

## **“OTHER CRIMES OR WRONGS”—DIFFERENCES BETWEEN FEDERAL AND TEXAS RULES**

There are a number of differences between the Federal Rules of Evidence (FRE) and the Texas Rules of Evidence (TRE) concerning the admission of “other crimes or wrongs” under 404(b), the “prior bad acts” provisions.

First, prior bad acts are generally not admissible in civil cases under the FRE, but are clearly admissible under the TRE. (Relatedly, you should know that the TRE permit the defendant in a civil assault or similar case to introduce 1) evidence of his or her character for moral virtue when accused of an act of moral turpitude (TRE 404(a)(1)(B)), or 2) evidence of the victim-plaintiff’s character for violence (TRE 404(a)(2).) The Advisory Committee’s Notes to FRE 404 state that character evidence, including prior bad acts, is inadmissible in civil cases, although some federal courts have admitted evidence of character in civil cases when the claim is the civil analogue of a criminal charge, like assault.

Second, both the FRE and the TRE agree that the prior bad acts evidence need not be the subject of a criminal conviction, nor be criminal in nature. But what if the prior bad act offered as evidence under 404(b) was the subject of a criminal prosecution, and the defendant was acquitted? Under federal law, even after acquittal, the other crimes evidence may be admitted. In Texas, the law is probably different. In a decision before the adoption of the TRE, *Dedrick v. State*, 623 S.W.2d 332, 336 (Crim. App. 1981), the Court of Criminal Appeals held inadmissible “other crimes” that were the subject of a prosecution and acquittal. The Court has not ruled on this issue since the adoption of the TRE, likely because prosecutors don’t attempt to admit the other crimes evidence that was the subject of an acquittal based on *Dedrick*.

Third, in *Huddleston v. United States*, 485 U.S. 681 (1988), the Supreme Court held that whether a prior bad act occurred, and whether the defendant committed the prior bad act are questions for the jury under FRE 104(b). Thus, the trial court makes no determination whether the prior bad act has occurred nor whether the defendant committed the prior bad act; it only determines whether there is sufficient evidence that a reasonable jury could find that a preponderance of the evidence shows the prior bad act occurred and that the defendant committed this prior bad act. Texas law, as explicated in *Harrell v. State*, 884 S.W.2d 154 (Tex. Crim. App. 1994), requires the trial court to find that sufficient evidence exists that the jury could find that the state has proven beyond a reasonable doubt that 1) the alleged act occurred and 2) that the defendant committed that act.

Fourth, under the FRE, if defense counsel so requests, the prosecution must provide the defense with “reasonable notice ... of the general nature of any [prior bad acts] evidence” it intends to offer at the trial. Under Texas law, if defense counsel so requests, the state must provide “reasonable notice ... of [its] intent to introduce in the State’s case in chief such [prior bad acts] evidence.” Thus, under Texas law, the prosecution is not required to provide defense counsel notice that it intends to offer such evidence in its *case-in-rebuttal*. If you represent a criminal defendant, and the state has not given you any notice that it intends to use prior bad acts

evidence, ask the trial court in a motion *in limine* to order the state to give the defendant notice of any 404(b) evidence it plans to use in its case-in-rebuttal.

Fifth, under Texas Code of Criminal Procedure § 37.07 (non-capital cases) and § 37.071 (capital cases), the state is permitted to offer prior bad acts evidence in the punishment phase of a trial. Juries determine punishment in Texas. As with prior bad act evidence offered in the guilt phase of the trial, the state must show beyond a reasonable doubt that the prior bad act was committed by the defendant. There is no such rule in the FRE.

Here is an example of an approved limiting instruction in Texas:

You are further instructed that if there is any evidence before you in this case regarding the defendant's committing an alleged offense other than the offense alleged against him in the indictment in this case, you cannot consider such evidence for any purpose unless you find and believe beyond a reasonable doubt that the defendant committed such other offense, if any, and even then you may only consider the same in determining the intent of the defendant, if any, in connection with the offense, if any, alleged against him in the indictment and for no other purpose.

*Broussard v. State*, 710 S.W.2d 753 (Tex. App.-Houston (14th Dist.) 1986).

If you are defense counsel, begin with this instruction. (Failure to request a limiting instruction waives any error.) However, the above instruction is quite complicated. Edit it and make it simpler and easier to understand. When the prior bad act evidence is offered, request the court to instruct the jury immediately based on your edited version. (The court is not required to issue that instruction at that time, but the court is unlikely to issue the instruction if you don't request it.) Further, you must request the court issue that same instruction when jury instructions are given at the end of the case. Failure to make the request waives any error, and is likely malpractice. Failure by the court to give the jury that instruction upon request is likely reversible error.