

EXEMPLARY AND EXCEPTIONAL CONFUSION UNDER THE FEDERAL RULES OF EVIDENCE

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I. INTRODUCTION

The Federal Rules of Evidence endeavor to steer a middle course between two dangers. The first is the danger of admitting evidence that is unreliable or that risks decisions on improper bases.¹ The second is the danger of excluding too much probative evidence.²

Given this goal of admitting just the right amount of just the right kind of evidence, it is unsurprising that very few of the Federal Rules of Evidence either absolutely allow or absolutely prohibit the admission of particular kinds of evidence. Instead, some rules begin by prohibiting the admission of a particular kind of evidence for all purposes, but then create certain exceptions. For example, Rule 410 prohibits the admission of plea-related statements against the criminal defendant who made the statements, regardless of the purpose, but subject to two exceptions.³ Other rules prohibit the admission of a particular kind of evidence, but only if the evidence is offered for a particular purpose. For example, Rule 407 prohibits the admission of evidence of subsequent remedial measures if the evidence is offered for the purpose of proving negligence or other culpability.⁴ Some of these rules that prohibit the admission of a particular kind of evidence only if the evidence is offered for a particular purpose further provide examples of purposes that are not prohibited by

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1. *United States v. Thevis*, 84 F.R.D. 57, 69 (N.D. Ga. 1979) ("The Federal Rules of Evidence regulate the procedure of the taking and admission of evidence in federal courts. Under those rules, there are certain exclusionary rules which 'facilitate the ascertainment of the facts by guarding against evidence which is unreliable or is calculated to prejudice or mislead.'" (quoting MCCORMICK ON EVIDENCE § 72 (Edward W. Cleary ed., 2d ed. 1972))).

2. See Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 922 (1995) ("Our current system throws out too much information, and in the end, this hurts both truth-seeking prosecutors *and* innocent defendants.").

3. FED. R. EVID. 410.

4. FED. R. EVID. 407.

the rule. For example, Rule 407 specifies that evidence of subsequent remedial measures is not prohibited by the rule if offered for purposes “such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.”⁵

The two types of evidence rules are often referred to as inclusionary and exclusionary.⁶ Rule 407 is an inclusionary rule because it allows for the admission of all evidence of subsequent remedial measures that are not offered for the prohibited purpose.⁷ Rule 410 is an exclusionary rule because it prohibits the admission of all statements made during plea discussions unless the evidence is made admissible by an exception.⁸

Problems arise when inclusionary rules are misunderstood to be exclusionary rules. This Article examines several inclusionary rules that are often misunderstood to be exclusionary rules. Specifically, inclusionary rules that provide examples of non-prohibited purposes are often misunderstood to be exclusionary rules because the examples are misunderstood to be exceptions. Among such problematic rules are Rules 407, 408, 411, and 404(b), which are examined in this Article.⁹ All of these rules provide examples of non-prohibited purposes that are often misunderstood to be exceptions.¹⁰

When examples are misunderstood to be exceptions, two undesirable consequences can follow. First, misunderstanding examples to be exceptions can result in the exclusion of evidence that should not be excluded under the rule. This result occurs when the purpose for admitting the evidence is not a specifically listed example of a non-prohibited purpose. For example, evidence of a subsequent remedial measure might be offered to prove a party’s plan, which is not included in Rule 407’s list of examples of non-prohibited purposes.¹¹ If a court misunderstands the examples to be exclusions, then the court might conclude that the evidence is inadmissible because “plan” is not an “exception.”¹² Second, misunderstanding examples to be exceptions can result in the admission of evidence that should not be admitted under the rule, when evidence that is offered to prove one of the listed examples is presumed to be admissible. For example, under Rule 404(b)(1), evidence

5. *Id.*

6. See Symposium, *The Federal Rules of Evidence*, 71 NW. U. L. REV. 634, 636 (1977).

7. See *United States v. Lattner*, 385 F.3d 947, 956 (6th Cir. 2004) (“When considering whether the Junction and Wesson Evidence were introduced for a proper purpose under Rule 404(b), it must be remembered that Rule 404(b) is an inclusionary, rather than exclusionary, rule.”).

8. See FED. R. EVID. 410.

9. See *infra* Parts II–III.

10. See *infra* Parts II–III.

11. See FED. R. EVID. 407.

12. See *infra* Part II.B.1.

of “other acts” is not admissible for the purpose of proving action in conformity with character.¹³ Rule 404(b)(2) provides a long list of examples of non-prohibited purposes, including, for example, intent.¹⁴ However, in many cases, evidence of “other acts” is relevant to the issue of intent only because it proves action in conformity with character, which should mean that the evidence is inadmissible.¹⁵ Many courts, however, simply conclude that the evidence is offered to prove intent and therefore is not inadmissible under Rule 404(b).¹⁶

Part II of this Article examines three “specialized relevance rules”—Rules 407, 408, and 411—that are commonly misunderstood to be exclusionary rules because their examples of non-prohibited purposes are misunderstood to be exceptions.¹⁷ Part III discusses Rule 404(b), which prohibits “character evidence” and which also is commonly misunderstood to be an exclusionary rule because its examples of non-prohibited purposes are misunderstood to be exceptions.¹⁸ For all of these rules, the proposed solution is to delete the specific examples of non-prohibited purposes and instead state only that evidence may be admissible for all purposes other than the specifically prohibited purposes.¹⁹

II. THE SPECIALIZED RELEVANCE RULES

A. *Examples Are Not Exceptions*

Under Rule 402, relevant evidence is admissible, subject to the additional Federal Rules of Evidence, as well as other federal rules such as the United States Constitution.²⁰ Among the many rules that make relevant evidence inadmissible are a set of rules collectively referred to

13. FED. R. EVID. 404(b)(1).

14. FED. R. EVID. 404(b)(2).

15. *See infra* notes 92-99 and accompanying text.

16. *See infra* notes 92-99 and accompanying text.

17. *See infra* Part II.

18. *See infra* Part III.

19. *See infra* Parts II–III.

20. Rule 402 provides:

Relevant evidence is admissible unless any of the following provides otherwise:

- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

FED. R. EVID. 402.

as “the specialized relevance rules.”²¹ These rules specify that a particular kind of evidence, such as evidence of subsequent remedial measures or offers to pay medical expenses, is inadmissible if offered for a particular purpose, such as proving negligence.²² These rules reflect a determination that when offered for a prohibited purpose, the probative value of the evidence is substantially outweighed by risk of unfair prejudice.²³ Additionally, the rules all are intended to promote public policy in favor of the excluded evidence. For example, Rule 407, which makes evidence of subsequent remedial measures inadmissible for the purpose of proving negligence, is intended to encourage parties to take steps to prevent future injuries without fear that those safety-enhancing steps will be used as evidence of prior culpability.²⁴

All but one of these rules has the same inclusionary structure: a specific kind of evidence is inadmissible for a particular purpose or set of purposes but remains admissible for all other purposes.²⁵ For example, Rule 407 prohibits evidence of subsequent remedial measures for the purpose of proving “negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.”²⁶ The rule then states that evidence of subsequent remedial measures may be admissible “for another purpose.”²⁷ Finally, this rule, like most inclusionary rules, provides examples of other purposes for which evidence of subsequent remedial measures may be admissible: “such as impeachment or—if disputed—proving ownership, control, or the feasibility of precautionary measures.”²⁸ Similarly, Rule 411 first states: “Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully.”²⁹ The rule then states: “But the court may admit this

21. See, e.g., CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 4.11, at 183 n.8 (3d ed. 2003) (describing the specialized relevance rules).

22. FED. R. EVID. 407, 409.

23. See CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE: PRACTICE UNDER THE RULES § 4.11, at 203 n.8 (2d ed. 1999) (“Each of these five rules reflects the rule-writers’ judgment that, as a matter of law, the evidence it governs fails a Rule 403 weighing test.”).

24. See FED. R. EVID. 407 advisory committee’s note (noting as a “ground for exclusion,” “a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety”).

25. Rule 410 departs from the structure of the other conditional relevance rules, identifying a certain kind of evidence—evidence of pleas, plea discussions, and related statements—as inadmissible for all purposes other than two specifically identified exceptions. See FED. R. EVID. 410. The exceptions of Rule 410(b) really are exceptions, rather than examples of permitted uses.

26. FED. R. EVID. 407.

27. *Id.*

28. *Id.*

29. FED. R. EVID. 411.

evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control."³⁰

This Article proposes that the final provisions of Rule 407 and 411, which provide a list of examples of permitted purposes for which a court may admit evidence, are asking for trouble—specifically, the trouble that courts will interpret the list not as examples, but as a specially enumerated, exhaustive list of exceptions. Cases in which courts make this mistake are presented in Part II.B.³¹

Rule 408 suffers from the same flaw as 407 and 411, as well as an additional flaw of its own. Like Rules 407 and 411, Rule 408 makes inadmissible a particular kind of evidence—evidence of compromise offers and conduct or statements made during compromise negotiations—if offered for a particular purpose—the purpose of proving or disproving the validity of a disputed claim or the purpose of impeachment.³² The rule then states that the evidence may be admissible “for another purpose.”³³ Finally, the rule provides some examples of other purposes for which the evidence may be admissible: “such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”³⁴

Additionally, Rule 408 mistakenly and confusingly labels as “exceptions” the examples of non-prohibited purposes.³⁵ The “exceptions” label is mistaken and confusing because the examples of non-prohibited purposes are admissible not because they are exceptions; they are admissible simply because they are not prohibited. As the Advisory Committee’s Note explains, “Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule.”³⁶

Admitting evidence for a purpose that is not prohibited by the rule is not an exception to the rule. To correct this specific error of Rule 408(b) and also to avoid the misconstruction of the lists of examples of non-prohibited purposes found in Rules 407 and 411, this Article proposes that another of the specialized relevance rules—Rule 409—should serve as a model for rules that exclude a particular kind of

30. *Id.*

31. *See infra* Part II.B.

32. FED. R. EVID. 408.

33. *Id.*

34. *Id.*

35. This confusion was, somewhat ironically, created by the 2011 restylers, who changed what had been (properly) labelled “permitted uses” to (the now improperly labelled) “exceptions.” For a further discussion of this, see *infra* note 58 and accompanying text.

36. FED. R. EVID. 408 advisory committee’s note.

evidence when offered for a particular purpose. Under Rule 409, “[e]vidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.”³⁷ Rule 409 simply states the rule—that a particular kind of evidence is inadmissible if offered for a particular purpose. The rule trusts judges (and everyone else) to understand the fairly straightforward proposition that if the particular evidence is not offered for the particular prohibited purpose, then the rule does not apply. The rule does not provide any potentially misleading lists of examples of non-prohibited purposes, and it does not mistakenly label those examples “exceptions.”³⁸

B. Evidence of Confusion

1. Rule 407: Subsequent Remedial Measures

Rule 407 prohibits the admission of evidence of subsequent remedial measures for the purpose of proving “negligence; culpable conduct; a defect in a product or its design; or a need for a warning or instruction.”³⁹ The rule additionally asserts: “But the court may admit this evidence for another purpose, such as impeachment or— if disputed—proving ownership, control, or the feasibility of precautionary measures.”⁴⁰ Many courts refer to this list of examples of non-prohibited purposes as “exceptions.”⁴¹ Some courts have even referred to the examples as particular exceptions, such as “the impeachment exception”⁴² and “the feasibility exception.”⁴³

37. FED. R. EVID. 409.

38. *See id.*

39. FED. R. EVID. 407.

40. *Id.*

41. *See, e.g.,* Kaczmarek v. Allied Chem. Corp., 836 F.2d 1055, 1060 (7th Cir. 1987) (“Rule 407 of the Federal Rules of Evidence forbids (with various exceptions) the introduction of evidence of repairs or other safety measures taken after an accident.”); Rostvet v. Lock City Transp. Co., No. 2:11-CV-21, 2014 WL 11531331, at *1 (D.N.D. Mar. 26, 2014) (“Each of the identified items are remedial measures covered by Rule 407 of the Federal Rules of Evidence. As such, these remedial measures are inadmissible unless they fall within some recognized exception to the rule.”); Jenks v. Textron, Inc., No. 09-CV-205-JD, 2012 WL 2679495, at *12 (D.N.H. July 6, 2012) (“Unless Textron opens the door to one of the exceptions under Rule 407, evidence of the warnings applied to E-Z-Go cars in 2008 and 2010 is barred by Rule 407.”).

42. *See, e.g.,* Minter v. Prime Equip. Co., 451 F.3d 1196, 1213 (10th Cir. 2006) (“Consequently, the evidence of Prime Equipment’s subsequent repair work on the guardrail does not fall within the impeachment exception to Rule 407.”); Petree v. Victor Fluid Power, Inc., 887 F.2d 34, 38 (3d Cir. 1989) (“In this opinion we shall first survey the use of the impeachment exception to Rule 407 and then discuss its relevance to the merits of this case.”); McLeod v. Dollar Gen., No. 13-3113, 2014 WL 4634962, at *2 (E.D. Pa. Sept. 16, 2014) (“The U.S. Court of Appeals for the Third Circuit has recognized the impeachment exception to F.R.E. 407.”); McLaurin v. Church Mut. Ins. Co., No. 2:12CV235-KS-MTP, 2014 WL 232116, at *4 (S.D. Miss. Jan. 22, 2014)

Courts make two kinds of mistakes about the examples of non-prohibited purposes. First, some courts seem to consider the list to be exhaustive. For example, the United States Court of Appeals for the Fifth Circuit recently stated: “As a result, because the Bumbo was being used contrary to its warnings by being placed on an elevated surface, the 2012-recall-related evidence does not fall within one of the exceptions in Rule 407.”⁴⁴ Similarly, a United States District Court in Iowa recently reasoned that it could not admit evidence because it was offered for a purpose not included in Rule 407’s list of examples:

Finally, Midwest has not suggested that the evidence will be used to impeach TCTW’s witnesses. Instead, Midwest argues that this subsequent remedial measure is probative of the parties’ intent and understanding of the bills of lading. This is not one of the recognized exceptions to Rule 407—Midwest has not provided any authority permitting the court to admit the evidence on these grounds and the court is unaware of any. Accordingly, the court finds that evidence of TCTW’s subsequent practice should be excluded from evidence.⁴⁵

Additionally, some courts refer to “exceptions” in a way that suggests that the courts consider impeachment or feasibility, for example, to be true exceptions to the prohibition against admitting evidence of subsequent remedial measures for the purpose of proving negligence. For example, the United States Court of Appeals for the Fourth Circuit stated: “Evidence of subsequent remedial measures,

(“Second, even if Church Mutual’s interpretation of Mr. Schrader’s testimony were sound and did not require speculative assumptions, evidence of the truss upgrades would fall outside of Rule 407’s impeachment exception.”); *Lidle v. Cirrus Design Corp.*, 278 F.R.D. 325, 332 (S.D.N.Y. 2011) (“At trial, the Court found that nothing in Waddick’s testimony was inconsistent with these documents and that these documents did not fall within the impeachment exception to the rule forbidding the introduction of subsequent remedial measures.”); *Jones v. H.W.C. Ltd.*, No. CIV.A. 01-3818, 2003 WL 42146, at *4 (E.D. La. Jan. 3, 2003) (“The Court finds, however, that evidence of defendant’s subsequent remedial measures is admissible under the impeachment exception.”).

43. See, e.g., *Maharaj v. GEICO Cas. Co.*, No. 12-80582-CIV, 2015 WL 11279830, at *7 (S.D. Fla. Mar. 12, 2015) (“As noted above, the feasibility exception to Rule 407 is inapplicable here.”); *Wielgus v. Ryobi Techns., Inc.*, No. 08 CV 1597, 2012 WL 3005306, at *6 (N.D. Ill. July 23, 2012) (“But the court, nevertheless, finds that Rule 407 does not bar the evidence from admission because the issue of feasibility is disputed in this case and Rule 407’s exception regarding feasibility applies.”).

44. *Blythe v. Bumbo Int’l Trust*, 634 F. App’x 944, 951 (5th Cir. 2015); accord *Minter v. Prime Equip. Co.*, No. CIV-02-132-KEW, 2007 WL 2703093, at *1 (E.D. Okla. Sept. 14, 2007) (“The Tenth Circuit Court of Appeals in its decision of June 29, 2006 affirmed this Court’s determination that such evidence represents a subsequent remedial measure, not subject to any of the stated express exceptions for admission.”); *Rollins v. Bd. of Governors for Higher Educ.*, 761 F. Supp. 939, 942 (D.R.I. 1991) (“Once again, however, I caution the defendants that this evidence will be admissible should it fall within one of the exceptions to Rule 407.”).

45. *Midwest Direct Logistics, Inc. v. Twin City Tanning Waterloo, LLC*, No. 15-CV-2013-LRR, 2016 WL 4467913, at *5 (N.D. Iowa Aug. 23, 2016).

however, may not be used to show negligence unless under an exception in Rule 407.⁴⁶ Similarly, the United States Court of Appeals for the Eighth Circuit stated: “Under Federal Rule of Evidence 407, a company’s postaccident design change is inadmissible to prove fault—absent some exception.”⁴⁷ This reasoning is, of course, flawed if it does reflect a belief that evidence of subsequent remedial measures may be used to prove negligence.

In order to curb the tendency of courts to misconstrue Rule 407’s examples of non-prohibited purposes as exceptions, this Article proposes simply deleting the examples of non-prohibited purposes. Specifically, the proposed revised rule reads:

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

~~But the court may admit this evidence for another purpose, such as impeachment or if disputed proving ownership, control, or the feasibility of precautionary measures.~~

2. Rule 411: Liability Insurance

Rule 411 prohibits the admission of evidence of liability insurance for the purpose of proving negligence or other wrongdoing.⁴⁸ The public policy that underlies Rule 411 is the desire to encourage people to obtain liability insurance without fear that the insurance will be used as evidence of negligence.⁴⁹ Rule 411 also includes a statement that the evidence may be admissible if offered for a non-prohibited purpose, and then provides a list of examples of non-prohibited purposes: “Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice or proving agency, ownership, or control.”⁵⁰

46. *Albrecht v. Balt. & Ohio R.R. Co.*, 808 F.2d 329, 331 (4th Cir. 1987).

47. *J.B. Hunt Transp., Inc. v. Gen. Motors Corp.*, 243 F.3d 441, 445 (8th Cir. 2001).

48. FED. R. EVID. 411.

49. *See id.* advisory committee’s note (1972 Proposed Rules) (“Knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds.”).

50. FED. R. EVID. 411.

As with Rule 407, courts often mistakenly refer to Rule 411's examples of non-prohibited purposes as "exceptions."⁵¹ Some courts further mistakenly refer to the "exceptions" as "narrow." For example, a United States District Court in Montana stated: "[T]he Court agrees that evidence of Townsquare's liability insurance must be excluded pursuant to Rule 411, unless it is offered for one of the narrow exceptions detailed in Rule 411."⁵² A similar mistake made by some courts is to require the purpose for offering the evidence to "fit within an exception"⁵³ or to be an "enumerated exception."⁵⁴

In order to curb the tendency of courts to misconstrue Rule 411's examples of non-prohibited purposes as exceptions, this Article proposes simply deleting the examples of non-prohibited purposes. Specifically, the proposed revised rule reads:

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. ~~But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.~~

3. Rule 408: Compromise Offers and Negotiations

Rule 408(a) prohibits the admission of a broad range of evidence surrounding compromise offers and negotiations for the purpose of

51. See, e.g., *Blanke v. Alexander*, 152 F.3d 1224, 1231 (10th Cir. 1998) ("Rule 411 contains a general prohibition against admission of evidence concerning liability insurance, with exceptions that are not relevant here."); *Dodd v. Simmons*, No. 1:12-CV-00087, 2015 WL 1293256, at *5 (M.D. Tenn. Mar. 23, 2015) ("This ruling does not prohibit the parties from offering evidence of liability insurance for any of the exceptions listed in Rule 411."); *Estate of Gee ex rel. Beeman v. Bloomington Hosp.*, No. 1:06-CV-00094-TWP-TAB, 2012 WL 639517, at *5 (S.D. Ind. Feb. 27, 2012) ("If Plaintiff believes an exception to Rule 411 applies regarding specific evidence about liability insurance, before offering such evidence, counsel must request a hearing outside the presence of the jury."); *Fid. Nat. Title Ins. Co. of N.Y. v. Intercounty Nat. Title Ins. Co.*, No. 00 C 5658, 2003 WL 2005233, at *2 (N.D. Ill. Apr. 30, 2003) ("Absent evidence supporting an exception to Rule 411, Fidelity's motion to bar evidence relating to its insurance coverage must be granted."); *Dobbins v. Crain Bros., Inc.*, 432 F. Supp. 1060, 1069 (W.D. Pa. 1976) ("The existence of insurance is some evidence of such ownership and control which may properly be considered by the jury under the exception clause to Rule 411 of the Federal Rules of Evidence.")

52. *McDonald v. Townsquare Media, LLC*, No. CV 12-203-M-DLC, 2014 WL 12600456, at *6 (D. Mont. Mar. 11, 2014).

53. *Vanderford v. Hornbeck Offshore Servs., LLC*, No. CIV.A. 04-773, 2005 WL 6227364, at *2 (E.D. La. Jan. 24, 2005) ("Defendant's Objection to Plaintiff's Exhibit 9 (Insurance Policy issued to Hornbeck) is SUSTAINED, as the Court finds that the insurance policy does not fit within an exception to F.R.E. 411.")

54. *Nat'l Union Fire Ins. Co. of Pittsburgh v. L.E. Myers Co. Grp.*, 937 F. Supp. 276, 287 (S.D.N.Y. 1996) ("The parties are warned, however, not to attempt to introduce at trial evidence regarding the brokers' insurance that does not fall within an exception enumerated in Rule 411.")

either proving the validity or amount of a disputed claim or impeaching a witness.⁵⁵ The public policy that underlies Rule 408 is the desire to encourage parties to participate in compromise negotiations without fear that things that are said or done during compromise negotiations can be used by the opposing party should the negotiations fail and the dispute proceed to trial.⁵⁶ Like Rules 407 and 411, Rule 408(b) provides examples of non-prohibited purposes: “The court may admit this evidence for another purpose, such as proving a witness’s bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.”⁵⁷

The same confusion that surrounds courts’ interpretations and applications of the examples of non-prohibited purposes listed in Rules 407 and 411 is also evident in courts’ decisions regarding the Rule 408(b) examples of permitted uses. Since 2011, this confusion has been invited and reinforced by the language of Rule 408(b), which the Restyling Committee inexplicably decided to “restyle” from “permitted uses” to “exceptions.”⁵⁸ Many courts’ references to the “exceptions” imply that the courts view the specifically listed examples of permitted uses as having some special significance, as compared to non-prohibited

55. FED. R. EVID. 408(a).

56. *See id.* advisory committee’s note (1972 Proposed Rules) (“A more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes.”); *see also* *Trebor Sportswear Co. v. Ltd. Stores, Inc.*, 865 F.2d 506, 510 (2d Cir. 1989) (“In furtherance of the public policy of encouraging settlements and avoiding wasteful litigation, Rule 408 bars the admission of most evidence of offers of compromise and settlement.”).

57. FED. R. EVID. 408(b).

58. The unrestyled rule clearly stated that 408(b) presented examples of “permitted uses,” while the present 408(b) misleadingly calls these examples “exceptions.” The advisory committee’s note to the 2011 restyling does not explain why “permitted uses” was changed to “exceptions.” At least one scholar has observed that this change is substantively incorrect:

I have a couple of points at which I did like something in the old rule better than the restyled rule.

. . . .

The other thing I had some doubts about is Rule 408, compromise offers. Many of our rules, from the hearsay rule to the character evidence rule to subsequent remedial measures, start by saying that a certain use is prohibited, but other uses are permitted. And in those cases the permitted uses are not exceptions to the prohibited use. It’s not that you can use it for a prohibited purpose because of an exception. Permitted uses are something different from the prohibited use. Well, that’s what Rule 408 used to say. It used to say the prohibited use was proving the validity of the claim, and the permitted use was showing bias or prejudice or negating undue delay. Now it says that proving bias, and so on, is an exception. Well, if it’s really an exception, does that mean that the lawyer can say, not only does this show bias, but why would he have made that offer unless he realized his claim was weak? The rule allowing use of compromise offers to show bias is not an exception to the rule against using those offers to prove invalidity of the claim. It gives permission to use the evidence for a purpose other than proving invalidity.

Symposium, *The Restyled Federal Rules of Evidence*, 53 WM. & MARY L. REV. 1435, 1496-97 (2012) (statement of Professor Roger C. Park).

uses that are not specifically listed, with respect to deciding whether certain evidence is admissible. For example, a United States District Court in Pennsylvania recently stated: “Because Plaintiffs do not allege that their reasons for wishing to introduce testimony regarding the offers in compromise or statements made in connection therewith in this case include any of the specific exceptional situations referenced in Rule 408(b), Defendant’s motion [to exclude the evidence] will be granted.”⁵⁹ Similarly, a United States District Court in South Carolina stated:

Rule 408 explicitly provides for certain exceptions under which evidence from settlement negotiations may be introduced, and if Plaintiff is in possession of evidence that would qualify as an exception under Rule 408(b), he is entitled by law to present it before a jury. The plain language of Rule 408 and the relevant caselaw interpreting the Rule, along with the present Order, should be sufficient to make it amply clear to both sides that in the absence of a clear exception, Rule 408 applies quite broadly to exclude any evidence produced as a result of settlement discussions between the parties.⁶⁰

In addition to misconstruing examples of permitted uses as enumerated exceptions, some courts have compounded this error by considering the “exceptions” to be “narrow” or “limited.” For example, a United States District Court in Montana stated that “evidence related to settlement negotiations may be admitted when offered in accordance with one of the narrow exceptions outlined in Federal Rule of Evidence 408(b).”⁶¹ Similarly, a United States District Court in Texas stated that “the letter . . . is accordingly inadmissible under Federal Rule of Evidence 408(a) as evidence of Defendant’s liability, and none of the limited exceptions to inadmissibility set forth in Federal Rule of Evidence 408(b) apply.”⁶²

Of course, courts must be careful to apply Rule 408 so as to promote its purpose of encouraging settlement negotiations. Additionally, it is true that Rule 408(a)’s prohibited purposes are broader than the prohibited purposes of Rules 407 and 411.⁶³ However, courts should also be careful not to apply Rule 408 more broadly than is

59. *Clemens v. N.Y. Cent. Mut. Fire Ins. Co.*, No. 3:13-CV-2447, 2015 WL 3742130, at *3 (M.D. Pa. June 15, 2015).

60. *Polk v. BP Amoco Chem. Co.*, 586 F. Supp. 2d 619, 623 (D.S.C. 2008).

61. *McDonald v. Townsquare Media, LLC*, No. CV 12-203-M-DLC, 2014 WL 12600456, at *4 (D. Mont. Mar. 11, 2014).

62. *Helen of Troy Ltd. v. John Paul Mitchell Sys., Inc.*, No. EP-05-CA-365-FM, 2007 WL 1858819, at *7 n.27 (W.D. Tex. June 26, 2007).

63. *Compare* FED R. EVID. 408(a), *with* FED R. EVID. 407, 411.

warranted; otherwise, parties may abuse the rule to gain an unfair advantage and thereby also undermine the purpose of the rule. For example, the United States Court of Appeals for the Seventh Circuit has observed:

It would be an abuse of Rule 408 to allow one party during compromise negotiations to lead his opponent to believe that he will not enforce applicable time limitations and then object when the opponent attempts to prove the waiver of time limitations. . . . Rule 408's spirit and purpose must be considered in its application. The purpose of Rule 408 is to encourage settlements. Settlements will not be encouraged if one party during settlement talks seduces the other party into violating the contract and then, when a settlement ultimately is not reached, accuses the other party at trial of violating the contract. To use Rule 408 to block evidence that the violation of the contract was invited would be unfair.⁶⁴

Other courts have similarly observed that applying Rule 408's prohibited purposes too broadly can lead to abuse of the rule. For example, in ruling that the defendant could present certain evidence that was created during settlement negotiations, a United States District Court in Illinois explained:

It would be an abuse of Rule 408 to allow a plaintiff during compromise negotiations to complicate and delay resolution of the matter, point to that delay as evidence of the defendant's bad faith, and then prevent the defendant from explaining its actions because settlement discussions were involved. The materials submitted by the Defendant will only be considered to the extent they are offered to rebut the Plaintiff's allegations of undue delay and bad faith.⁶⁵

Similarly, a United States Bankruptcy Court in Texas stated, in ruling that statements made during settlement negotiations were admissible under Rule 408 because they were offered for the purpose of proving estoppel: "It would be unfair for Savoy to make representations to the Debtors that the Debtors clearly relied upon, and then hide behind Rule 408. The rule was not written for such purposes."⁶⁶

64. *Bankcard Am., Inc. v. Universal Bancard Sys., Inc.*, 203 F.3d 477, 484 (7th Cir. 2000) (citation omitted) (first citing *Cent. Soya Co. Inc. v. Epstein Fisheries, Inc.*, 676 F.2d 939, 944 (7th Cir. 1982); and then citing *Winchester Packaging, Inc. v. Mobil Chem. Co.*, 14 F.3d 316 (7th Cir. 1994)).

65. *Thompson v. Safeway, Inc.*, No. 01 C 3260, 2002 WL 500547, at *2 (N.D. Ill. Apr. 2, 2002) (citation omitted) (quoting *Bankcard*, 203 F.3d at 484).

66. *In re Nucentrix Broadband Networks, Inc.*, 314 B.R. 581, 588 (Bankr. N.D. Tex. 2004).

Given the “strong public policy” in favor of promoting settlement negotiations,⁶⁷ some courts have suggested that it is better to err on the side of excluding rather than admitting evidence of settlement negotiations. For example, the United States Court of Appeals for the Tenth Circuit stated that “when the issue is doubtful, the better practice is to exclude evidence of compromises or compromise offers.”⁶⁸ However, even assuming the validity of this contention, that it is better to erroneously exclude than to erroneously admit evidence of settlement negotiations, the question whether to exclude or admit evidence of settlement negotiations for a non-prohibited purpose should be decided by applying Rule 403, not by expanding Rule 408. Once a trial court has determined that evidence of settlement negotiations is being offered for a non-prohibited purpose, the court can then weigh the risk that the jury will use the evidence for the prohibited purpose and thereby undermine the public policy in favor of promoting settlement negotiations against the probative value of the evidence for the non-prohibited purpose.⁶⁹

In sum, the 408(b) “exceptions” are subject to being misconstrued as limited, specifically-enumerated grounds for admission rather than as examples of non-prohibited purposes. To resolve this confusion, it is proposed that Rule 408 be rewritten to read:

Rule 408. Compromise Offers and Negotiations

(a) ~~Prohibited Uses.~~ Evidence of the following is not admissible — on behalf of any party — either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

- (1) furnishing, promising, or offering — or accepting, promising to accept, or offering to accept — a valuable consideration in compromising or attempting to compromise the claim; and
- (2) conduct or a statement made during compromise negotiations about the claim — except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

67. See *supra* note 56.

68. *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987).

69. See JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S FEDERAL EVIDENCE § 408.08, at 408-33, 408-34 (Mark S. Brodin & Matthew Bender eds., 2d ed. 2017) (“The almost unavoidable impact of the disclosure of such evidence is that the jury will consider the offer or agreement as evidence of a concession of liability. . . . The danger that the evidence will be used for the wrong purpose is especially great when the witness being impeached is one of the litigants.”); see also *Williams v. Chevron U.S.A., Inc.*, 875 F.2d 501, 504 (5th Cir. 1989) (explaining the exclusion of evidence offered for impeachment purposes was not an abuse of discretion when “it [was] undoubtedly possible that the jury would have confused its purpose for that precluded by Rule 408”).

~~(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.~~

III. RULE 404(B): CRIMES, WRONGS, OR OTHER ACTS

Rule 404(b)(1) prohibits the admission of evidence of “crimes, wrongs, or other acts” for the purpose of proving that someone possessed a particular kind of character and then acted in accordance with that character.⁷⁰ The rule exists to guard against the possible overvaluation of such character evidence by jurors. As the Supreme Court explained in *Michelson v. United States*, a 1948 case that has come to be considered a landmark regarding the use of character evidence:

The State may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudge 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 issues, unfair surprise and undue prejudice.⁷¹

The risk of unfair prejudice from the use of propensity evidence has been recognized by numerous courts. For example, the Supreme Court in *Old Chief v. United States* explained: “Although . . . ‘propensity evidence’ is relevant, the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment—creates a prejudicial effect that outweighs ordinary relevance.”⁷² Or as the United States Court of Appeals for the Tenth Circuit stated: “Showing that a man is generally bad has never been under our system allowable. The defendant has a right to be tried on the truth of the specific charge contained in the indictment.”⁷³

70. FED. R. EVID. 404(b).

71. *Michelson v. United States*, 335 U.S. 469, 475-76 (1948) (footnotes omitted).

72. *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (alteration in original) (quoting *United States v. Moccia*, 681 F.2d 61, 63 (1st Cir. 1982)).

73. *United States v. Gilliland*, 586 F.2d 1384, 1389 (10th Cir. 1978); *accord Boyd v. United States*, 142 U.S. 450, 458 (1892).

The structure of Rule 404(b) is the same as the structure of Rules 407, 408, 409, and 411: the rule prohibits a particular kind of evidence—evidence of “crimes, wrongs, or others acts”—if offered for a particular purpose—proving character to then prove action in accordance with that character.⁷⁴ Logically, if the evidence of “crimes, wrongs, or others acts” is offered for a purpose—any purpose—other than the particular prohibited purpose, then it is not barred by the rule. But also like Rules 407, 408, and 411, Rule 404(b) includes a list of examples of purposes that are not prohibited: “This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.”⁷⁵

Many courts have mistakenly referred to this list as a list of “exceptions.”⁷⁶ Some courts further refer to the examples of non-prohibited purposes as “articulated,”⁷⁷ “carved out,”⁷⁸ “enumerated,”⁷⁹

Proof of [other crimes] only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death. . . . However depraved in character, and however full of crime their past lives may have been, the defendants were entitled to be tried upon competent evidence, and only for the offense charged.

Boyd, 142 U.S. at 458.

74. See FED. R. EVID. 404(b)(1).

75. FED. R. EVID. 404(b)(2).

76. See, e.g., *United States v. Ramer*, Crim. No. 14-10-GFVT, 2015 WL 1976436, at *2 (E.D. Ky. May 4, 2015) (“Like all rules, however, Rule 404(b) is not without exception.”); *Lamkin v. Thaler*, No. 4:12-CV-442-A, 2012 WL 4900896, at *3 (N.D. Tex. Oct. 15, 2012) (“Next, we must address the question of whether the extraneous offense evidence was admissible as an exception under Rule 404(b).”); *Rhein v. McCoy*, No. 09-CV-02386-REB-MEH, 2011 WL 4345872, at *4 (D. Colo. Sept. 16, 2011) (“None of the exceptions listed in Rule 404(b) is applicable, based on the record in this case.”); *United States v. Carneglia*, 256 F.R.D. 104, 111 (E.D.N.Y. 2009) (“A trial court has broad discretion to admit evidence pursuant to Rule 404(b) exceptions.”).

77. See, e.g., *United States v. Lionetti*, 298 F. App’x 212, 215 (3d Cir. 2008) (“Second, that the evidence might have been relevant to Lionetti’s defense does not, in itself, render the evidence admissible; it must still come within one of the articulated exceptions in Rule 404(b).”).

78. See, e.g., *United States v. Barr*, No. 86-5249, 1988 WL 26631 (Table), at *4 (9th Cir. Mar. 24, 1988) (“The government contends, and correctly so, that this testimony is admissible to prove motive, opportunity, intent, preparation and plan under the exceptions carved out in Fed. R. Evid. 404(b).”); *Casares v. Bernal*, No. 08 CV 4198, 2011 WL 1988788, at *10 (N.D. Ill. May 20, 2011) (referring to “the exceptions carved out in Rule 404(b)"); *United States v. Local 1804-1, Int’l Longshoremen’s Ass’n*, 812 F. Supp. 1303, 1344 (S.D.N.Y. 1993) (“Although evidence of so-called ‘prior bad acts’ is not generally admissible as evidence of character, Fed. R. Evid. 404(b) carves out an exception where such evidence is offered to prove ‘intent.’”).

79. See, e.g., *United States v. Nowak*, 370 F. App’x 39, 42 (11th Cir. 2010) (“In this case, the district court did not abuse its discretion in denying Nowak’s motion *in limine* because all of the challenged evidence fell within the enumerated exceptions of Rule 404(b).”); *United States v. Cuch*, 842 F.2d 1173, 1176 (10th Cir. 1988) (“Furthermore, before such evidence is properly admitted it must tend to establish intent, knowledge motive or one of the enumerated exceptions; must have real probative value, not just possible worth; and must be reasonably close in time to the crime

“explicit,”⁸⁰ “express,”⁸¹ “recognized,”⁸² “specific,”⁸³ or “set out” “exceptions.”⁸⁴ For example, a United States District Court in California stated: “All of the evidence is . . . subject to Rule 404 and is inadmissible unless it satisfies one of the exceptions set out in Rule 404(b).”⁸⁵ Similarly, a United States District Court in Kentucky stated: “Such

charged.”); *CFTC v. Rosenberg*, 85 F. Supp. 2d 424, 437-38 (D.N.J. 2000) (“I conclude that ‘intent’ is a proper evidentiary purpose for the admission of the Driskill evidence. Not only is intent an exception enumerated in Rule 404(b), but it is well-established that similar prior acts may be admitted to show a pattern of operation suggestive of intent where it is in fact an issue at trial.”); *United States v. Nagib*, 939 F. Supp. 653, 654 (E.D. Wis. 1996) (“The court further determined that this court should have identified the specific exception among those enumerated in Rule 404(b), Fed. R. Evid., permitting the receipt of certain bad acts evidence.”).

80. See, e.g., *United States v. Wright*, No. 94-60108, 1994 WL 574215, at *2 (5th Cir. Oct. 4, 1994) (“Evidence admitted to show identity or intent, however, is an explicit exception to the prohibition against otherwise inadmissible character evidence.”); *Estate of Reynolds v. City of Detroit*, No. 08-CV-14909, 2011 WL 6031937, at *4 n.1 (E.D. Mich. Dec. 5, 2011) (“Plaintiff is clear that the purpose of admitting the Board Minutes is to show Defendant’s knowledge of Randall’s criminal history, not as character evidence against Randall. This falls squarely within the exception explicitly stated in Rule 404(b).”).

81. See, e.g., *United States v. Curescu*, 674 F.3d 735, 742 (7th Cir. 2012) (“The use of evidence of prior crimes to show ‘absence of mistake’ is an express exception to the prohibition of prior-crimes evidence.”); *United States v. Fleming*, 290 F. App’x 946, 948 (7th Cir. 2008) (discussing admissibility of evidence “when one of the express exceptions to Rule 404(b) applies”); *United States v. Smith*, 54 F. App’x 282, 283 (9th Cir. 2003) (“This evidence falls under the express 404(b) exception to the exclusion of prior bad acts evidence . . .”).

82. See, e.g., *Hance v. Karlis*, 94 F.3d 655 (10th Cir. 1996) (“Consequently, we find no abuse in permitting the testimony under this exception expressly recognized under Fed. R. Evid. 404(b).”); *United States v. Ngo*, No. 91-50794, 1993 WL 18266, at *3 (9th Cir. Jan. 28, 1993) (“The evidence does not fall into any of the exceptions recognized in Rule 404(b).”); *United States v. Byrd*, 771 F.2d 215, 220 (7th Cir. 1985) (“In this circuit evidence of uncharged misconduct is admissible only if . . . it fits within an exception recognized by Rule 404(b) of the Federal Rules of Evidence . . .”); *Singo v. Easterling*, No. 3:08-CV-00514, 2016 WL 2595125, at *18 (M.D. Tenn. May 5, 2016) (“The generally recognized exceptions to the rule allow evidence offered to prove motive, identity, intent, absence of mistake, opportunity, or a common scheme or plan.”); *Virgin Islands v. Lake*, No. ST-11-CR-35, 2011 WL 4442608, at *1 (V.I. Sept. 15, 2011) (“But, Rule 404(b) specifically permits the introduction of such evidence when relevant for the purpose of proving several recognized exceptions, including identity.”).

83. See, e.g., *United States v. Lamb*, 214 F. App’x 908, 915 (11th Cir. 2007) (“Subject to specific exceptions, Rule 404(b) provides that extrinsic evidence of other crimes, wrongs, or acts is not admissible to prove a defendant’s character in order to show action in conformity therewith.”); *Hill v. City of Chicago*, No. 06 C 6772, 2011 WL 3840336, at *3 (N.D. Ill. Aug. 30, 2011) (“Rule 404(b) does not specifically enumerate ‘modus operandi’ proof as an exception for similar act evidence but this court has approved the introduction of modus operandi evidence under the ‘identity’ exception to Rule 404(b).” (quoting *United States v. Connelly*, 874 F.2d 412, 417 n.7 (7th Cir. 1989))).

84. At least one law review writer has similarly fallen into this trap. See H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. PA. L. REV. 845, 857 (1982) (“[B]ecause the victim’s aggressiveness is clearly ‘pertinent’ to a defense of responsive attack, the federal rules classify it as an enumerated exception to the rule against the use of character evidence to prove consistent conduct.”).

85. *United States v. Sanchez*, No. CR 08-00836(A) ABC, 2011 WL 6090164, at *8 (C.D. Cal. Dec. 5, 2011).

extrinsic evidence of criminal activity is inadmissible absent an enumerated exception under FRE 404(b).⁸⁶ Relatedly, some courts have referred to the particular examples of non-prohibited purposes as specific named exceptions, such as “the opportunity exception,”⁸⁷ the “motive exception,”⁸⁸ the “intent exception,”⁸⁹ “the absence of mistake or accident exception,”⁹⁰ and “the knowledge exception.”⁹¹

86. *United States v. Broecker*, Crim. Action No. 11-97-C, 2012 WL 2050251, at *3 (W.D. Ky. June 6, 2012).

87. *See, e.g.*, *United States v. Slaughter*, 248 F. App'x 210, 212 (2d Cir. 2007) (“The evidence here was properly admitted under the opportunity exception of FRE 404(b).”); *Atlantic Richfield Co. v. IMCO Gen. Const. Co.*, No. C01-1310L, 2005 WL 6762854, at *2 (W.D. Wash. Jan. 27, 2005) (“Evidence regarding how IMCO conducted its operations at the Dakin–Yew construction site may be admissible under the ‘opportunity’ exception to Fed. R. Evid. 404(a).”).

88. *See, e.g.*, *Sims v. Blot*, 354 F. App'x 504, 507 (2d Cir. 2009) (“The evidence of Sims’s prison conduct was admissible under 404(b), primarily under the ‘proof of motive’ exception.” (citing FED. R. EVID. 404(b))); *United States v. May*, No. 94-5268, 1995 WL 520767 (Table), at *1 (4th Cir. 1995) (“In these circumstances, evidence of the Kentucky murder charge fell within the ‘motive’ exception to Rule 404(b).”); *United States v. Hernandez*, 780 F.2d 113, 117 (D.C. Cir. 1986) (“As to Hernandez, evidence of the fight clearly qualified under the ‘motive’ exception of Rule 404(b).”).

89. *See, e.g.*, *United States v. Teran*, 496 F. App'x 287, 293 n.* (4th Cir. 2012) (“Teran’s prior firearms conviction is admissible under the ‘intent’ exception to bad character evidence.”); *United States v. Zeuli*, 725 F.2d 813, 816 (1st Cir. 1984) (“We agree with the Government that the ‘intent’ exception to Rule 404(b) justifies the trial court’s decision to admit the evidence in this case.”); *Hooks v. Langston*, No. 6:05CV065, 2007 WL 1831800, at *5 (S.D. Ga. June 25, 2007) (ruling that “prior, similar beatings by Langston can be admitted to show Langston’s intent to harm Hooks when he handcuffed him, so they will be admitted ‘under the “intent”’ exception to the general rule against character evidence” (quoting *Carson v. Polley*, 689 F.2d 562, 572 (5th Cir. 1982))).

90. *See, e.g.*, *Young v. Rabideau*, 821 F.2d 373, 380 (9th Cir. 1987) (“The ‘absence of mistake or accident’ exception to Rule 404(b) is a close corollary of the ‘intent’ exception: evidence of prior misconduct may be admissible for the purpose of showing that an action was intentional and not mistaken or accidental.”); *United States v. Hadaway*, 681 F.2d 214, 220 (4th Cir. 1982) (Widener, J., dissenting) (“Here, the court below and the majority both found that the proffered evidence met the motive and intent exceptions of Rule 404(b). I disagree.”).

91. *See, e.g.*, *United States v. Hankins*, 94 F. App'x 507, 510 (9th Cir. 2004) (“In sum, the government’s evidence relating to his prior bad act on March 17, 2001 did not tend to prove a material point and was not sufficiently similar to the presently charged offense, and thus did not qualify under the ‘knowledge’ exception to Rule 404(b).”); *United States v. Paguio*, 114 F.3d 928, 931 (9th Cir. 1997) (“The evidence was admissible to show knowledge of the limited extent of her borrowing capacity, under the ‘knowledge’ exception in the second sentence of Rule 404(b).”); *United States v. Collins*, 764 F.2d 647, 653 (9th Cir. 1985) (“Since the district court found that there was evidence of large cash deposits during the course of Collins’ hearts of palm importation efforts which was relevant to her claims that she was ignorant of the eight pounds of cocaine which she received, the evidence would be properly admissible under the ‘knowledge’ exception to the rule.”); *Lewis v. Triborough Bridge*, No. 97 CIV. 0607 (PKL), 2001 WL 21256, at *3 (S.D.N.Y. Jan. 9, 2001) (“Moreover, evidence of Mr. Senesi’s pornographic video watching would surely fall under Rule 404(b)’s ‘knowledge’ exception, demonstrating that the TBTA knew that Mr. Senesi may not have been the appropriate person to investigate plaintiffs’ claims based on his reputation for pornography.”); *see also* *United States v. Sussman*, 709 F.3d 155, 175 (3d Cir. 2013) (“‘Knowledge’ and ‘intent’ are also both exceptions under Federal Rule of Evidence 404(b)

In some cases, considering the list of examples to be a list of exceptions seems to have facilitated—perhaps even inappropriately “fast-tracked”—the admission of certain evidence, when the proponent of the evidence claimed that the evidence was being offered for a purpose that is included in the list of examples. For example, a United States District Court in Pennsylvania stated: “The evidence is not excludable under Rule 404(b) because the rule contains an exception for intent.”⁹² Similarly, the United States Court of Appeals for the Fifth Circuit stated: “The close proximity of the marijuana to the cocaine supports an inference that Brooks knew of the drugs and intended illegally to bring them into the United States. Accordingly, this evidence fits within one of the rule 404(b) exceptions.”⁹³ The United States Court of Appeals for the First Circuit has stated: “Rule 404(b)(2) specifically permits the admission of a prior conviction to prove intent, and we have repeatedly upheld the admission of prior drug dealing by a defendant to prove a present intent to distribute.”⁹⁴ The United States Court of Appeals for the Ninth Circuit stated:

Smith was on probation for sexual assault of a child in Colorado. The evidence had probative value as to Smith’s knowledge and motive for his actions as well as the absence of mistake. These were at issue. This evidence falls under the express 404(b) exception to the exclusion of prior bad acts evidence⁹⁵

A leading treatise on the Federal Rules of Evidence has observed that “courts on occasion have admitted other-acts evidence almost automatically, without any real analysis, if they find it fits within one of the categories specified in Rule 404(b).”⁹⁶ Some scholars argue that such almost-automatic admission occurs more often than occasionally.⁹⁷

permitting the use of the defendant’s prior ‘Crimes, Wrongs, or Other Acts.’”); *United States v. Moore*, 641 F.3d 812, 822-23 (7th Cir. 2011) (ruling that the trial court erred “because it replaced the ‘opportunity’ exception with the ‘lack of mistake’ exception during its delivery of the final instructions at the close of evidence”).

92. *Lensing v. Potter*, No. 1:03-CV-575, 2010 WL 2670785, at *5 (W.D. Mich. July 1, 2010); *accord* *United States v. Holloway*, 740 F.2d 1373, 1377 (6th Cir. 1984) (“The evidence in question here was clearly probative of the absence of mistake and thus came within one of the exceptions stated in Rule 404(b).”).

93. *United States v. Brooks*, 670 F.2d 625, 629 (5th Cir. 1982).

94. *United States v. Henry*, 848 F.3d 1, 8 (1st Cir. 2017).

95. *United States v. Smith*, 54 F. App’x 282, 283 (9th Cir. 2003).

96. WEINSTEIN & BERGER, *supra* note 69, § 404.20; *see also* 1 CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, *FEDERAL EVIDENCE* § 4.28 (4th ed. 2013) (“Perhaps because the issue so inundates courts hearing criminal appeals, published opinions often give it but passing mention, and it is lamentably common to see recitations of laundry lists of permissive uses, with little analysis or attention to the particulars.”).

97. *See* Edward R. Becker & Aviva Orenstein, *The Federal Rules of Evidence After Sixteen*

In other cases, the idea that the “enumerated” “exceptions” have some special power seems to have prompted the exclusion of evidence, when the proposed purpose was not one included as an example of a permitted purpose. For example, the United States Court of Appeals for the Seventh Circuit noted that “‘pattern’ is not listed in Rule 404(b) as an exception.”⁹⁸ The Court then proceeded to explain: “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.”⁹⁹ A similar reasoning is evident in some courts’ requirement that evidence “fit” one of these “exceptions” to be admissible. For example, a United States District Court in Louisiana stated: “Unless Plaintiffs’ counsel can fit evidence of prior accidents into one of 404(b)’s exceptions . . . only evidence pertaining to the January 5, 1998 accident in which decedent allegedly was critically injured shall be admissible.”¹⁰⁰

Some courts have further mistakenly considered the examples of non-prohibited purposes to define a universe of “limited” or “narrow” “exceptions.” For example, a United States District Court in Kansas referred to Rule 404(b) as “a narrow and specifically considered exception allowing for the use of evidence of specific *acts*,”¹⁰¹ while a

Years—The Effect of “Plain Meaning” Jurisprudence, the Need for an Advisory Committee on the Rules of Evidence, and Suggestions for Selective Revision of the Rules, 60 GEO. WASH. L. REV. 857, 904 (1992) (“Rule 404(b) . . . routinely enables the prosecutor to present highly prejudicial evidence of other criminal conduct by the defendant.”); Thomas J. Leach, “Propensity” Evidence and FRE 404: A Proposed Amended Rule with an Accompanying “Plain English” Jury Instruction, 68 TENN. L. REV. 825, 861 (2001) (“Non-propensity uses are invoked as loopholes in service of prohibited ‘propensity’ aims.”); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 184 (1998) (“[C]ourts routinely admit bad acts evidence precisely for its relevance to defendant propensity.”).

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

99. *Id.*; accord *United States v. Lott*, 442 F.3d 981, 983 (7th Cir. 2006) (“His motion *in limine* and later objection at trial relied on Fed. R. Evid. 404(b), which, except for certain listed exceptions, prohibits introduction of evidence of ‘other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.”); *Neuren v. Adduci*, 43 F.3d 1507, 1511 (D.C. Cir. 1995) (“The DL & A character evidence does not fall within any of the exceptions expressly contemplated by Rule 404(b).”).

100. *Walker v. Yellow Freight Sys., Inc.*, No. CIV. A. 98-3565, 1999 WL 955364, at *2 (E.D. La. Oct. 19, 1999); accord *Scandinavian Ship Supply Co. v. Blumenfeld*, No. CIV.A. 12-1732, 2015 WL 2335084, at *3 (E.D. Pa. May 14, 2015) (“Plaintiffs have failed to articulate how evidence of Blumenfeld’s alleged wrongdoing in unrelated circumstances is admissible under any of the 404(b)(2) exceptions.”); *Thompson v. City of New York*, No. 05 CIV. 3082(PAC)JCF, 2006 WL 298702, at *1 (S.D.N.Y. Feb. 7, 2006) (“Application of Rule 404(b) requires a two-part analysis: first, whether the proposed evidence fits within one of the exceptions provided by the Rule, and, second, even if it does, whether under Rule 403 the evidence’s probative value is substantially outweighed by the potential for jury confusion or prejudice.” (citing *Shaw v. City of New York*, No. 95 CIV. 9325 AJP, 1997 WL 187352, at *6 (S.D.N.Y. Apr. 15, 1997))).

101. *Schweitzer-Reschke v. Avnet, Inc.*, 881 F. Supp. 530, 533 (D. Kan. 1995).

United States District Court in Illinois stated that “Rule 404(b) must be implemented as a rule of prohibition with certain limited exceptions.”¹⁰² Similarly, the United States Court of Appeals for the District of Columbia Circuit stated: “This court has repeatedly emphasized the narrow scope of the ‘bad acts’ evidence exceptions under Rule 404(b) (such evidence may be used to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident’).”¹⁰³ In fact, however, the scope of potential non-prohibited purposes is quite broad; so long as the evidence of crimes, wrongs, or other acts is not being offered for the purpose of proving action in conformity with character, the evidence is not barred by Rule 404(b).¹⁰⁴

It is likely that many of these courts reached the right conclusion, either to admit or exclude the evidence. However, even if the conclusions were correct, it is disturbing that the explanations for the rulings were so flawed. For example, a United States District Court in Pennsylvania stated:

At oral argument, counsel for Mr. Lewis argued that the information Officer Leach possesses and testified to with respect to the falsification of police records by Defendant Samarco should be admissible pursuant to Rule 404(b), in that the evidence is probative of Defendant Samarco’s “truthfulness or untruthfulness.” This purpose, however, does not fit into any of the exceptions provided under Rule 404(b), in that the evidence would not be submitted to establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident. Officer Leach’s testimony is therefore not admissible pursuant to Rule 404(b).¹⁰⁵

Similarly, a United States District Court in Illinois stated: “Prior acts evidence may be used to show that defendants have an MO, but only if the MO tends to prove one of the exceptions listed in Rule 404(b).”¹⁰⁶ All of these explanations miss the key point of 404(b). The

102. *United States v. Gerard*, 926 F. Supp. 1351, 1358 (N.D. Ill. 1996); *accord United States v. Mtola*, 598 F. App’x 416, 420 (6th Cir. 2015) (“Rule 404(b)(2) provides exceptions to Rule 404(b)(1); these exceptions permit the Government to offer evidence of ‘a crime, wrong, or other act’ in limited circumstances—to prove ‘motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.’”).

103. *United States v. Nicely*, 922 F.2d 850, 856 (D.C. Cir. 1991).

104. *See Huddleston v. United States*, 485 U.S. 681, 687-88 (1988) (discussing the admissibility of evidence under Rule 404).

105. *Lewis v. City of Philadelphia*, No. CIV.A. 03-2310, 2004 WL 2674515, at *4 (E.D. Pa. Nov. 19, 2004); *accord United States v. Curran*, No. 2:09-CR-0325, 2011 WL 3421420, at *2 (W.D. Pa. Aug. 4, 2011) (“The Court finds that the government has not advanced a persuasive argument to establish that Curran’s marijuana use falls within any of the exceptions set forth in Rule 404(b).”).

106. *Newsome v. James*, No. 96 C 7680, 2000 WL 1047822, at *1 (N.D. Ill. July 27, 2000);

key question that must be asked under 404(b) is whether the evidence is being offered to prove action in accordance with character; if it is, then it is barred under 404(b) even if it is relevant to one of the examples of non-prohibited purposes, and if the evidence is not being offered to prove action in accordance with character, then it is not barred under 404(b) regardless of whether it is relevant to one of the examples of non-prohibited purposes. Of course, the evidence must be probative of some material issue, under Rule 401, but it does not matter at all whether the relevant issue is or is not one of the examples included in 404(b)(2).¹⁰⁷

Even more problematic, the examples of non-prohibited purposes presented in 404(b)(2) have been misconstrued by some courts not to be “exceptions” to the prohibition against evidence of crimes, wrongs, or other acts but instead to be “exceptions” to the prohibition against character evidence.¹⁰⁸ For example, a United States District Court in Arizona recently stated: “Rule 404(b) precludes use of crimes, wrongs or other prior bad acts to show that a person’s more recent action conformed to the earlier action (with certain exceptions relating to motive, opportunity, intent, and the like).”¹⁰⁹ Similarly, the Court of Appeals for the Ninth Circuit stated: “FRE 404(b) sets forth exceptions to the general inadmissibility of propensity evidence, one of which is to prove knowledge.”¹¹⁰

accord United States v. Agrell, 965 F.2d 222, 225 (7th Cir. 1992) (“The trial court received the evidence preliminarily and noted that a motion to strike would be sustained if the testimony did not satisfy any of the exceptions of Rule 404(b).”); Am. Family Mut. Ins. Co. v. Miell, 569 F. Supp. 2d 841, 848 (N.D. Iowa 2008) (“Thus, Miell’s intent—one of the exceptions found in Rule 404(b)—was an issue at the time of trial.”).

107. See FED. RULE. EVID. 401.

108. See Thomas J. Reed, *Admitting the Accused’s Criminal History: The Trouble with Rule 404(b)*, 78 TEMP. L. REV. 201, 214 (2005) (“[C]ourts have consistently construed Rule 404(b) as if it were . . . a categorical rule of inadmissibility followed by a string of specific exceptions.”).

109. Lespron v. Tutor Time Learning Ctr., LLC, No. 2:10-CV-1760 JWS, 2014 WL 1806331, at *2 (D. Ariz. May 7, 2014).

110. United States v. Goss, 256 F. App’x 122, 125 (9th Cir. 2007); *accord* Boyd v. City & Cty. of San Francisco, 576 F.3d 938, 947 (9th Cir. 2009) (“[T]he admission of evidence in support of the suicide by cop theory falls within the large exception for otherwise inadmissible character evidence carved out in Rule 404(b).”); United States v. Matthews, 431 F.3d 1296, 1319 (11th Cir. 2005) (Tjoflat, J., specially concurring) (“The second sentence of Rule 404(b) is an exception to the general rule that ‘[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.’” (quoting FED. R. EVID. 404(b))); United States v. LeMay, 260 F.3d 1018, 1025 (9th Cir. 2001) (referring to “traditional 404(b) exceptions to the ban on character evidence”); United States v. Mitchell, 172 F.3d 1104, 1107 (9th Cir. 1999) (“Rule 404(b) is an exception to the general rule against evidence of character to prove conduct, where evidence of ‘other crimes, wrongs, or acts’ may be proof of motive etc.” (quoting FED. R. EVID. 404)); United States v. Wright, No. 94-60108, 1994 WL 574215, at *2 (5th Cir. Oct. 4, 1994) (“Evidence admitted to show identity or intent, however, is an explicit exception to the prohibition against otherwise inadmissible character evidence.”); United States v. Flores Perez, 849 F.2d 1, 4 (1st Cir. 1988) (stating that when the other-acts evidence “is introduced to show

Of course, many courts do understand that 404(b) lists examples of purposes for which evidence of other crimes, wrongs or acts may be admitted only when those purposes do not involve proving propensity, or action in conformity with character. For example, a United States District Court in Illinois recently observed: “Rule 404(b)(2)’s authorization to introduce other-acts evidence for another purpose is *not* an exception to Rule 404(b)(1)’s ban against proving an act via propensity.”¹¹¹ More thoroughly, as the United States Court of Appeals for the Seventh Circuit recently explained in an en banc opinion:

knowledge, motive, or intent, the Rule 404(b) exceptions to the prohibition against character evidence have been construed broadly”); *United States v. McCollum*, 732 F.2d 1419, 1429 (9th Cir. 1984) (“Rule 404(b) is intended to be a very limited exception to the longstanding common law tradition that protects a criminal defendant from guilt by reputation.”); *Carson v. Polley*, 689 F.2d 562, 572 (5th Cir. 1982) (“The report as to Deputy Sheriff Holley tended to show Holley’s intent to do harm to Carson when booking him at the jail, and, therefore, was admissible under the ‘intent’ exception to the general rule against character evidence.” (quoting FED. R. EVID. 404(b))); *United States v. Jackson*, 588 F.2d 1046, 1056 (5th Cir. 1979) (“Since none of the recognized exceptions to the rule are applicable in this case, Rule 404(b) precluded the government from introducing evidence of appellant’s other criminal acts to establish his propensity to commit the crimes charged in the indictment.”); *United States v. Webber*, No. 2:14-CR-00443, 2017 WL 149963, at *10 (D. Utah Jan. 13, 2017) (“Pursuant to Federal Rule of Evidence 404(a)(1), ‘evidence of a person’s character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.’ Rule 404(a)(2) and Rule 404(b) provide a litany of exceptions to this rule”); *United States v. Richard*, No. 6:15-CR-00175, 2016 WL 3583728, at *2 (W.D. La. June 27, 2016) (“Rule 404(b)(2) of the Federal Rules of Evidence provides an exception to the general rule, stating that in criminal cases, evidence of a defendant’s character may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.” (citing FED. R. EVID. 404(b)(2))); *United States v. Stratos*, No. 2:11-CR-00537-TLN, 2015 WL 1814315, at *1 (E.D. Cal. Apr. 21, 2015) (“Rule 404(b) functions as an exception to a general prohibition on character evidence”); *Fisher v. Fapso*, No. 12-CV-00403, 2015 WL 5692901, at *4 (N.D. Ill. Sept. 25, 2015) (“Rule 404(b) includes an express exception to the general prohibition on evidence of prior bad acts when the purpose of introducing such evidence is to establish motive” (citing FED. R. EVID. 404(b))); *Roguz v. Walsh*, No. 09-1052 TLM, 2013 WL 1498126, at *3 n.2 (D. Conn. Apr. 5, 2013) (“The Court notes that neither Walsh nor the City of New Britain have argued that any of the evidence in this case could be used for any of the other purposes laid out by Rule 404(b) as exceptions to the general prohibition against character evidence used to prove propensity.”); *Smith v. Specialty Pool Contractors*, No. 02:07-CV-1464, 2009 WL 799748, at *3 (W.D. Pa. Mar. 25, 2009) (“Rule 404(b) is an exception to the general rule against evidence of character to prove conduct” (citing FED. R. EVID. 404(b))); *United States v. Graham*, 50 M.J. 56, 60 (C.A.A.F. 1999) (“Our rule, Mil. R. Evid. 404(b), as well as its federal civilian counterpart, Fed. R. Evid. 404(b), establish a general prohibition against using evidence of prior ‘bad’ conduct to demonstrate that a person has acted ‘in conformity therewith,’ subject to specific exceptions.”).

111. *Young v. City of Harvey*, No. 15 C 11596, 2016 WL 4158952, at *2 (N.D. Ill. Aug. 4, 2016); *accord* *United States v. Rubio-Estrada*, 857 F.2d 845, 853 (1st Cir. 1988) (Torruella, J., dissenting) (“Motive, opportunity, intent, etc., are *not exceptions* to the general proscription, they are *other uses* of this kind of evidence.”); *Johnson v. Pistilli*, No. 95 C 6424, 1996 WL 587554, at *3 (N.D. Ill. Oct. 8, 1996) (“Rule 404(b) merely provides a clarification to 404(a)—it is not an exception to the bar against introducing character evidence for purposes of showing action in conformity therewith.”).

A common misconception about Rule 404(b) is that it establishes a rule of exclusion subject to certain exceptions. That's not quite right. The text of the rule does not say that propensity evidence is inadmissible *except* when it is used to prove motive, opportunity, intent, etc. Rather, it says that propensity evidence—other-act evidence offered to prove a person's character and inviting an inference that he acted in conformity therewith—is *categorically* inadmissible. But the rule also acknowledges that there may be “another” use for other-act evidence—i.e., a different, *non-propensity* use. So it's technically incorrect to characterize the purposes listed in subsection (2) as “exceptions” to the rule of subsection (1). The Rules of Evidence do contain some true exceptions to the rule against propensity evidence, but they're found elsewhere—notably in Rules 412 through 415, which are limited to sexual-assault cases. In contrast, the purposes enumerated in subsection (2) of Rule 404(b) simply identify situations in which the rule of subsection (1) by its terms does not apply.¹¹²

Thus, if there is any “exception” that is created by Rule 404(b), it is the exception to the general admissibility of (relevant) evidence of crimes, wrongs, or other acts; this evidence is admissible unless the purpose for admitting the evidence is to prove conformity with character.¹¹³ As a United States District Court in New Jersey recognized: “Rule 404(b) is a rule of general admissibility—that is, it is an inclusionary rule subject to the single exception of propensity. Other acts evidence may be admissible for any non-propensity purpose.”¹¹⁴

A somewhat different kind of mistake regarding Rule 404(b)'s list of examples of non-prohibited purposes is that, in instructing juries regarding the proper use of the evidence of crimes, wrongs, or other acts, some courts have recited some or all of the list as if it were up to the jury to determine which if any of the “exceptions” to apply to the evidence. Appellate courts have discouraged such instructions,¹¹⁵ but it is

112. *United States v. Gomez*, 763 F.3d 845, 855 n. 3 (7th Cir. 2014) (citations omitted) (citing FED. R. EVID. 404).

113. *See United States v. Commanche*, 577 F.3d 1261, 1267 (10th Cir. 2009) (“Rule 404(b) carves out an exception to the general proposition that relevant evidence is admissible, *see* Fed. R. Evid. 402, precluding the use of other bad acts to prove character and demonstrate action in conformity therewith, Fed. R. Evid. 404(b).”).

114. *Hilburn v. New Jersey Dep't of Corr.*, No. CIV. 7-6064, 2012 WL 3133890, at *17 (D.N.J. July 31, 2012) (citation omitted) (citing *United States v. Green*, 617 F.3d 233, 244 (3d Cir. 2010)).

115. *See, e.g., United States v. Stacy*, 769 F.3d 969, 975 (7th Cir. 2014) (“The boilerplate instructions given in this case allowed the jury to consider the evidence of Stacy's prior act for the purpose of assessing ‘intent, knowledge, and absence of mistake.’”); *United States v. Lee*, 612 F.3d 170, 201 (3d Cir. 2010) (Rendell, J., dissenting) (“By simply repeating the entire litany of permissible theories under Rule 404(b), the judge's instruction gave the jury inadequate guidance. It also failed to limit the government to the theories it proffered in support of admission of the

problematic that they continue to occur. For example, in 2016 the United States Court of Appeals for the District of Columbia Circuit wrote:

The problems with the Rule 404(b) instruction did not stop there, unfortunately. The court's final jury instruction identified a litany of potentially relevant purposes for the Rule 404(b) evidence (such as absence of mistake or accident) that had never previously been mentioned and that were not at issue in the case. That inclusion of irrelevant purposes for Rule 404(b) evidence risked confusing the jury as to the *proper* purpose for which it might consider such evidence. For that reason, we have repeatedly noted with approval jury instructions that identify the *specific* purpose for which a particular piece of "other crimes" evidence has been admitted. As a general rule, then, a proper Rule 404(b) jury instruction should identify the evidence at issue and the particular purpose for which a jury could permissibly use it, rather than providing an incomplete description of the evidence at issue and an undifferentiated laundry list of evidentiary uses that may confuse more than it instructs.¹¹⁶

evidence."); *United States v. Johnson*, 439 F.3d 947, 953-54 (8th Cir. 2006) ("We have instructed that district courts, when ruling on Rule 404(b) evidence admissibility, should not make 'broad reference which merely restates the components of the rule,' but 'should specify which components of the rule form the basis of its ruling and why.'" (quoting *United States v. Harvey*, 845 F.2d 760, 762 (8th Cir. 1988))); *United States v. Hardwell*, 80 F.3d 1471, 1491 (10th Cir. 1996) ("'Laundry list' limiting instructions that simply recite all of the purposes listed by Rule 404(b) are disapproved because they do not adequately advise the jury of the limited purposes for which the evidence was admitted." (quoting *United States v. Patterson*, 20 F.3d 809, 813 n.3 (10th Cir. 1994))); *United States v. Cortijo-Diaz*, 875 F.2d 13, 15-16 (1st Cir. 1989) ("It is true that the trial court gave the jury a limiting instruction with respect to this evidence. But this instruction, which consisted of a laundry-list of permitted uses contained in the rule, was simply incapable of limiting the damage caused by this evidence."); *United States v. Mothershed*, 859 F.2d 585, 589 (8th Cir. 1988) (discouraging district courts from using "laundry list" approach when instructing jury on Rule 404(b) evidence, but holding such practice "is not in itself a basis for reversal"); *United States v. Tyndale*, 56 M.J. 209, 220 (C.A.A.F. 2001) (Gierke, J., dissenting) ("The instructions merely gave the members a laundry list of permissible uses under Mil. R. Evid. 404(b): to prove knowledge, to prove intent, or to rebut appellant's claim of innocent ingestion."). *But see* *United States v. Ellis*, 817 F.3d 570, 580 (8th Cir. 2016) ("[A]ny prejudicial effect of admitting the prior-conviction evidence was mitigated by the district court's limiting instruction to the jury that it could consider the evidence of Ellis's prior conviction only to evaluate his credibility and to determine 'knowledge, motive, absence of mistake, accident or intent.'"); *United States v. Faulls*, 821 F.3d 502, 507 (4th Cir. 2016) (stating with approval: "The court twice gave the jury a limiting instruction regarding this evidence, stating that it could be considered only to prove 'the defendant's motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in connection with' Faulls's charges, but not as evidence of Faulls's character or propensity to commit the offenses"); *United States v. Cooper*, 624 F. App'x 819, 821 (4th Cir. 2015) (stating with approval that "[a]t the conclusion of Officer Rudy's testimony, the court instructed the jury to limit its consideration of that testimony to the issues of intent, motive, plan, preparation, absence of mistake, or lack of accident").

116. *United States v. McGill*, 815 F.3d 846, 889 (D.C. Cir. 2016) (citations omitted).

The confusion caused by Rule 404(b)(2)'s list of examples of non-prohibited purposes should be eliminated by eliminating the list. The list serves no productive purpose and has the unproductive effect of obscuring the rule. What trial judges should require of a party seeking to admit evidence of a crime, wrong, or other act is a specific chain of inferences that connects the evidence to a material fact and that does not make that connection by including a propensity inference.¹¹⁷ It is not enough to say that the crime, wrong, or other act evidence is offered to prove one or more of the listed examples of non-prohibited purposes. Instead, what is needed is a non-propensity chain of reasoning. As the United States Court of Appeals for the Third Circuit has stated: "If the government offers prior offense evidence, it must clearly articulate how that evidence fits into a chain of logical inferences, no link of which can be the inference that because the defendant committed drug offenses before, he therefore is more likely to have committed this one."¹¹⁸ The list of examples of non-prohibited purposes has become a list of "magic words" that risks the admission of evidence that should be inadmissible.¹¹⁹ Eliminating this list from the rule would decrease the risk of improperly admitting propensity evidence.

Additionally, eliminating the list and focusing on the chain of inferences that makes evidence of crimes, wrongs, or other acts

117. See Deena Greenberg, *Closing Pandora's Box: Limiting the Use of 404(b) to Introduce Prior Convictions in Drug Prosecutions*, 50 HARV. C.R.-C.L. L. REV. 519, 543 (2015) ("Courts' justification for admitting prior convictions to prove intent, however, often collapses into *only* general propensity reasoning, which is explicitly forbidden under 404(b)."); Paul S. Milich, *The Degrading Character Rule in American Criminal Trials*, 47 GA. L. REV. 775, 798 n.49 (2013) ("Courts too often pay little attention to whether 404(b) evidence is truly needed to prove, for example, intent when intent is not actively at issue in the case.").

118. *United States v. Sampson*, 980 F.2d 883, 887 (3d Cir. 1992); see also *United States v. Miller*, 673 F.3d 688, 700 (7th Cir. 2012) ("A prosecutor who wants to use prior bad acts evidence must come to court prepared with a specific reason, other than propensity, why the evidence will be probative of a disputed issue that is permissible under Rule 404(b). Mere recitation that a permissible Rule 404(b) purpose is 'at issue' does not suffice.").

119. See Reed, *supra* note 108, at 250-51 ("It is time to admit that in the real world of the criminal prosecutions, the prosecutor will be able to prove relevant specific instances of the accused's uncharged misconduct by employing the 'magic words' vocabulary of Rule 404(b) . . ."); cf. *Edwards v. State*, 422 S.E.2d 424, 426 (Ga. 1992) (Fletcher, J., concurring) ("Those basic words, [motive, plan, scheme etc.], in numerous variations, are being used like some magic litany to justify the introduction of independent act evidence in case after case that comes before this court. However, there is nothing magic about those words and their use is no substitute for the requisite analysis that this type of evidence must undergo before it may be introduced . . ."); *State v. Winter*, 648 A.2d 624, 627 (Vt. 1994) ("We must also emphasize that the grounds for admission specified in Rule 404(b) are not magic words, the utterance of which automatically admits all uncharged misconduct evidence. The State has the burden to show precisely how the proffered evidence is relevant to the theory advanced, how the issue to which it is addressed is related to the disputed elements in the case, and how the probative value of the evidence is not substantially outweighed by its prejudicial effect.").

admissible might result in more appropriate application of Rule 403, when a trial court has determined that evidence of crimes, wrongs, or other acts is being offered for a non-prohibited purpose. Given the high risk of unfair prejudice, especially to criminal defendants when evidence of a prior conviction is admitted, a party seeking to admit such evidence should be required to explain in detail—without relying on propensity inferences—how that evidence is relevant. Such an explanation can then aid the trial judge in assessing the probative value of the evidence and in determining whether the probative value is substantially outweighed by the risk of unfair prejudice. The present practice of allowing a list of “exceptions” to substitute for real analysis of whether the evidence’s relevance depends upon propensity reasoning is inadequate, in terms of applying both Rule 404(b) and 403.

Rule 404(b) is an immensely important rule. According to some commentators, the rule appears in appellate court decisions more than any other rule of evidence.¹²⁰ The rule should be revised to better ensure that evidence of crimes, wrongs, or other acts is not admitted unless the evidence really is probative of something besides character, and sufficiently probative to justify the risk of unfair prejudice that is inherent in such evidence. To achieve these goals, it is proposed that Rule 404 be rewritten to read:

404(b) Crimes, Wrongs, or Other Acts.

(1) ~~Prohibited Uses.~~ Evidence of a crime, wrong, or other act is not admissible to prove a person’s character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ~~Permitted Uses;~~ Notice in a Criminal Case. ~~This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.~~ On request by a defendant in a criminal case, the prosecutor must:

120. See FED. R. EVID. 404 advisory committee’s note to 1991 amendment (“Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence.”); see also *United States v. Davis*, 726 F.3d 434, 441 (3d Cir. 2013) (“Rule 404(b) has become the most cited evidentiary rule on appeal.”); 22B CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., *FEDERAL PRACTICE AND PROCEDURE* § 5239, at 95 (2014) (“There is no question of evidence more frequently litigated in the appellate courts than the admissibility of evidence of other crimes, wrongs, or acts.”); David Culberg, *The Accused’s Bad Character: Theory and Practice*, 84 NOTRE DAME L. REV. 1343, 1357 (2009) (“Rule 404(b) has been the most contested Federal Rule of Evidence, giving rise to by far the most appeals.”); Andrew J. Morris, *Federal Rule of Evidence 404(b): The Fictitious Ban on Character Reasoning from Other Crime Evidence*, 17 REV. LITIG. 181, 182 (1998) (referring to Rule 404(b) as “the single most important issue in contemporary criminal evidence law”); Reed, *supra* note 108, at 211 (citations omitted) (“Since 1975, Rule 404(b) has been the most contested Federal Rule of Evidence. It has been cited in 5,603 federal trial and appellate decisions since adoption. No other evidentiary rule comes close to this rule as a breeder of issues for appeals.”).

- (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and
- (B) do so before trial — or during trial if the court, for good cause, excuses lack of pretrial notice.

IV. CONCLUSION

The Federal Rules of Evidence are a complex assortment of inclusionary rules (some with examples of permitted purposes) and exclusionary rules (some with true exceptions). Given the complexity, some degree of confusion is inevitable. On the other hand, some of the complexity—and consequently, some of the confusion—could be diminished simply by deleting the specific, enumerated examples of permitted purposes. In the cases of Rules 407, 408, 411, and 404(b), less is more. These relatively minor, non-disruptive changes could substantially increase the effectiveness of the rules, in terms of achieving the purposes of these specific rules as well as the overall purposes of the Federal Rules of Evidence.¹²¹

121. *See* FED. R. EVID. 102 (“These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.”).