#### Volume 1

# PART I. SUBSTANTIVE EVIDENTIARY RESTRICTIONS ON ADMISSION OF UNCHARGED MISCONDUCT— LOGICAL RELEVANCE

#### **CHAPTER 1. INTRODUCTION**

§ 1:1	Importance of uncharged misconduct evidence
§ 1:2	—Impact of uncharged misconduct evidence
§ 1:3	—Risk of verdict on improper basis
§ 1:4	—Volume of legal authority
§ 1:5	Distinguishing uncharged misconduct from other types of evidence
§ 1:6	—Use at pretrial and posttrial hearings
§ 1:7	—Bases of logical relevance; Credibility theories
§ 1:8	— — Character evidence of party witness's untruthfulness
§ 1:9	<ul> <li>— Cross-examination of character witness about defendant's misconduct</li> </ul>
§ 1:10	— —Use of witness's own misconduct to impeach credibility
§ 1:11	— —Use of witness's conviction to impeach credibility
§ 1:12	— —Use of defendant's misconduct to show witness's bias
§ 1:13	— —Use of uncharged misconduct to impeach person's competency as witness
§ 1:14	— Use of misconduct as basis of expert's opinion
§ 1:15	—Character and habit evidence

Summary of distinctions between uncharged misconduct and related types of evidence

§ 1:17 Preview of analysis of uncharged misconduct

## CHAPTER 2. USE OF DEFENDANT'S UNCHARGED ACTS TO PROVE FACTS OTHER THAN DEFENDANT'S BAD CHARACTER

O	
§ 2:1	Introduction
§ 2:2	Jury and bench trials
§ 2:3	Act
§ 2:4	Act by defendant: Limitation of doctrine limited to acts of natural persons
§ 2:5	Act by defendant—Must defendant have been actor?
§ 2:6	—Who decides whether defendant was actor?
§ 2.0 § 2:7	—Conditional or provisional admission of evidence
§ 2:8	—Types of evidence admissible to prove defendant's identity as actor
§ 2:9	—Standard or measure of proof required to establish defendant's identity as actor
§ 2:10	— Types of evidence sufficient to satisfy the standard
§ 2:11	Uncharged act by defendant
§ 2:12	Uncharged prior act by defendant
§ 2:13	Uncharged similar act by defendant
§ 2:14	Uncharged act of misconduct by defendant
§ 2:15	—Admission of noncriminal acts
§ 2:16	—Admission of evidence that merely implies defendant's misconduct
§ 2:17	—Exclusion of evidence of act falling short of misconduct
§ 2:18	Logically relevant uncharged act by defendant
§ 2:19	—Prohibition against using defendant's acts as circumstantial proof of conduct
§ 2:20	— —Using defendant's acts to show character trait and then treating character trait as circumstantial proof of conduct
§ 2:21	<ul> <li>— Evolution of prohibition and its gradual weakening and narrowing</li> </ul>
§ 2:22	— —Contextual statutory construction argument about character traits that could compel further narrowing of the prohibition
§ 2:23	———Evaluation of strength of argument

xviii

§ 2:24	————The text to be interpreted
$\S 2:25$	————Context of the text to be interpreted
§ 2:26	— —Contextual statutory construction argument
	that could compel further narrowing of the
	prohibition—Evaluation of strength of
	argument—Extrinsic legislative history
$\S 2:27$	— —Inconsistent usage of "character" and
	"character trait"
§ 2:28	Independently logically relevant act by
	defendant—Four basic methods of circumventing
	prohibition against using defendant's acts as
	circumstantial proof of conduct
$\S 2:29$	— First method: Using defendant's acts to
	establish immediate inference other than
_	defendant's subjective bad character
§ 2:30	——Second method: Using defendant's character
	to establish ultimate fact other than defendant's
0.001	conduct
§ 2:31	——Third method: Using uncharged misconduct
	to show the defendant's morally neutral
e o oo	propensity to establish the defendant's behavior
§ 2:32	— —Fourth method: Using defendant's character
	to prove defendant's behavior when defendant's character has great probative value for that
	purpose.
§ 2:33	— —The historical background of the relevant
ყ ∠.აა	statutes and court rules
§ 2:34	— —The policy merits of such statutes and court
3 2.0 <del>4</del>	rules
§ 2:35	— —The application of the statutes and rules
5 2.00	recognizing this method
§ 2:36	———The types of cases in which the statutes
3 2.00	and rules apply
§ 2:37	— — The types of evidence admissible under
3 2.01	the statutes and rules
§ 2:38	— — The judge's discretion to exclude
, <b>2</b> .00	prejudicial evidence otherwise admissible under
	these statutes and rules
§ 2:39	—Facts that defendant's uncharged misconduct
5	may be used to prove
§ 2:40	——Early view of liberal admissibility of
	defendant's uncharged misconduct and reaction
	against that view
§ 2:41	——Emergence of inclusionary and exclusionary
	views in England

- \$ 2:42 Early American case law
   \$ 2:43 People versus Molineux; Spread of exclusionary approach in the United States
   \$ 2:44 Impact of debate over exclusionary approach on American evidence statutes
   \$ 2:45 Counterattack on exclusionary view; Growing trend toward inclusionary view
   \$ 2:46 Adoption of Federal Rule of Evidence 404(b)
- CHAPTER 3. USE OF DEFENDANT'S UNCHARGED ACTS TO PROVE

# UNCHARGED ACTS TO PROVE DEFENDANT'S IDENTITY AS CRIMINAL § 3:1 Introduction § 3:2 Use of uncharged misconduct to prove defendant's identity as criminal

Defendant's possession of capacity suited to

- commission of charged crime
  § 3:4 Acts manifesting defendant's consciousness of
- § 3:5 —Objections to evidence of defendant's consciousness of guilt
- § 3:6 Defendant's membership in conspiracy aimed at commission of charged crime
- § 3:7 Use of doctrine of chances to prove defendant's identity as perpetrator
- § 3:8 Witness's observation of defendant's uncharged misconduct as increasing reliability of witness's identification of defendant in charged crime
- § 3:9 Defendant's disposition toward sexual misconduct as evidence of defendant's identity as sex offender
- § 3:10 Defendant's possession of fruits of charged crime
- § 3:11 Defendant's knowledge of information probably possessed only by the perpetrator
- § 3:12 Proof of striking similarity between defendant's modus operandi and manner in which charged crime was committed
- § 3:13 —Requirement no. 1: Very high degree of similarity between charged and uncharged crimes
- § 3:14 —Requirement no. 2: Unique methodology
- § 3:15 ——Cases in which courts have found sufficient inference of unique methodology

§ 2:47

§ 3:3

Conclusion

§ 3:16	——Cases in which courts have found insufficient inference of unique methodology
§ 3:17	Evidence of uncharged misconduct that shows defendant's motive for committing charged crime
§ 3:18	—Category no. 1: Cases in which uncharged crime supplies motive for charged crime
§ 3:19	——Examples
§ 3:20	—Category no. 2: Cases in which uncharged crime evidences same motive that impelled charged crime
§ 3:21	Evidence of uncharged misconduct motivated by the charged crime
§ 3:22	Evidence of uncharged misconduct that shows defendant's opportunity to commit charged crime
§ 3:23	Evidence of uncharged misconduct that shows defendant's plan which includes charged crime
§ 3:24	—Category no. 1: True plan or linked act cases
§ 3:25	—Category no. 1: true plan or linked act cases— Examples
§ 3:26	—Category no. 2: Spurious plan or unlinked act cases
§ 3:27	Evidence of uncharged misconduct—Showing defendant's preparation to commit charged crime
§ 3:28	—Showing defendant's presence near site of charged crime
§ 3:29	—Showing defendant's relationship to victim or other parties
§ 3:30	—Matching criminal's description of criminal's background
§ 3:31	—Matching the description of the criminal
§ 3:32	—Showing defendant's possession of tool or skill suitable for commission of charged crime
§ 3:33	—"Tracing" defendant to charged crime

## CHAPTER 4. USE OF DEFENDANT'S UNCHARGED ACTS TO PROVE COMMISSION OF ACTUS REUS

- § 4:1 Introduction
- § 4:2 Admissibility of anonymous acts to prove commission of actus reus
- § 4:3 Theories of independent logical relevance— Uncharged misconduct negating natural accident

#### Uncharged Misconduct Evidence

§ 4:4	—Uncharged misconduct negating automatism
§ 4:5	—Uncharged misconduct proving battered child syndrome
§ 4:6	——Evolution of battered child syndrome evidence in the United States
§ 4:7	—Uncharged misconduct showing defendant's
8 4.1	capacity to commit actus reus
§ 4:8	—Uncharged misconduct showing existence of conspiracy to commit actus reus
§ 4:9	—Uncharged misconduct showing defendant's consciousness of guilt
§ 4:10	—Use of uncharged misconduct showing
8 4.10	defendant's control over person or object when
	actus reus includes ordering that person or
	involves the object
§ 4:11	—Evidence of defendant's sexual misconduct
	showing disposition to commit actus reus
§ 4:12	——Admission of evidence of defendant's sexual
	misconduct under normal theories of logical
	relevance
§ 4:13	——Distortion of plan theory of logical relevance
§ 4:14	——Recognition of narrow special exception for
	defendant's disposition toward deviant sexual misconduct
§ 4:15	<ul> <li>—Recognition of broad special exception for</li> </ul>
	defendant's disposition toward nondeviant sexual misconduct
§ 4:16	— — Criticism of special exceptions for evidence of
	defendant's disposition toward sexual misconduct
§ 4:17	——Imposition of requirement for expert
3	testimony of psychological predisposition
§ 4:18	——Abolition of special exceptions
§ 4:19	—Evidence of defendant's domestic violence
_	showing disposition to commit actus reus
§ 4:20	—Evidence of defendant's sexual misconduct
	showing disposition to commit actus reus—
	Legislative creation of special exceptions
§ 4:21	—Uncharged misconduct showing defendant's
0 4 0 0	motive to commit actus reus
§ 4:22	—Uncharged misconduct showing defendant's
¢ 4.00	plan to commit actus reus
§ 4:23	—Uncharged misconduct showing defendant's
§ 4:24	preparation to commit actus reus —Uncharged misconduct showing defendant's

prior relationship to alleged co-conspirator and increasing probability they performed act of making illegal agreement

### CHAPTER 5. USE OF DEFENDANT'S UNCHARGED ACTS TO PROVE MENS REA

§ 5:1	Introduction
§ 5:2	Applicability of character evidence prohibition to uncharged misconduct used to prove mens rea
§ 5:3	Use of defendant's misconduct to prove mens rea—In general
§ 5:4	—Temporal relationship of uncharged act offered to prove mens rea to charged act
§ 5:5	—Similarity of uncharged act offered to prove mens rea to charged crime
§ 5:6	<ul> <li>—Necessity for similarity under doctrine of chances</li> </ul>
§ 5:7	— Need for proponent to prove more than one similar act to invoke doctrine of chances
§ 5:8	<ul> <li>— Degree of similarity required between uncharged and charged acts to invoke doctrine of chances</li> </ul>
§ 5:9	<ul> <li>— Aspects of similarity between charged and uncharged acts</li> </ul>
§ 5:10	Types of intents which similar misconduct may be used to prove
§ 5:11	Use of uncharged misconduct to prove elements of mens rea—Disproving defendant's claim that he or she acted accidentally
§ 5:12	—Proving defendant's prior attempts to commit charged crime
§ 5:13	—Proving defendant's capacity to commit charged crime
§ 5:14	—Proving defendant's mental competency to stand trial
§ 5:15	-Proving defendant's consciousness of guilt
§ 5:16	—Proving defendant's membership in conspiracy to commit charged crime
§ 5:17	—Proving that defendant acted deliberately
§ 5:18	—Rebutting defendant's claim of diminished mental capacity
8 5.19	—Using defendant's disposition toward sexual

#### Uncharged Misconduct Evidence

	misconduct as evidence of mens rea in sex offense prosecutions
§ 5:20	—Rebutting defendant's claim of duress
§ 5:21	—Rebutting defendant's claim of inadvertence
§ 5:22	—Showing defendant's intent to distribute
§ 5:23	—Disproving defendant's claim of intoxication
§ 5:24	—Showing defendant's guilty knowledge
§ 5:25	<ul> <li>— Category no. 1: Uncharged acts during which defendant reveals guilty knowledge</li> </ul>
§ 5:26	<ul> <li>— Category no. 2: Uncharged acts during which defendant gains direct knowledge of fact relevant to charged crime</li> </ul>
§ 5:27	<ul> <li>— Category no. 3: Uncharged acts during which defendant learns fact that is circumstantial evidence of guilty knowledge at time of charged crime</li> </ul>
§ 5:28	— —Category no. 4: Uncharged acts which tend to prove guilty knowledge by virtue of doctrine of chances
§ 5:29	— —Cases in which defendant is charged with knowing receipt or possession of stolen property, forgery, or uttering
§ 5:30	— — —Proof requirements for uncharged incident of possession
§ 5:31	— — —Proof requirements for similarity between uncharged and charged incidents
§ 5:32	—Proving defendant's malice
§ 5:33	—Rebutting defendant's claim of mistake
§ 5:34	—Showing modus operandi
§ 5:35	—Proving motive
§ 5:36	—Proving plan
§ 5:37	—Proving premeditation
§ 5:38	—Proving defendant's preparation to commit charged crime
§ 5:39	—Proving defendant's recklessness
§ 5:40	—Proving defendant's sanity
§ 5:41	—Offering a statistical evaluation of the defendant's uncharged acts to prove intent
§ 5:42	—Proving defendant's willfulness

## CHAPTER 6. USE OF DEFENDANT'S UNCHARGED ACTS FOR OTHER PURPOSES, INCLUDING REBUTTAL OF AFFIRMATIVE DEFENSES

#### I. INTRODUCTION

§ 6:1 Introduction

## II. MISCELLANEOUS THEORIES FOR USING UNCHARGED MISCONDUCT TO PROVE ESSENTIAL ELEMENTS OF CHARGED CRIME

§ 6:2 Use of uncharged misconduct to prove essential elements of charged crime—Causation § 6:3 -Alienage § 6:4 -Alleged victim's lack of consent § 6:5 —Corpus delicti —Corroboration of prosecution's case § 6:6 § 6:7 —Corroboration of defendant's confession —Degree of crime § 6:8 -Exercise of due care by alleged victim § 6:9 § 6:10 —Alleged victim's fear § 6:11 Use of uncharged misconduct to prove essential elements of charged crimes—Foreseeability Use of uncharged misconduct to prove essential § 6:12 elements of charged crime—Defendant's intoxication § 6:13 —Lawfulness of alleged victim's conduct § 6:14 —Explanation for relevant conduct § 6:15 -Source of defendant's unreported income Use of evidence of defendant's uncharged § 6:16 misconduct to rebut defense's introduction of

### III. USE OF UNCHARGED MISCONDUCT TO DISPROVE DEFENDANT'S AFFIRMATIVE DEFENSES

third party's misconduct to suggest that third

§ 6:17 Use of uncharged misconduct to disprove defendant's affirmative defenses—In general

party was perpetrator

- § 6:18 —Simple defense of alibi
- § 6:19 —Affirmative defense of entrapment
- § 6:20 —Affirmative defense of self-defense
- § 6:21 —Affirmative defense of running of statute of limitations
- § 6:22 —Affirmative defense of renunciation

### IV. INTRODUCTION OF UNCHARGED MISCONDUCT ON CREDIBILITY THEORIES OF LOGICAL RELEVANCE

- § 6:23 Introduction of uncharged misconduct on credibility theories of logical relevance—In general
- § 6:24 —Use of uncharged misconduct to impeach defendant's credibility
- § 6:25 —Use of uncharged misconduct to impeach defense witness's credibility
- § 6:26 —Use of uncharged misconduct to rehabilitate prosecution witnesses' credibility on redirect
- § 6:27 —Use of uncharged misconduct to counter defense's "missing witness" argument

#### V. MISCELLANEOUS THEORIES

- § 6:28 Reference to uncharged crime in confession to charged crime
- § 6:29 Reference to uncharged crime during commission of charged crime
- § 6:30 Commission of uncharged crime simultaneously with charged crime—Res gestae doctrine
- § 6:31 —View permitting admission of evidence if uncharged crime committed simultaneously with charged crime
- § 6:32 —View permitting admission of evidence if uncharged crime committed in same series of events as charged crime
- § 6:33 —View requiring that uncharged crime be independently logically relevant; Exception for inseparable crimes
- § 6:34 —Trend toward requiring independent logical relevance

### CHAPTER 7. USE OF PARTY'S UNCHARGED ACTS IN CIVIL CASES

§ 7:1 Introduction

§ 7:2 Uncharged misconduct evidencing the party's consciousness of the weakness of their position in the litigation

#### I. LIABILITY—INTENTIONAL TORTS

- § 7:3 Common-law admissibility of party's uncharged misconduct in intentional tort actions—In general
- § 7:4 —Proving defendant's identity as tortfeasor
- § 7:5 —Proving party's motive
- § 7:6 —Proving defendant's plan
- § 7:7 —Proving or disproving defendant's tortious intent
- § 7:8 —Proving or disproving causation
- § 7:9 —Rebuttal
- § 7:10 Admissibility of defendant's uncharged misconduct in intentional tort actions under federal rules of evidence
- § 7:11 —Applicability of Federal Rule of Evidence 404(b)
- § 7:12 —Effects of applicability of Federal Rule of Evidence 404(b)
- § 7:13 —Effect of enactment of Federal Rule of Evidence
  415

#### II. LIABILITY—NEGLIGENT TORTS

- § 7:14 Common-law admissibility of defendant's uncharged misconduct in negligence actions
- § 7:15 Theories of admissibility requiring showing of similarity of conditions
- § 7:16 —Proof that defendant committed negligent act by establishing that defendant habitually acts in that fashion
- § 7:17 —Proof of existence of physical condition
- § 7:18 —Proof of dangerousness of physical condition
- § 7:19 —Proof of defendant's notice of existence of dangerous character of physical condition
- § 7:20 —Proof or disproof that defendant's negligence caused plaintiff's injury
- § 7:21 Theories of admissibility that do not require showing of similarity of conditions
- § 7:22 —Rebuttal
- § 7:23 —Res gestae
- § 7:24 Impact of Federal Rule of Evidence 404(b) on

admissibility of civil defendant's uncharged negligence

#### III. LIABILITY—STRICT LIABILITY

- § 7:25 Common-law admissibility of defendant's uncharged misconduct in strict liability actions—Similarities to standards governing negligence actions
- § 7:26 Improper use of plaintiff's character by expert in product liability cases
- § 7:27 Differences from standards governing negligence actions
- § 7:28 Effect of Federal Rule of Evidence 404(b) on admissibility of civil defendant's uncharged misconduct in strict liability cases

#### IV. DAMAGES

- § 7:29 Plaintiff's proof of damages
- § 7:30 Defendant's disproof of damages

#### Volume 2

# PART II. SUBSTANTIVE EVIDENTIARY RESTRICTIONS ON ADMISSION OF UNCHARGED MISCONDUCT— LEGAL RELEVANCE

#### CHAPTER 8. LEGAL RELEVANCE LIMITATIONS ON ADMISSIBILITY OF DEFENDANT'S UNCHARGED ACTS

#### I. LEGAL RELEVANCE, IN GENERAL

- § 8:1 Introduction
- § 8:2 Whether judge may exclude logically relevant uncharged misconduct evidence under legal relevance doctrine
- § 8:3 What factors judge considers in evaluating legal relevance of uncharged misconduct evidence

xxviii

### II. DETERMINING PROPONENT'S NEED FOR UNCHARGED MISCONDUCT EVIDENCE

§ 8:4	Factor no. 1: How definitely proponent has proved defendant's commission of act of uncharged misconduct
§ 8:5	Factor no. 2: How probative uncharged act is of material fact of consequence that act is offered to prove
§ 8:6	—Whether uncharged act is offered to prove intermediate or ultimate fact
§ 8:7	—Whether uncharged act is highly similar to charged crime
§ 8:8	—Whether uncharged act is remote in time from charged act
§ 8:9	—Whether the source of the evidence about the uncharged act is independent of the victim testifying to the charged offense
§ 8:10	—Whether charged act is deliberate or spontaneous
§ 8:11	Factor no. 3: Whether material fact that uncharged misconduct is offered to prove is in genuine dispute
§ 8:12	—When defendant offers to stipulate to existence of material fact that uncharged misconduct is offered to prove
§ 8:13	—When defendant expressly admits existence of material fact but does not offer to formally stipulate to its existence
§ 8:14	—When defendant does not affirmatively dispute existence of material fact
§ 8:15	—When defendant cross-examines prosecution witnesses who testify to existence of material fact
§ 8:16	—When defendant affirmatively denies or will probably affirmatively deny existence of material fact
§ 8:17	Factor no. 4: Whether proponent has alternative, less prejudicial evidence to prove material fact that uncharged misconduct is offered to prove
§ 8:18	—Cases in which proponent has absolute need for uncharged misconduct to prove material fact
§ 8:19	—Cases in which proponent has only relative need for uncharged misconduct
§ 8:20	— Wiew no. 1: Even when proponent has ample,

- alternative evidence of material fact, proponent may introduce uncharged misconduct evidence
- § 8:21 Wiew no. 2: Proponent may introduce uncharged misconduct only when alternative evidence of material fact is equivocal
- § 8:22 —View no. 3: Proponent's uncharged misconduct barred only when alternative evidence leaves no doubt about existence of material fact
- § 8:23 —View no. 4: Even if cumulative, uncharged misconduct logically relevant to prove intent usually admissible

#### III. DETERMINING PREJUDICIAL CHARACTER OF UNCHARGED MISCONDUCT EVIDENCE

- § 8:24 Factor no. 5: How prejudicial is uncharged misconduct evidence
- § 8:25 —Considerations determining prejudicial character of uncharged misconduct evidence

## IV. BALANCING PROPONENT'S NEED FOR UNCHARGED MISCONDUCT EVIDENCE AGAINST EVIDENCE'S PREJUDICIAL CHARACTER

- § 8:26 Balancing process
- § 8:27 —Difficulty and unpredictability of balancing process
- § 8:28 —Balancing process at common law
- § 8:29 —Balancing process under Federal Rules of Evidence

#### V. JUDGE'S ULTIMATE RULING ON ADMISSIBILITY OF UNCHARGED MISCONDUCT EVIDENCE

- § 8:30 Trial judge's final ruling on admissibility of uncharged misconduct evidence
- § 8:31 —Ruling admitting all of proponent's evidence
- $\S~8:32$  —Ruling excluding all of proponent's evidence
- § 8:33 —Ruling admitting some of proponent's evidence but excluding balance

# PART III. PROCEDURAL RESTRICTIONS ON THE ADMISSION OF UNCHARGED MISCONDUCT

## CHAPTER 9. PROCEDURAL LIMITATIONS ON EVIDENCE OF DEFENDANT'S UNCHARGED ACTS

§ 9:1 Introduction

#### I. PRETRIAL PROCEDURES

§ 9:2	Motion to strike reference to uncharged
§ 9:3	misconduct in pleading Joinder
-	
§ 9:4	—Joinder and misjoinder of offenses
§ 9:5	——Prejudicial joinder
§ 9:6	—Joinder of defendants
§ 9:7	Pretrial discovery by defense
§ 9:8	—Form of discovery motion
§ 9:9	—Form of memorandum in support of discovery motion
§ 9:10	Pretrial notice by prosecution
§ 9:11	—Form of pretrial notice
§ 9:12	Pretrial motion by defendant for additional
	disclosure in response to prosecution's notice
§ 9:13	—Form of defense motion for additional disclosure
§ 9:14	—Form of memorandum in support of motion for additional disclosure
§ 9:15	Pretrial motions in limine—Motions in limine by defense to exclude uncharged misconduct evidence
§ 9:16	—Form of defense motion in limine
§ 9:17	—Form of memorandum of law in support of
5	motion in limine
§ 9:18	—Motions in limine by prosecution to admit
	uncharged misconduct evidence
§ 9:19	——Form of prosecution motion in limine
§ 9:20	Pretrial speedy trial motion: tolling of period by pendency of defense motion related to uncharged
	misconduct evidence

 $\S~9{:}21~$  Pretrial agreement governing admissibility of uncharged misconduct

#### II. TRIAL PROCEDURES

§ 9:22	Recusal of trial judge
§ 9:23	Jury selection
§ 9:24	Opening statement
§ 9:25	Order of proof—The necessity for proving corpus or presenting prima facie case before prosecutor's offer of uncharged misconduct evidence
§ 9:26	<ul> <li>Necessity for proving defendant's commission of physical elements of charged offense before offering defendant's uncharged misconduct to prove mens rea</li> </ul>
§ 9:27	—Confining all uncharged misconduct evidence to prosecutor's rebuttal
§ 9:28	—Confining all uncharged misconduct evidence to prosecutor's case-in-chief
§ 9:29	Foundation or predicate for uncharged misconduct evidence
§ 9:30	—Sample foundation for criminal case
§ 9:31	—Sample foundation for civil case
§ 9:32	Requirement that prosecutor specify theory of independent logical relevance of uncharged misconduct when evidence is offered
§ 9:33	Defense objections to proffered uncharged misconduct evidence—In general
§ 9:34	—Standing to object
§ 9:35	—Timeliness of objection
§ 9:36	—Specificity of objection
§ 9:37	—Sample objections
§ 9:38	— —General objections to uncharged misconduct evidence
§ 9:39	<ul> <li>— Logical relevance objections to uncharged misconduct—Offered to prove defendant's identity as criminal</li> </ul>
§ 9:40	— — —Offered to prove commission of actus reus
§ 9:41	— — Offered to prove mens rea
§ 9:42	— — — Offered to prove other essential elements of charged crime
§ 9:43	— — Offered to disprove defenses
§ 9:44	— — Offered on credibility
xxxii	

§ 9:45	———Offered on other theories
§ 9:46	— — —In intentional tort actions
§ 9:47	— — —In negligence actions
§ 9:48	— — —In products liability actions
§ 9:49	— —Legal relevance objections to uncharged
5	misconduct
§ 9:50	——Procedural objections to uncharged
	misconduct
§ 9:51	— —Constitutional objections to uncharged
	misconduct
§ 9:52	Necessity for out-of-court hearing to adjudicate
	defense objection to proffered uncharged
	misconduct evidence
§ 9:53	Preliminary fact-finding procedures to adjudicate
	defense objection to proffered uncharged
	misconduct evidence—In general
§ 9:54	—Identity of finder of fact
§ 9:55	—Measure of burden of proof on existence of
0.00	preliminary fact
§ 9:56	—Necessity for explicit findings by finder of fact
§ 9:57	Necessity for offer of proof
§ 9:58	Cross-examination of defendant about acts of
	uncharged misconduct
§ 9:59	—Fifth Amendment as precluding cross-
	examination of defendant about uncharged misconduct
§ 9:60	
8 9:00	—Prosecutor's cross-examination of defendant about uncharged misconduct absent independent
	evidence of uncharged act
§ 9:61	Prosecutor's motion to reopen
§ 9:62	Trial judge's instructions to jury about uncharged
5 0.02	misconduct evidence
§ 9:63	—Curative instructions to disregard
§ 9:64	—Admissibility instructions
§ 9:65	——Sample admissibility instruction
§ 9:66	— —Analysis of sample instruction
§ 9:67	—Cautionary instructions
§ 9:68	—Limiting instructions
§ 9.00 § 9:69	_
8 9:09	— —Giving limiting instruction over defense's objection
8 0.70	
§ 9:70	<ul> <li>— Necessity of granting defense requests for limiting instruction</li> </ul>
§ 9:71	•
8 9.11	— —Need for sua sponte limiting instruction

#### Uncharged Misconduct Evidence

0 0 =0	
§ 9:72	— —Wording of limiting instructions
§ 9:73	— — —Sample limiting instruction
§ 9:74	— — —Analysis of sample instruction
§ 9:75	<ul> <li>—Reading of limiting instructions to jury</li> </ul>
§ 9:76	Defendant's right to an instruction that the jury may not convict the defendant of the uncharged crime
§ 9:77	Improper judicial questioning about uncharged misconduct
§ 9:78	Defense motion for continuance to investigate uncharged acts
§ 9:79	Defense right to cross-examine about uncharged misconduct
§ 9:80	Closing argument or summation
§ 9:81	New trial motion—Proof that the jurors
	considered extraneous evidence of the
	defendant's uncharged misconduct
III.	POSTTRIAL PROCEDURES
§ 9:82	Direct appeal—In general
§ 9:82 § 9:83	Direct appeal—In general —Scope of appellate review
-	
§ 9:83	<ul><li>—Scope of appellate review</li><li>—Defendant's ability to raise objections other</li></ul>
§ 9:83 § 9:84	<ul> <li>—Scope of appellate review</li> <li>—Defendant's ability to raise objections other than those specified in trial court</li> <li>—Prosecutor's ability to raise theories of logical relevance other than those specified in trial</li> </ul>
§ 9:83 § 9:84 § 9:85	<ul> <li>—Scope of appellate review</li> <li>—Defendant's ability to raise objections other than those specified in trial court</li> <li>—Prosecutor's ability to raise theories of logical relevance other than those specified in trial court</li> </ul>
\$ 9:83 \$ 9:84 \$ 9:85 \$ 9:86	<ul> <li>—Scope of appellate review</li> <li>—Defendant's ability to raise objections other than those specified in trial court</li> <li>—Prosecutor's ability to raise theories of logical relevance other than those specified in trial court</li> <li>—Reversibility of error</li> <li>—Factors considered in deciding whether error</li> </ul>
\$ 9:83 \$ 9:84 \$ 9:85 \$ 9:86 \$ 9:87	<ul> <li>—Scope of appellate review</li> <li>—Defendant's ability to raise objections other than those specified in trial court</li> <li>—Prosecutor's ability to raise theories of logical relevance other than those specified in trial court</li> <li>—Reversibility of error</li> <li>—Factors considered in deciding whether error was harmful</li> <li>—Treatment of error committed in bench trial</li> </ul>

§ 9:91 —Bail pending appeal

§ 9:92 Collateral attack—Habeas corpus

# PART IV. CONSTITUTIONAL RESTRICTIONS ON ADMISSION OF UNCHARGED MISCONDUCT

#### CHAPTER 10. CONSTITUTIONAL LIMITATIONS ON USE OF DEFENDANT'S UNCHARGED MISCONDUCT

§ 10:1	Introduction
§ 10:2	Evidence rule as violative of the separation of powers
§ 10:3	Commerce Clause restrictions on admissibility of other acts proffered to show civil defendant's liability for punitive damages
§ 10:4	First Amendment right of press to access to uncharged misconduct evidence
§ 10:5	First Amendment restriction on uncharged misconduct in the form of speech or association
§ 10:6	Fourth and Fourteenth Amendment prohibition of unreasonable searches and seizure
§ 10:7	Fifth and Fourteenth Amendment collateral estoppel doctrine—In general
§ 10:8	—View no. 1: Evidence of act automatically inadmissible if defendant already acquitted of act
§ 10:9	—View no. 2: Collateral estoppel doctrine applicable to subsequent use of evidence of act as uncharged misconduct
§ 10:10	—View no. 3: Collateral estoppel inapplicable to subsequent use of evidence of act as uncharged misconduct
§ 10:11	— —View no. 4: Collateral estoppel inapplicable subject to defendant's right to inform jury of prior acquittal
§ 10:12	Fifth and Fourteenth Amendment double jeopardy doctrine
§ 10:13	Fifth and Fourteenth Amendment due process doctrine
§ 10:14	—Bar to the application of collateral estoppel to preclude defendant from relitigating issue in subsequent case
§ 10:15	—Bar to all use of uncharged misconduct

#### Uncharged Misconduct Evidence

	evidence because of risk of improperly based decision
§ 10:16	—Bar to all use of uncharged misconduct evidence because it undermines mandated
§ 10:17	standard of proof  — — Precluding assigning the defense the burden of proof on a third party's commission of an act that would necessarily exculpate the defendant
§ 10:18	—Bar to use of flimsy and inflammatory uncharged misconduct evidence
§ 10:19	—Requiring prosecution to establish defendant's commission of uncharged act by proof beyond reasonable doubt
§ 10:20	—Requiring prosecution to give defense pretrial notice of prosecution's intent to introduce uncharged misconduct evidence
§ 10:21	—Requiring retrial on charged offense if defendant acquitted of uncharged offense after its use as uncharged misconduct evidence
§ 10:22	—Limiting judge's power to instruct jury that they may infer existence of disputed ultimate fact from uncharged misconduct
§ 10:23	—Limiting judge's ability to treat uncharged misconduct evidence as legally sufficient to sustain a conviction
§ 10:24	—Preventing prosecutor from introducing uncharged misconduct evidence if prior indictment was dismissed for government delay
§ 10:25	—Forbidding the prosecution from adding charges to justify the introduction of uncharged misconduct earlier ruled inadmissible
§ 10:26	—Precluding the prosecution from using evidence of an uncharged act when the delay between the alleged act and the use has impaired the accused's ability to rebut the evidence
§ 10:27	—Requiring prosecution to provide the defense with evidence that a third party might have committed the crime the defendant is charged with
§ 10:28	Fifth and Fourteenth Amendment privilege against self-incrimination and grand jury guarantee
§ 10:29	Fifth and Fourteenth Amendment privilege against self-incrimination

§ 10:30	—Admission of uncharged misconduct as violating accused's privilege not to take stand
§ 10:31	—Witness's privilege as allowing testifying defendant to refuse to answer cross-
§ 10:32	examination questions about uncharged act —Use of defendant's confession violative of Miranda v. Arizona to prove uncharged misconduct
§ 10:33	—Grant of immunity to defendant for uncharged misconduct as bar to introduction of uncharged act at trial for charged offense
§ 10:34	Sixth and Fourteenth Amendment guarantee of right to counsel—In general
§ 10:35	—Use of defendant's statement obtained in violation of right to counsel to prove uncharged misconduct
§ 10:36	—Use of conviction obtained in violation of right to counsel to prove defendant's uncharged misconduct
§ 10:37	— —Uncharged misconduct evidence as reason for attorney's advice that client enter guilty plea when client attacks advice as incompetent
§ 10:38	— — Uncharged misconduct evidence as reason for attorney's failure to offer evidence of defendant's good character
§ 10:39	— —Attorney's incompetence at trial in interjecting inadmissible uncharged misconduct or failing to object to its admission or request a limiting instruction
§ 10:40	—Use of defendant's conduct, advised by counsel, as consciousness of guilt evidence
§ 10:41	— — Uncharged misconduct admissible against one defendant as basis for conflict of interest of attorney representing codefendants
§ 10:42	— —Attorney's incompetence at trial in failing to introduce uncharged misconduct of third parties
§ 10:43	Sixth and Fourteenth Amendment right to testify and present defense
§ 10:44	Sixth and Fourteenth Amendment right to confront and cross-examine accusers
§ 10:45	Fourteenth Amendment Equal Protection Clause
§ 10:46	—Distinction between evidence of bad acts offered by prosecution and good acts offered by defense

§ 10:47	—Distinction between defendant's uncharged misconduct offered by prosecution to prove motive to commit the charged crime and defendant's uncharged misconduct offered by defense to prove defendant's disincentive to commit the crime
§ 10:48	—Distinction between defendant's uncharged misconduct and misconduct of codefendants
§ 10:49	—Distinction between defendant's uncharged misconduct and uncharged misconduct of defendants charged with different offenses
§ 10:50	Fourteenth Amendment equal protection clause—Distinction between defendant's charged offense and uncharged similar misconduct by third parties—Selective prosecution and enforcement claims
§ 10:51	Fourteenth Amendment Equal Protection Clause—Distinction between defendant's uncharged misconduct and misconduct of third parties who might have committed charged offense
§ 10:52	—Distinction between defendant's uncharged misconduct and mischarged misconduct of third parties who might have committed charged offense—The modern version of the SODDI (some other dude did it) defense
§ 10:53	—Distinction between defendant's uncharged misconduct and misconduct of alleged victim
§ 10:54	—Distinction between defendant's uncharged misconduct and misconduct of informant
§ 10:55	—Distinction between defendant's uncharged misconduct and misconduct of police
§ 10:56	Right to a public hearing on the admissibility of uncharged misconduct evidence under the Sixth Amendment public trial guarantee
§ 10:57	Prohibition of ex post facto legislation

#### **CHAPTER 11. CONCLUSION**

§ 11:1 In general

#### **APPENDICES**

 $\begin{array}{ccc} \text{APPENDIX I.} & \text{State Versions of Federal Rule of} \\ & \text{Evidence } 404(b) \end{array}$ 

**Table of Laws and Rules** 

xxxviii

Table of Cases Index