does not err in admitting extraneous evidence which is relevant, though of minimal probative value, under rule 403. The defense **must always** object on the basis of Rule 403. See **Montgomery**, 810 S.W.2d at 389; **Lum v. State**, 903 S.W.2d 365, 371 (Tex. App. -- Texarkana 1995, pet. ref'd); **Peoples v. State**, 874 S.W.2d 804, 808 (Tex. App. -- Fort Worth 1994, pet. ref'd)(failure to object under rule 403 waives any claim of unfair prejudicial in admitting extraneous).

Rule 403 imposes the burden on the opponent of the evidence to overcome the presumption of admissibility. **Montgomery**, 810 S.W.2d at 389; **McFarland v. State**, 845 S.W.2d 824, 827 (Tex. Crim. App. 1992)(when the opponent requests a balancing test under Rule 403, the presumption favors admission of the evidence). Thus, a relevant extraneous offense will be admitted unless the defense can successfully demonstrate that the prejudicial effect or other counter factor substantially outweighs the probative value. See **Crank v. State**, 761 S.W.2d 328, 342 n. 5 (Tex. Crim. App. 1988). However, in **Montgomery**, the Court held that the opponent need do nothing more than level a Rule 403 objection. It is the proponent of evidence, the State, which is in the best position to articulate the relative probative value of the evidence. Then the defendant may wish to articulate the specific prejudicial aspects which counterbalance that probative value. There is no specific burden of proof laid on either party, but because the Rule favors admissibility, it is the defendant who, as a practical matter, must demonstrate why the evidence should not be admitted.

Certainly "unfair prejudice" is a consideration which can justify the exclusion of relevant evidence. That is not to say however, that any evidence which in any way prejudices an opponent's case should be excluded. The term refers to "an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." **Torres v. State**, 794 S.W.2d 596 (Tex.App. - Austin 1990, no pet.).

B. Factors To Be Considered.

The **Montgomery** opinion set out some factors that the trial judge should consider when balancing the probative versus prejudicial effect of extraneous offenses. 810 S.W.2d at 389; see also **Taylor v. State**, 920 S.W.2d 319, 323 (Tex. Crim. App. 1996)(setting out **Montgomery** balancing factors and analyzing evidence under each factor). Commentators, such as Wright & Graham, Judge Weinstein, and Goode, Sharlot, et. al, have suggested others. See e.g. **Wright & Graham, Federal Rules of Civil Procedure and Evidence** 5250, at 544-45. The following list is not comprehensive, but may provide assistance:

1. The inherent probative value. The more similar the offenses, the closer in time, the more closely linked to the charged offense, the greater the inherent probative value. See **Robinson v. State**, 701 S.W.2d 895, 898 (Tex. Crim. App. 1985). How compelling is the uncharged act in proving the disputed issue of identity, intent, etc.? How strong is the evidence in showing that the defendant, in fact, committed the extraneous act? See **United States v. Veltmann**, 6 F.3d 1483, 1499 (11th Cir. 1993)(without a strong link between present fire and cause of prior fires, evidence of those prior fires was of minimal probative value in proving defendant committed charged arson).

2. The likelihood of unfair prejudice. How great is the potential that the other crimes or bad acts may sway the jury in some irrational, emotional way and distract them from making a reasoned response to relevant evidence? See **Schweinle v. State**, 893 S.W.2d 708, 712 (Tex. App. -- Texarkana 1995, rev'd on other grounds)(testimony of defendant's psychological manipulation is not an act likely to invite a jury to convict on emotional or moral grounds). See **United States v. Brooke**, 4 F.3d 1480 (9th Cir. 1993). In **Taylor v. State**, 920 S.W.2d 319, 324 (Tex. Crim. App. 1996), the Court held that since the prior capital murder was no more heinous that the charged capital murder, evidence of the first murder was unlikely to create unfair prejudice.

3. Time to prove extraneous. How much trial time does the proponent need to develop evidence of the extraneous offense? Will the factfinder's attention be diverted from the indicted offense? See e.g., **United States v. Ridlehuber**, 11 F.3d 516, 520-24 (5th Cir. 1993)(admission of extrinsic evidence concerning existence of clandestine drug lab in defendant's basement was reversible error when defendant was charged with possession of unregistered short-barreled shotgun; government had "dual focus: drugs and guns" and spent all of its time on the drugs; "proof of defendant's motive for possessing the gun took center stage at trial; the gun itself, like a corpse that opens a detective story, served more as a prop around which the government's theory of the case

revolved"). The less time that this evidence will take, the less likely it will unfairly divert the jury's attention away from the main case.

4. "Need" for the evidence. The more circumstantial the State's case, the more the witnesses have been impeached, the more plausible the defense theory sounds, the more probative the extraneous offense. **Montgomery**, 810 S.W.2d at 397; **Castillo v. State**, 910 S.W.2d 124, 128 (Tex. App. -- El Paso 1995, pet. ref'd)(State had no compelling need for extraneous in child sexual assault trial; defendant's intent could be inferred from his conduct). The greater the need to resort to an extraneous offense to prove up some material issue in a case, the higher will be the probative value of that offense in relation to its potential for abuse. **Crank v. State**, 761 S.W.2d 328, 342 (Tex. Crim. App. 1988); **Morgan v. State**, 692 S.W.2d 877 (Tex. Crim. App. 1985). Put another way, the more hotly contested the issue, the more probative the extraneous offense. **Taylor v. State**, 920 S.W.2d 319, 324 (Tex. Crim. App. 1996).

The distinction between a direct evidence case and a circumstantial evidence case is also an important one. It helps us decide "whether, at what time, and for what purpose an extraneous offense is admissible." **Williams v. State**, 662 S.W.2d 344, 346 (Tex. Crim. App. 1983); **Elkins v. State**, 647 S.W.2d 663 (Tex. Crim. App. 1983); **Mulchahey v. State**, 574 S.W.2d 112 (Tex. Crim. App. 1978). In a direct evidence case the court must consider whether the material issue to which the extraneous conduct is relevant is contested, and, if so, determine whether its admission would be of assistance to the jury in resolving the contested issue. **Elkins** supra at 665. "In a circumstantial evidence case, admissibility as part of the State's direct evidence depends on the transaction's relevance to a material issue which the State must prove." **Williams**, supra at 346.

5. Alternate proof. Is there other available evidence to establish the "relevant fact" that the extraneous misconduct is offered to show? How strong is that evidence? See **Morgan v. State**, 692 S.W.2d 877, 880 (Tex. Crim. App. 1985)(when the proponent has other compelling or undisputed evidence to establish the fact of consequence that the uncharged misconduct is offered to prove, that evidence weighs much less than it otherwise would in the "probative/prejudicial" balance). For example, if the defendant offers to stipulate to the fact to which the misconduct is offered, this alternate proof takes away a significant portion of the probative value of the extrinsic evidence. See **United States v. Tavares**, 21 F.3d 1 (1st Cir. 1994).

6. Proof provided by defense. Defendant=s admission of extraneous offense committed earlier that morning met all of the elements of the offense charged.

Therefore, the Court of Criminal Appeals held that the defendant could be convicted on that evidence. **Rankin v. State**, 953 SW2d 740, 741 (Tex. Crim. App. 1996).

7. Limiting instruction. Is a limiting instruction to the jury likely to be effective in channeling the jury's use of the uncharged misconduct evidence toward its proper purpose and prevent its misuse as propensity evidence? In analyzing this factor, the more similar the two offenses are, the more likely that a jury may misuse that evidence as "He's stolen before, he did it again; he's a thief." See **United States v. Sanders**, 964 f.2d 295 (4th Cir. 1992).

C. Trial Court's Ruling.

It is ultimately the trial court's responsibility to balance the factors that increase probative value against those that raise a risk of unfair prejudice and strike a balance under Rule 403 in admitting or excluding the evidence. He need not articulate his precise reasoning on the record, though that may be helpful. **United States v. Moreno**, 878 F.2d 817 (5th Cir. 1988), *cert. denied*, 493 U.S. 979 (1989); **United States v. Levy**, 731 F.2d 997 (2d Cir. 1984). The record must show that the trial court did actually conduct a balancing test. **Montgomery**, 810 S.W.2d at 389. After conducting the balancing test, and applying the factors described above, the trial court must be given wide latitude to exclude or admit misconduct evidence. So long as the trial court operates within the boundaries of its discretion, an appellate court should not disturb its decision. **Montgomery**, 810 S.W.2d at 390; **Templin v. State**, 711 S.W.2d 30, 33 (Tex. Crim. App. 1986).

In **Montgomery**, the Court of Criminal Appeals rejected the proposition that the appellate court may superimpose its judgment as to relevance over that of the trial court. Reasonable perceptions of common experience may vary. Since the process cannot be wholly objectified, appellate courts will uphold a trial court's ruling absent an abuse of discretion. On the other hand, "[w]hen the appellate court can say with confidence that by no reasonable perception of common experience can it be concluded that proffered evidence has a tendency to make the existence of a fact of consequence more or less probable than it would otherwise be, then it can be said the trial court abused its discretion to admit the evidence." **Montgomery**, 810 S.W.2d at 391. Additionally, if what the trial court finds to be common experience is no more than a common prejudice, then so too has the trial court abused its discretion.

In **Gilbert v. State**, 808 S.W.2d 467, 473 (Tex. Crim. App. 1991), the Court held that "if extraneous offense evidence is not 'relevant' apart from supporting an inference

of 'character conformity,' it is inadmissible as a matter of law." While "some degree of deference" is due the trial court's determination of relevance under rule 404(b), a trial court cannot admit evidence that is patently irrelevant. Thus, in Texas, the trial court's determination of "relevance" is reviewed under a more rigorous standard than the "clear abuse of discretion" standard in federal courts. See **United States v. Maggitt**, 784 F.2d 590, 597 (5th Cir. 1986), but see **United States v. Parada-Talamantes**, 32 F.3d 168, 169-70 (5th Cir. 1994)("guilt by association" irrelevant under Rule 404(b); plain error to hold otherwise).

Appellate Review

On appeal, the trial court's rulings on Rule 404(b) and 403 will be reviewed on an abuse of discretion standard. The courts will not make a de novo review. If the trial judge's ruling is within the "zone of reasonable disagreement," his decision must be upheld. **Montgomery**, 810 S.W.2d at 392. Appellate courts must recognize that the decision making process cannot be wholly objectified, but rather will be done by a trial judge using his own life experiences as exemplary of common experience. When reasonable persons would disagree about such perceptions and inferences from experience, the trial judge's ruling should stand.

In **Montgomery**, the Court stated that it was following federal practice and holdings in adopting its standard for appellate review. Unfortunately, that standard has been expressed in various and conflicting ways. These include:

> "The balancing of probative value against prejudicial effect required under this rule is within the discretion of the trial judge, and we reverse such determinations only if we find an abuse of the court's discretion." **United States v. Royal**, 972 F.2d 643, 647 (5th Cir. 1992).
>
> "Federal appellate review is limited and the trial court will be reversed only for an abuse of discretion. **United States v. Pizarro**, 756 F.2d 579 (7th Cir. 1985).
>
> "The ruling must fall within the ambit of reasonable debate." **United States v. Ranney**, 719 F.2d 1183 (1st Cir. 1983).
>
> "The admission of extraneous offenses will be upheld unless the trial court acts arbitrarily or irrationally." **United States v. Schiff**, 612 F.2d 73 (2d Cir. 1979).

> "When the trial court does not make an on-the-record determination, the ruling is not accorded the usual deference given to a trial court's exercise of discretion." **United States v. Talavera**, 668 F.2d 625 (1st Cir. 1982).

The usual approach, in both Texas and the federal appellate courts, is to view both probative force and prejudice most favorably toward the proponent. That is, to give the evidence its maximum probative force and its minimum reasonable prejudicial value. **United States v. Holloway**, 740 F.2d 1373 (6th Cir. 1984).

E. The Penalty for a Silent Record.

In **Rankin v. State**, 974 S.W.2d 707, 712 (Tex. Crim. App. 1996), the Court of Criminal Appeals remanded the case back to the intermediate court to determine how, if at all, evidence of the defendant's "plan" of fondling two other small girls related to intent or any other fact of consequence in the aggravated sexual assault case. The message to all trial participants is clear: explain the entire chain of logical relevancy of this evidence on the record at the time it is offered or objected to. The court stated that a Rule 403 balancing test demands an inquiry into all of the factors set out in **Montgomery.** This "appellate orbit" problem can be avoided if the defense, prosecutor, and trial court explicitly discuss the relevancy of the evidence, its probative value and prejudicial effect, and the balancing of the **Montgomery** factors at trial.

A. Arts. 37.07 & 37.071

Sec. 3 Evidence of prior criminal record in all criminal cases after a finding of guilty.

(a)(1) Regardless of the plea and whether the punishment be assessed by the judge or the jury, evidence may be offered by the state and the defendant as to any matter the court deems relevant to sentencing, including but not limited to the prior criminal record of the defendant, his general reputation, his character, an opinion regarding his character, the circumstances of the offense for which he is being tried, and, notwithstanding Rules 404 and 405, Texas Rules of Evidence, any other evidence of an extraneous crime or bad act that is shown beyond a reasonable doubt by evidence to have been committed by the defendant or for which he could be held criminally responsible, regardless of whether he has previously been charged with or finally convicted of the crime or act. A court may consider as a factor in mitigating punishment the conduct of a defendant while participating in a

program under Chapter 17 of this code as a condition of release on bail. Additionally, notwithstanding Rule 609(d), Texas Rules of Evidence, and subject to subsection (h), evidence may be offered by the state and the defendant of an adjudication of delinquency based on a violation by the defendant of a penal law of the grade of:

(A) a felony; or

(B) a misdemeanor punishable by confinement in jail.

(2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in the future criminal conduct.

* * *

(g) On timely request of the defendant, notice of intent to introduce evidence under this article shall be given in the same manner required by Rule 404(b), Texas Rules of Criminal (sic) Evidence. If the attorney representing the state intends to introduce an extraneous crime or bad act that has not resulted in a final conviction in a court of record or a probated or suspended sentence, notice of that intent is reasonable only if the notice includes the date on which and the county in which the alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act. The requirement under this subsection that the attorney representing the state give notice applies only if the defendant makes a timely request to the attorney representing the state for the notice.

* * *

(i) Evidence of an adjudication for conduct that is a violation of a penal law of the grade of misdemeanor punishable by confinement in jail is admissible by confinement in jail is admissible only if the conduct upon which the adjudication is based occurred on or after January 1, 1996.

B. Article 37.071:

Sec. 2. (a)(1) If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the

> defendant shall be sentenced to death or life imprisonment. . . . In the proceeding, evidence may be presented by the state and the defendant or the defendant's counsel as to any matter that the court deems relevant to sentence, including evidence of the defendant's background or character or the circumstances of the offense that mitigates against the imposition of the death penalty.
>
> (2) Notwithstanding Subdivision (1), evidence may not be offered by the state to establish that the race or ethnicity of the defendant makes it likely that the defendant will engage in future criminal conduct.

The logical rationale behind admitting extraneous offenses in either a capital or non-capital punishment hearing is to demonstrate that this person is unlikely to reform his conduct or rehabilitate himself, thus he is morally deserving of an appropriate punishment. In both instances, it is assumed that the past is the single best predictor of the future and those who have committed crimes in the past are likely to continue to do so if permitted. Just as future dangerousness is an explicit question in capital cases, it is an equally valid, though implicit, criterion in a non-capital case. The defendant's punishment for the charged crime may not be increased on the basis that he has committed crimes in the past as is done under the federal sentencing guidelines. See **Borjan v. State**, 787 S.W.2d 53, 56 (Tex. Crim. App. 1990)(State cannot ask jury to assess punishment for collateral crimes and add such penalty to the punishment for charged offense). Nonetheless, his sentence may be increased if the jury finds that he is likely to commit crimes in the future. This evidence demonstrates lack of rehabilitation potential and his bad character for law abidingness. Cf. **Beasley**, 902 S.W.2d at 456.

The statute requires that the State, if requested by the defendant, give advance notice of its intent to use such evidence at the punishment stage in the same manner as in Rule 404(b). **Tex. Code Crim. Proc.** art. 37.07 § 3(g).

The State must also show, beyond a reasonable doubt, that the defendant committed the extraneous act. **Tex. Code Crim. Proc.** art. 37.07 § 3(a)(1). Interestingly, this requirement is notably missing in Article 37.071 of the Texas Code of Criminal Procedure, involving the imposition of the death penalty. Under the doctrine espoused in **Apprendi v. New Jersey**, 530 U.S. 466, 120 S.Ct. 2348 (2000), that any element that increases the penalty must, in the first instance, be decided by the finder of fact and, in the second instance, proven beyond a reasonable doubt, there is a question, or at least an argument, that Article 37.071 is unconstitutional, either on its face or as applied in a particular case.

Juvenile offenses, whether adjudicated or not, are also admissible. See **Jackson v. State**, 861 S.W.2d 259 (Tex. App. -- Dallas 1993, no pet.)(rejecting a claim that admission of juvenile adjudications violate separation of powers doctrine).

In **Beasley v. State**, 902 S.W.2d 452, 456 (Tex. Crim. App. 1995), and **Anderson v. State**, 901 S.W.2d 946 (Tex. Crim. App. 1995), that evidence of gang membership was admissible at the punishment stage. This evidence was logically relevant to show the defendant's character. To make such evidence admissible, the State must prove: 1) the defendant is a member; and 2) the group commits bad or illegal acts. The State need not prove that the defendant is connected to their specific illegal acts. His association with the group is sufficient.

In **Pondexter v. State**, 942 S.W.2d 577, 584 (Tex. Cr. App. 1996), the Court held although the introduction of that evidence at the guilt/innocence phase of the trial was not relevant or admissible, it was harmless error. The Court also reaffirmed its holdings in **Beasley** and **Anderson**. supra.

Also, specific acts of misconduct are admissible through cross-examination of the defendant's character witnesses, but not by implication through the detailed testimony of "bad character" prosecution witnesses. See **Monroe v. State**, 864 S.W.2d 140 (Tex. App. -- Texarkana 1993, pet. ref'd). In this case, the State called seven witnesses to testify to their opinion that the defendant was not a peaceful and law-abiding person. Each was asked the specific date of their contact with the defendant and how they were employed at that time. Each had been a convenience store clerk. This was error, but harmless. This opinion was written before the changes to art. 37.07. Now the State could offer these same witnesses to testify directly to the extraneous robbery committed by the defendant against them, but it must give prior notice, if requested, and offer proof sufficient to support a finding, beyond a reasonable doubt, that the defendant committed the robberies.

When the State offers extraneous offenses during the punishment stage under article 37.07, the jury should be specifically instructed that the State must prove those extraneous offenses beyond a reasonable doubt. In **Mitchell v. State**, 931 S.W.2d 950, 954 (Tex. Crim. App.1996), the Court held that the jury, not the trial judge, determines whether the State has established the prior offenses beyond a reasonable doubt. Thus, the jury must be instructed that before it may consider any unadjudicated conduct in assessing the proper punishment, it must be convinced beyond a reasonable doubt that the defendant committed the extraneous offenses or is at least criminally responsible for its commission.

X. DISCOVERY.

As previously noted, Rule 404(b) provides for the admissibility of various extraneous acts, if, "upon timely request by the accused, reasonable notice is given in advance of trial of intent to introduce in the State's case in chief such evidence other than that arising in the same transaction." **Tex. R. Evid**. Rule 404(b).

In 1993, the Court of Criminal Appeals addressed for the first time the question of what constitutes a proper request under Rule 404(b). **Espinosa v. State**, 853 S.W.2d 36 (Tex. Crim. App. 1993). **Espinoza** makes two things clear when a defendant relies on a motion for notice, directed to the trial court, rather than a request for notice, directed to the State. First, "when a defendant relies on a motion for discovery to request notice pursuant to Rule 404(b), it is incumbent upon him to secure a ruling on his motion in order to trigger the notice requirements of that rule." See also **United States v. Tuesta-Toro**, 29 F.3d 771 (1st Cir. 1994)(defendant sought to exclude extraneous offenses because he had not received notice under Federal Rule 404(b) despite his omnibus pretrial discovery motion; claim rejected since his "overbroad pretrial request" did not specifically mention 404(b) and did not fairly alert the government of what was being requested). Second, a motion must "specifically request notice of the State's intent to use extraneous offenses at trial." A concurring opinion by Judge Baird suggests that counsel file a document entitled "Rule 404(b) Request for Notice of Intent to Offer Extraneous Conduct", and timely serve the State with a copy. The defendant would not thereby be required to obtain a ruling from the trial court as he would were he to rely upon a discovery motion. However, the request for notice must be timely. A request for notice on the day of trial is not timely. **Espinoza**, 853 S.W.2d at 39.

> Practice Tip: Defense counsel should file a request for notice with the clerk of the court and send a copy to the State. The request should specifically requests notice under Rule 404(b), Rule 609(f) and Article 37.07. The request for notice should include a certificate of service. This will trigger the presumption that the notice was sent and received. Lastly, the notice should be filed as soon as practicable so as to allow time to prepare to defend against allegations of extraneous conduct and, in the event the State's notice does not come until the 11th hour, strengthen defense arguments that the notice was not reasonable.

Article 37.07 § (3)(g) of the Texas Code of Criminal Procedure sets out some minimal information required in order for the notice is to be considered "reasonable." The minimal information required is "the date on which and the county in which the

alleged crime or bad act occurred and the name of the alleged victim of the crime or bad act." **Tex. Code Crim. Proc.** art. 37.07 § 3(g). Additionally, although it is not new law, it is clear that a motion in limine is still insufficient to invoke the notice requirements of Rule 404(b), nor will such a motion preserve error. **Gonzales v. State**, 685 S.W.2d 47 (Tex. Crim. App. 1985).

In **Buchanan v. State**, 911 S.W.2d 11, 14 (Tex. Crim. App. 1995), the Court of Criminal Appeals held that the State's "open file policy" cannot substitute for written notice under Rule 404(b). The fact that the extraneous offense was contained within an offense report that the defense attorney had reviewed in the State's file does not indicate "an intent to introduce such evidence" in its case in chief. Notice is not required, however, if the extraneous is offered in the rebuttal case. **Herring v. State**, 752 S.W.2d 169 (Tex.App. -- Houston [lst Dist.] 1988), *aff'd as reformed*, 758 S.W.2d 283 (Tex. Crim. App. 1988).

Even if the State withholds or neglects to give the requested notice, a defendant must still show harm. **Tex. R. App. Proc.** Rule 44.2(b); **Buchanan**, 911 S.W.2d at 15; **Hernandez v. State**, 914 S.W.2d 226, 232-33 (Tex. App. -- Waco 1996, no pet.)(decided under prior Rule 81(b)(2); harmless error when State failed to give notice under Rule 404(b); defendant requested notice in December 1993 and State gave notice in October 1994, just three days before trial; the State was very lucky).

XI. LIMITING INSTRUCTIONS.

The principal means of channeling a jury's use of extraneous offense toward the limited purpose for which they are admissible and away from the prohibited purpose as "bad character" evidence is the limiting instruction. Critics are skeptical regarding the utility of such instructions and some defense attorneys prefer not to have the evidence emphasized by such exhortations, particularly as written out in the jury instructions. See 22 **Wright & Graham**, supra, § 5249, at 539. If a limiting instruction is requested, it should be given twice: once verbally at the time the evidence is introduced and a second time in the jury instructions.

The Court of Criminal Appeals has held that limiting instructions must be given at the time the extraneous offense is introduced if the defense so requests under Rule 105. **Rankin v. State**, 974 S.W.2d 707, 712 (Tex. Crim. App. 1996)("logic demands that the instructions be given at the first opportunity. . . . An instruction given for the first time during the jury charge necessarily leaves a window of time in which the jury can contemplate the evidence in an inappropriate manner"); see also **United States v. Rivera**,

837 F.2d 906, 913 (10th Cir. 1988); 21 **C. Wright & K. Graham, Federal Practice & Procedure** § 5065 (1992); but see **Rankin**, 974 S.W.2d at 714 (McCormick, P.J., dissenting)(plain language of Rule 105 leaves timing of limiting instructions to trial judge; noting practical and jurisprudential problems of engrafting an implicit requirement onto the rule when it could instead amend the rule prospectively, putting litigants on notice).

The limiting instruction should inform the jury of the precise purposes for which it may consider the extraneous offense. Since an extraneous offense may be used for more than one purpose, e.g., identity, intent, motive, and rebutting a defensive theory, the jury should be informed of all of those relevant purposes. **Taylor v. State**, 920 S.W.2d 31 9, 324-25 (Tex. Crim. App. 1996).

The jury should also be instructed that they cannot consider any extraneous act evidence unless they believe beyond a reasonable doubt that the defendant committed the act. **Ex Parte Varelas**, 45 S.W.3d 627, 631 (Tex. Crim. App. 2001)(stating if a defendant requests an instruction on the standard of proof, he is entitled to the instruction).

A. Admission as intrinsic evidence or "consciousness of guilt."

It has already been noted that it is not necessary to give the jury a limiting instruction as to an extraneous offense which is admitted as a part of a transaction which includes the offense on trial. **Camacho v. State**, 864 S.W.2d 524, 533-34 (Tex. Crim. App. 1993); **Hoffert v. State**, 623 S.W.2d 141 (Tex. Crim. App. 1981); **Gibson v. State**, 875 S.W.2d 56, 6 (Tex. App. -- Texarkana 1994, pet. ref=d)(when offenses are intertwined into one inseparable transaction, no limiting instructions on use of uncharged misconduct should be given). That is in keeping with the general Texas rule that no instruction to limit a jury's consideration of evidence is necessary when the evidence is admissible to prove a main fact in the case. **Porter v. State**, 709 S.W.2d 213 (Tex. Crim. App. 1986).

B. Admission as other exception.

In all but the unusual case, such as when the defendant himself introduces the extraneous offense, a careful trial judge and prosecutor will inevitably give the jury a limiting instruction. Such an instruction is relatively brief and should be tailored to fit the particular purpose for which the extraneous offense evidence was admitted; to prove identity, for example. Care must be taken not to comment on the weight of the evidence by asserting or assuming the truthfulness of the extraneous matter. See **Crank v. State**,

761 S.W.2d 328, 342 (Tex. Crim. App. 1988); **King v. State**, 553 S.W.2d 105 (Tex. Crim. App. 1977); see also, **Tex. R. Evid**. Rule 105(a); **Tex. Code Crim. Proc.** art. 36.14. For examples of an appropriate form and wording, see Paul McClung, **Jury Charges for Texas Criminal Practice**.

Any error in failing to give a limiting instruction in the jury charge will be reviewed under the familiar standard of **Almanza v. State**, 686 S.W.2d 157 (Tex. Crim. App. 1984). If the defendant objected and requested a limiting instruction, reversal will be mandated if the improper omission was calculated to cause "some harm" to the defendant. If the defendant failed to request s limiting instruction, he must show "egregious harm." Good luck. Very few evidentiary rulings themselves cause "egregious harm," thus the proper admission of extraneous offenses, but the unobjected-to failure to limit their use is most unlikely to cause egregious harm.

XII. LIMITING USE IN ARGUMENT

A. Cannot overtly punish for extraneous offenses. The prosecutor may, in his sentencing argument, refer to the facts of the offense, the prior criminal record of the defendant, and the status of the evidence as it pertains to character evidence, including extraneous offenses that have been introduced. See **Spencer v. State**, 466 S.W.2d 749 (Tex. Crim. App. 1971) (prosecutor pointed out that neither family, friends, nor minister had provided character testimony in behalf of the defendant).

Although the prosecutor may refer to the context in which the crime has occurred, the offender's bad character for law abidingness, and his lack of reformation capability as expressed through prior offenses, he may not urge the jury to punish the defendant for crimes in evidence but **not** on trial and cumulate that punishment with the sentence for the principal offense. **Brown v. State**, 530 S.W.2d 118 (Tex. Crim. App. 1975). The use of extraneous offenses at the punishment stage is precisely like that of prior final convictions. The prosecutor cannot argue punish him once for this crime and then punish him again for his prior convictions.

XIII. PRESERVATION OF ERROR.

A. General. Nothing in the Texas Rules of Evidence, including Rules 403 and 404, relieves a defendant from the responsibility of properly preserving error. Proper preservation remains a prerequisite to a successful appeal. **Johnson v. State**, 747 S.W.2d 451 (Tex. App. -- Houston [14th Dist.] 1988, pet ref'd).

B. Timeliness. A defendant must object at his earliest opportunity. That includes at the time the evidence is first offered or when it is re-offered or when it is referred to in final argument. Failure to voice a timely objection waives the error. See **Holman v. State**, 772 S.W.2d 530 (Tex. App. -- Beaumont 1989, no pet.)(defendant objected to a question concerning prior drug use; objection sustained; State later raised the issue during rebuttal; defense offered no objection; error waived).

C. Specificity. The requirement here is no different than for any other objection; it must be specific. The objection must be such that the offering party and the court are on notice as to the exact nature of the objection. A general objection is the functional equivalent of no objection and will ordinarily not preserve error. **Gass v. State**, 785 S.W.2d 834 (Tex.App. - Beaumont 1990, no pet.); **West v. State**, 790 S.W.2d 3 (Tex.App. - San Antonio 1989, no pet.); **Turner v. State**, 719 S.W.2d 190 (Tex.Cr.App. 1986). Rule 103(a)(1) acknowledges that there exist situations in which the basis of a general objection is apparent from the context in which it is made, but that is an exceedingly dangerous line to walk. Neither **should** counsel simply cite a rule of evidence by number. In a 1990 case appealing a conviction for injury to a child, the Court noted that "naming a series of evidentiary rules in an objection without an explanation of how the rules are applicable is not sufficient to preserve error, even if one of the rules might apply, because it fails to state the specific grounds for the objection." **Sandow v. State**, 787 S.W.2d 588 (Tex. App. - Austin 1990, pet. ref'd).

The degree of specificity and articulateness demanded by the appellate courts all depends upon their eagerness to examine the issue. In **Lankston v. State**, 827 S.W.2d 907, 909 (Tex. Crim. App. 1992), for example, the Court of Criminal Appeals stated that English, not legalese, is a sufficient language to make a specific objection. "[A]ll a party has to do . . . is to let the trial judge know what he wants, why he thinks himself entitled to it and to do so clearly enough for the judge to understand him at the time when the trial court is in a proper position to do something about it."

On the other hand, in **Purtell v. State**, 761 S.W.2d 360 (Tex. Crim. App. 1988), a capital murder conviction, the Court took a less generous approach. There the defense lawyer had successfully objected to two references to extraneous offenses, excluding those incidents from the jury's consideration. However, when the State later offered into evidence a tape recording which included yet another reference to the same extraneous matters, the defense objected only that the proper predicate had not been laid. The Court of Criminal Appeals held that counsel had waived his error by not specifically objecting to the extraneous matters. No matter that both the trial court and the State were presumably clearly on notice as to the defendant's opposition to any mention of the

extraneous material in whatever form. Inasmuch as the prudent defense lawyer had filed a pre-trial objection, not a motion in limine, to all mention of extraneous matters, it would seem that he had sufficiently alerted the trial judge to the essential issue.

D. Adverse ruling. Again the rule remains constant. The opposing party must pursue the issue to the point of an adverse ruling. If the objection is sustained, the defendant should move for an instruction to disregard. If that is granted and an instruction given, a motion for mistrial must be made. **Nethery v. State**, 692 S.W.2d 686 (Tex. Crim. App. 1985), *cert. denied*, 474 U.S. 1110 (1986). And remember that a ruling must be made. Not all judicial utterances are rulings.

E. Running objections. So-called "running-objections" have been found sufficient in one context, **Moreno v. State**, 755 S.W.2d 866 (Tex. Crim. App. 1988), and insufficient to preserve error in another. **Mares v. State**, 758 S.W.2d 932 (Tex. App. -- El Paso 1988, no pet.). A footnote in **Sattiewhite v. State**, 786 S.W.2d 271, 283 n. 4 (Tex. Crim. App. 1989), *cert. denied*, 498 U.S. 881 (1990) observes that, "in some instances a running objection will actually promote the orderly progression of the trial." That observation notwithstanding, counsel is well advised not to make too broad a running objection, not to make it encompass too great a span of testimony, and to renew it with each new witness. See **Killibrew v. State**, 746 S.W.2d 245, 247 (Tex. App. -- Texarkana 1987, pet. ref'd)(beware of "running objections" that do not precisely specify the witness, the topic, the testimony, and the extent of the objection; defendant failed to make specific objection to inadmissible portions of 12 page document; error waived). Clearly the objection, "You honor, we would like a running objection whenever the matter is brought up," is ill-advised.

XIV. CONCLUSION.

Evidence of extraneous offenses has long been a deadly weapon in the prosecutor's arsenal. Deservedly so. They can be very probative evidence on a specific, disputed issue. Juries immediately recognize their probative worth. Conversely, they are all too likely to use such evidence precisely for the prohibited "bad character" reason without even recognizing that they are doing so. The conscientious defense lawyer should be familiar with both the law and the logic of extraneous offenses and know how to exclude, limit, or at least preserve his or her record regarding such offenses. The conscientious prosecutor should have an equally clear understanding of the law and logic of admitting uncharged misconduct and always be prepared to articulate to the trial judge and opposing counsel the logical chain of inferences that make this evidence relevant under Rule 404(b), and highly probative under Rule 403. The greatest burden, however,

lies with the conscientious trial judge who must follow and appreciate the logical inferences supporting or denying relevance of the extraneous offense, and then carefully weigh the probative value and potential for unfair prejudicial effect in each and every instance. The federal and Texas drafters gave the trial judge such great discretion in determining the admission or exclusion of this problematic type of evidence precisely because they trusted him, as Johnny-on-the-spot and King Solomon on the bench, to make a thoughtful, reasoned case-by-case decision, listening to everyone, balancing the rights of all.

APPENDIX A

TEXAS RULES OF EVIDENCE
ARTICLE IV.
RELEVANCY AND ITS LIMITS

RULE 401. DEFINITION OF "RELEVANT EVIDENCE"

"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.

RULE 402. RELEVANT EVIDENCE GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE

All relevant evidence is admissible, except as otherwise provided by Constitution, by statute, by these rules, or by other rules prescribed pursuant to statutory authority. Evidence which is not relevant is inadmissible.

RULE 403. EXCLUSION OF RELEVANT EVIDENCE ON SPECIAL GROUNDS

Although relevant, evidence may be excluded if its 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, or needless presentation of cumulative evidence.

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT; EXCEPTIONS; OTHER CRIMES

(a) **Character Evidence Generally.** Evidence of a person=s character or character trait 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 character trait offered:

(A) by an accused in a criminal case, or by the prosecution to rebut the same, or

(B) by a party accused in a civil case of conduct involving moral turpitude, or by the accusing party to rebut the same;

(2) *Character of victim.* In a criminal case and subject to Rule 412, evidence of a pertinent character trait of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of peaceable character of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor; or in a civil case, evidence of character for violence of the alleged victim of

assaultive conduct offered on the issue of self-defense by a party accused of the assaultive conduct, or evidence of peaceable character to rebut the same;

(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**. Evidence of other crimes, wrongs or acts 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, provided that upon timely request by the accused in a criminal case, reasonable notice is given in advance of trial of intent to introduce in the State's case-in-chief such evidence other than that arising in the same transaction.