

GARDEN STATE CLE LESSON PLAN

A 1.0 credit course

**FREE DOWNLOAD
LESSON PLAN AND EVALUATION**

THE MYSTERY OF NJRE 404(b)

With

Robert Ramsey
Author, NJ Arrest, Search & Seizure Review
(Thomson-West)

And

Scott A. Krasny
Certified Criminal and Certified Civil
Trial Attorney

Program description

NJRE 404 is one of those rules you just have to know, especially if you do criminal work. This 1.0 credit program examines Rules 403 & 404, with special emphasis on 404(b).

I. Introduction

- **Scott Krasney – certified as both criminal and civil trial attorney, prefers criminal over civil**
- **Focus on 1-2 rules of evidence – particularly 404(b)**
- **Starting point for teaching 404(b) – must begin with “relevance” from Rule 401**
- **All relevant evidence is coming in**
- **Rule 401: “Relevant Evidence”**
 - **“Evidence having a tendency in reason to prove or disprove any fact or consequence to the determination of the action.”**
 - **Federal rule for relevance goes to materiality**
- **Relevance means almost everything is coming in – if it’s relevant it is coming in**
- **Admissibility has nothing to do with how probative it is – Rule requires only “tendency in reason”**
- **Rule 402: “Relevant Evidence Generally Admissible”**
 - **“Except as otherwise provided in these rules or by law, all relevant evidence is admissible.”**
- **All relevant evidence is admissible.**
- **Whatever I think is relevant- may prove an inference to a fact – it is relevant**
- **Rule 402 – “as otherwise provided...” could mean:**
 - **A privilege**
 - **NJRE 404**
 - **NJRE 403 [biggest rule to exclude evidence]**
 - **NJRE 404(b)**
- **NJRE 403: “Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time”**
 - **“Except as otherwise provided by these rules or other law, relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence.”**
- **Cannot get to 403 if the evidence is not relevant**
- **NJRE 611 “Mode and Order of Interrogation and Presentation” – same methods of excluding evidence as to not waste time**
- **403 is important to know**

- **Relevant evidence is always dangerous to the defendant**
- **Evidence is always prejudicial to defendant – but has to be “unduly prejudicial” to be excluded**
- **Rule 104 “Preliminary Questions” – to determine whether conditions of admissibility for piece of evidence have been met; normally rules are relaxed for this hearing, except for privilege**
- **Rule 403 – object under this during 104 hearing – waste of time – does not move the case forward – only rule to apply in 104 hearing**
- **If cannot get evidence out under 403, then do 104 hearing to exclude**
- **104 hearing is good way to hear testimony before trial**
- **Does client testify under 104 hearing?**
 - **Rules allow defendant to testify without waiving privilege**
 - **Sometimes if you only have certain defenses, the defendant testifying is the way to address those issues**
 - **Defendant can testify without putting himself at risk on other issues**
 - **Nothing defendant says can be used substantively against him at trial**
 - **Scope of cross-examination is limited to 104 hearing**

II. Rule 403

- **“undue prejudice”**
 - **Autopsy photographs – certainly relevant evidence, but is it unduly prejudicial? – don’t need pictures to establish cause of death – pictures are inflammatory, unnecessary, etc.**
 - **Crime scene photographs that show blood, etc.**
 - **Extensive criminal record – jurors cannot understand jury instruction, jury will form a conclusion regardless of instruction**
- **“confusion of the issues”**
 - **Other arrests or matters will confuse the jurors – try a collateral case/another case as a side note**
- **“undue delay, waste of time, or needless presentation of cumulative evidence” – all similar**

- **Don't have to prove the same point several times or with several witnesses saying the same thing**
- **Defendant should be able to have as many witnesses as needed – more latitude with a jury trial as opposed to a bench trial**
- **Don't need 10 officers all testifying to the same thing!**
- **Rule applies to both state and the defense**
- **Character witnesses for the defense (Rule 608) is an exception to the cumulative evidence limitation**
 - **Practical aspect**
 - **Can have too many**
 - **3-4 people from different walks of life – all character evidence but from different things/reasons – cover a greater universe of information**
- **Hypothetical: Speeding case – 65 in a 40 mph zone; if prosecutor asks officer “when you walked up to the car, did the driver indicate how fast he was going” – this is objectionable because speeding is a strict liability defense – does not need to have an intention – does not matter what the driver thought – this is objectionable as irrelevant!**
 - **Under definition of relevance – there is nothing material to the case – defendant's ability to know how fast he is going is not at issue**

III. Rule 404(b)

- **“Other crimes, wrongs, or acts. Except as otherwise provided by Rule 608(b) evidence of other crimes, wrongs, or acts is not admissible to prove the disposition of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.”**
- **Signature crime – “identity” part of rule**
 - **Argue 403 in that you are going to be litigating the other cases and it will take a lot of time and confuse the jury**

- **104 hearing in advance to make sure that judge accepts parameters of the evidence and admissibility**
 - **Not as many 104 hearings from the State's side**
 - **Defense wants 104 hearing**
- **Example: Shoplifting case with 2 priors to show absence of mistake – whether or not the state wins the argument – bench trial situation – judge hears the priors regardless of ruling**
 - **State v. Medina, 349 NJ Super 108 (App. Div. 2002) – judge should be able to hear prejudicial evidence and then decide case on admissible evidence.**
- **Rule 104 – want to introduce priors to establish absence of mistake even if defendant is not going to testify**
 - **Defendant does not have to testify in order to make this argument**
 - **404 allows for this – no need for defendant to testify for evidence to come in**
 - **Defense would argue that if defendant is not testifying it is a problem**
- **Need to understand rule in light of 104, 402 and 403**
- **Example: Drunk driving case – need to admit evidence of prior DWIs – less leeway in a strict liability case such as this – not as persuasive an argument as shoplifting case where defendant can make an excuse**
- **Shoplifting case is a tricky case to prove – so getting in priors would be a stronger argument – lack of mistake**
- **404b – you HAVE TO KNOW**
- **The State is always trying to get in other things about your client that they want to use to prove something in the case – but really showing prior record**
- **Does not need to be prior conviction – State v. Harris, 156 N.J. 22 (1998) – State wants to put in old robbery into drug case by using subsequent DP offenses to bridge the time gap (remoteness) under Rule 609 (Impeachment by prior conviction)**
- **State v. Cofield, 127 NJ 328 (1992) – 4 factors to argue**
 - **1) Relevant to material issues generally disputed – something of consequence to the case – something important to the case – if not disputed then not coming in**

- **2) Similar in kind and reasonably close in time to the offense charged – if it is too remote by time and nature then not coming in**
- **3) Proofs have to be clear and convincing**
- **4) Probative value must not be outweighed by apparent prejudice**
- ***State v. Carlucci*, 217 NJ 129 (2014): going back to *Cofield*, Cofield is still correct analysis, defendant denies that she knows a bag of something is cocaine, claims that she used cocaine and other drugs in the past, state wants to use her statements to show her knowledge that what was in the bag was cocaine, can they use that to prove knowledge? Court said cops tested it and it was cocaine, therefore not necessary to have her statement admitted to show that it was cocaine. Good case to use to keep out 404b evidence. Issue with clear and convincing evidence standard for 404 evidence the State is trying to admit.**
- ***Jackson v. Denno*, 378 US 368 (1964) – issue as to whether her (Carlucci’s) statement was voluntary – this could have been the issue in why the statement was not admitted.**
- **404b says “may be admitted” – defense has the advantage; look at the language of the rule itself – try to keep this evidence out because if it comes in then can be very bad for client**
- **Ask to limit the 404b – tell the jury how the evidence that is coming in should be limited**
- **Rule 105 Limited Admissibility – “when evidence is admitted as to one party or for one purpose but is not admissible as to another party or for another purpose, the judge, upon request, shall restrict the evidence to its proper scope and shall instruct the jury accordingly but may permit a party to waive a limiting instruction.”**
- **Evidence of Domestic Violence restraining order in a homicide case – 404B refers to civil wrongs not only criminal wrongs, state argues the TRO shows motive for murder, defense must argue ancillary matter – not clear and convincing standard – smaller criminal act or civil wrong cannot carry the day – will inflame the jury; prosecutor will argue that compelling circumstantial**

- evidence – juries like motive evidence even though not required**
- **Motive evidence can be a challenge for the defense bar**
- **Buying life insurance as 404b evidence - can come in under 404B as a plan in a homicide case**
- **Rule cannot be used for proof of conduct**
- **Poverty as motivation to steal – prejudicial under 404b**
- **403 and 404 takes you off on a tangent and away from the case being tried**
- **Always object – preserve issue for appeal – must go through Cofield analysis to get evidence excluded**
- **State should move for 104 hearing because it is state's desire to get evidence in**
 - **Do not want to make motion in limine**
 - **Wait until jury is empaneled to let jeopardy attach**
 - **See what state opens to and then you can see where the state is going and then ask for a 104 hearing**
- **Do not expect that the state will give you heads up that 404 evidence is coming in – look at discovery and you can know it is coming**
- **104 hearing is outside presence of the jury – so does not matter if before or during trial – if hearing during trial and the evidence does not come in then possible mistrial situation**
- **State does not use 404b as much as they should – state just believes evidence goes to motive and is admissible and makes no pre-trial application for admissibility**
 - **Object and then ask for 104 hearing**
 - **If evidence is not admitted, then possible mistrial**
- **Sex offenses:**
 - **What a person likes to do and personal affairs, what they have in their home – regardless of something that is a criminal charge**
 - **State will want to put something in evidence to show something in the long run – juries don't like sex cases to begin with**
- **Civil trial can also include 404b evidence**

IV. Advice for Young Attorneys

- **402 – relevance – is it coming in**

- **403 – can we keep this out**
- **104 hearing – shouldn't we hear whether this comes in first? Getting free testimony.**
- **404**
- **These rules flow into each other and take each one step by step**
- **Write down Cofield factors – organizes your mind as to why the evidence should be excluded**
- **Bring your Rules to court**