2005 DRAFTING REQUEST

Bill

Received: **10/04/2005**

Received By: **rryan**

Wanted: **As time permits**

Identical to LRB:

For: **Scott Suder (608) 267-0280**

By/Representing: **Luke Hilgemann**

This file may be shown to any legislator: **NO**

Drafter: **rryan**

May Contact:

Addl. Drafters:

Subject: **Criminal Law - procedure**

Extra Copies:

Submit via email: **YES**

Requester's email: **rep.suder@legis.state.wi.us**

Carbon copy (CC:) to: **cathlene.hanaman@legis.state.wi.us**
michael.dsida@legis.state.wi.us

Pre Topic:

No specific pre topic given

Topic:

Admitting evidence of prior crimes

Instructions:

See Attached

Drafting History:

Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?							
/1	rryan 10/11/2005	kfollett 10/27/2005	rschluet 10/27/2005	_____ _____	sbasford 10/27/2005	lemery 01/26/2006	

FE Sent For:

<END>

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Vers.	Drafted	Reviewed	Typed	Proofed	Submitted	Jacketed	Required
/?	rryan	11kf 10/27	10/25				

FE Sent For:

<END>

Ryan, Robin

From: Dsida, Michael
Sent: Tuesday, October 04, 2005 2:13 PM
To: Ryan, Robin
Subject: FW: Bill drafting request for Rep. Suder

I didn't enter this.

Maybe you can also take "theft of cable TV" from Cathlene. I'll get you the folder for it.

From: Northrop, Lori
Sent: Friday, September 30, 2005 12:07 PM
To: Dsida, Michael
Subject: FW: Bill drafting request for Rep. Suder

Thought this would go to you Mike. Thanks and happy Friday :)

From: Hilgemann, Luke
Sent: Friday, September 30, 2005 12:05 PM
To: LRB.Legal
Cc: Emerson, Anne
Subject: Bill drafting request for Rep. Suder

= assault?

Rep. Suder would like to have a bill drafted to allow a defendant's prior convictions for similar crimes to be admissable as evidence in criminal trials for sexual abuse of a minor. Several states, including most recently Michigan, have passed similar bills. I have enclosed a story outlining Michigan's bill for your review. http://writ.news.findlaw.com/colb/20050921.html

If you should have any questions, please feel free to contact us.

Luke Hilgemann
Luke Hilgemann
Office of Rep. Scott Suder
Wisconsin's 69th Assembly District
Room 21 North, State Capitol
888.534.0069 or 608.267.0280

http://writ.findlaw.com/colb/20050921.html

Michigan's Proposed Law Admitting Prior Crimes in Child Sex Abuse Cases:

Why It Has Broader Implications for the Law of Evidence

By SHERRY F. COLB

Wednesday, Sep. 21, 2005

The Michigan state senate has passed, and the state's governor has promised to sign, a bill that would alter the rules of evidence in criminal trials. The bill provides that in criminal trials for sexual abuse of a minor, a defendant's prior convictions for similar acts would be admissible as evidence that the defendant is guilty of the offense charged in the current case.

The bill will likely soon become law in Michigan, and an increasing number of states have passed comparable statutes. These statutes are significant, for the decision to admit such evidence against a criminal defendant represents a sharp departure from the usual approach, an approach that reflects the concern that hearing about prior offenses could unfairly prejudice a jury against the accused.

The Michigan statute thus confronts us with a broader question about character evidence at trials: Should we reconsider the old assumption that juries cannot hear about a defendant's prior crimes without losing their way?

If we conclude upon reexamination that juries truly are unable to handle such evidence, then the law has a far bigger problem on its hands than the handling of cases that involve the sexual abuse of minors.

The Rule Against the Admission of Propensity Evidence

The Federal Rules of Evidence, as well as most states' rules, provide that in general, evidence of a person's character may not be offered at trial to prove that on the particular occasion giving rise to the litigation, a person behaved in a manner consistent with his overall character.

Consider the following example. John Doe (a patient) brings a lawsuit against Jane Smith (a medical doctor) alleging that Smith negligently failed to diagnose Doe's throat infection before it could spread to his lungs and cause serious complications. As it turns out, Dr. Smith was previously found liable for malpractice against a different patient -- Luke Roe -- for surgically removing a healthy portion of his lung, instead of the diseased section that she was supposed to remove. John Doe wishes to introduce evidence of this prior malpractice against Jane Smith in the current suit.

If permitted to do so, John Doe would offer the evidence of Jane Smith's prior negligence for the following set of inferences: Dr. Smith's negligence in treating Luke Roe tends to support the conclusion that Jane is a negligent doctor. If Jane is a negligent doctor, then her failure to diagnose

John's throat infection can more readily be attributed to negligence than it could be if the same error were made by a doctor without a demonstrated propensity for negligence in the practice of medicine.

I suspect that these inferences will strike most readers as eminently reasonable. Indeed, if one (say, an insurance company) were trying to predict whether a doctor was likely to commit malpractice in the future, one would probably want to know whether the doctor had done so in the past.

Propensities really do seem to have some meaningful predictive power, and therefore, knowledge about a person's track record can be illuminating. If we accept the reality of propensities, moreover, it would appear no less useful to learn of them in a context in which one is attempting to ascertain what happened in the past, where the past is unknown to the fact-finder.

Yet evidence of prior negligence is generally not admissible in a negligence case to support the inferences outlined above: that the defendant is a negligent practitioner and that he or she was therefore more likely to have been negligent in this particular case.

The same principle holds true in the criminal context. A prosecutor cannot offer evidence that a criminal defendant previously committed armed robbery, to help prove that he is guilty of the armed robbery with which he stands accused at the current trial. This is true, again, notwithstanding the probability that a person who is prepared to commit armed robbery once, is more likely to commit the crime again in the future than a person who has never before committed armed robbery - as recidivism statistics bear out.

Stated differently, propensity evidence, in the criminal and civil contexts, seems relevant to the determination of what happened on a particular occasion. Yet it is not generally admissible. Why?

The Reason for the Propensity Rule

The rationale behind the general rule against admitting propensity evidence at trial is that juries will place far too much weight on such evidence. Propensities may be relevant, in other words, but not as relevant as juries will assume that they are. A jury will thus systematically overvalue propensity evidence.

Consider the case of the armed robber. A person who stands accused of armed robbery claims that he is innocent. The fact that he has committed armed robbery in the past, however, does make the innocence story slightly less likely to be true than if there were no prior history.

Still, there are lots of people who could have committed this robbery, other than the defendant, notwithstanding his prior bad acts. The likelihood of his innocence, then, is very great, even after we know that he has committed armed robbery before. Most armed robbers in the country, after all, are innocent of any one particular robbery charged, yet the fact that they each have a history of armed robbery does nothing to distinguish one from another.

Okay, the reader might say. That may well be true, but the jury understands this reality - it is simply part of how a jury evaluates evidence. For example, if the particular person who robbed a liquor store was wearing a Yankees shirt at the time, we would want the jury to know that the defendant on trial owned a Yankees shirt, even though that evidence alone does not distinguish him from a large group of other, innocent, people who also own Yankees shirts.

One piece of evidence does not need to do all of the work. It will either add up when considered as a whole, or, if it does not, then the jury will acquit the defendant. Therefore, the exclusion of prior bad acts evidence cannot rest entirely on the limited relevance of such evidence; it must rest instead on the perceived disparity between the actual value of the evidence, on the one hand, and the jury's probable perception of the value of the evidence, on the other.

The Fear that Juries Will Attribute Too Much Value to Propensity Evidence

The conventional view of jurors is that they are unable to comprehend that propensity evidence is not all that relevant. As a result, once they learn that a defendant has committed a crime before, they will be inclined to convict him this time, regardless of the strength or weakness of the other evidence in this case. By contrast, when they learn that a defendant owns clothing that matches the culprit's clothing, they will not have a similar reaction.

Perhaps this view of jurors reflects, in part, the idea that jurors might no longer care very much whether the defendant is innocent once they learn that he has acted in this way before. If the defendant is a killer or an armed robber, the jury might feel, then it is not such a terrible thing if he is convicted incorrectly of the crime charged -- he is guilty of something, after all.

It may be in part the fear of such thinking that drives the ordinarily-applicable rule against propensity evidence. But is this fear well-founded?

Trusting Juries In Cases Involving Sex Crimes Against Minors: Rationales

Michigan will probably soon have formalized its decision to trust juries to value propensity evidence appropriately, at least with respect to sexual criminal propensity in the context of sex crimes against minors.

This trust may reflect one of two views: The first view is that, in the case of sex crimes against children, the likelihood of recidivism is far greater than in the case of other sorts of crimes and therefore, placing great weight on propensity evidence -- which jurors are inclined to do anyway -- is now appropriate.

The second view is that the youth of their victims makes sex crimes against children especially difficult to prosecute, and propensity evidence -- while perhaps subject to distortion -- is necessary in such cases if anyone is ever to be held accountable for violating children.

On this second view, the risk of convicting some innocent defendants (who have a history of molesting children) is not as troubling as the risk of never convicting any guilty defendants, given that young witnesses are often incapable of providing useful testimony.

One could challenge these two views. Some have suggested, for example, that although recidivism may be high among child molesters, it is also high among people who commit robberies (though not among murderers). In view of this fact, they say, child molestation should not be singled out for distinct evidentiary treatment.

As to the second argument, our system seems generally to embrace the view that acquitting an innocent person is so important that ensuring such an acquittal is worth the release of ten (or a hundred, or more, depending on one's source) guilty people. If the introduction of character evidence is enough to convict a person (against whom the evidence is otherwise weak) of child molestation, then the risk of convicting the innocent becomes quite grave.

Michigan's decision to maintain its general rule against propensity evidence and lift it only in the case of child molestation trials, moreover, demonstrates that Michigan continues to distrust juries' evaluation of propensity evidence -- in most cases -- much as other states do. If that were not so, it would have lifted the ban on propensity evidence more generally.

Why the Jury Often Gets to Hear Propensity Evidence

But is such distrust consistent with the manner and circumstances in which propensity evidence often can make its way into a trial?

Though evidence of character is generally inadmissible at trial, it is not invariably so. Character evidence is admissible, for example, to attack witness credibility. Once a person testifies at a trial,

the opponent may accordingly offer prior bad acts (including criminal convictions) that tend to show that the witness is dishonest.

The credibility exception comes up most frequently in the case of the criminal defendant who takes the witness stand. A criminal defendant has a constitutional right to testify on his own behalf, just as he has the right to refrain from testifying. Once a defendant does take the stand, however, his credibility becomes an issue for the jury, and he is therefore subject to evidentiary attempts to portray him as a liar.

Whether or not the jury believes the defendant's sworn statements will turn, in part, on whether they consider him to be an honest person. Evidence rules thus allow the jury to hear information about propensity that might assist in the determination of whether or not the witness is dishonest (and is therefore more likely to be lying in the proceeding before the jury).

One way to judge whether a witness is dishonest is to consider prior actions that suggest dishonesty. Evidence rules, moreover, tend to consider criminal convictions relevant to the issue of honesty and dishonesty. Therefore, if the criminal defendant on trial for armed robbery opts to testify, he may find the prosecutor educating the jury about his prior convictions for larceny. Only if he does not testify can he feel confident that the jury will remain ignorant of these prior convictions.

Once the defendant takes the stand, the prosecutor will argue -- perhaps plausibly -- that committing larceny is an act that tends to show that a person is dishonest, and therefore that the person is currently more likely than he would be in the absence of such a propensity, to be lying to the jury. If the prior conviction is admitted, as it often will be, the judge will tell the jury that it may only consider the conviction as proof bearing on the witness's credibility, not as proof on the question of whether he in fact committed the offense with which he is charged.

But think about what this means. A person is charged with robbery. The jury wants to know whether the person committed the robbery. The defendant swears that he is innocent. The prosecutor gives the jury evidence about a larceny (theft) of which the defendant was previously convicted. The judge then explains to the jury that it may not draw the following inference: the defendant committed larceny, so that makes it more likely than it would be absent the larceny conviction, that he committed the robbery he is now charged with committing.

The judge would tell the jury that it may, however, draw a different inference: the defendant committed larceny, so that makes it more likely that he would tell a lie while under oath -- which, in turn, makes his statement "I am innocent" less persuasive than it would otherwise be.

Therefore, we can draw on the propensity evidence in order to choose not to believe him when he says that he did not commit the robbery, but we cannot draw on the same evidence to find that, in fact, he did commit the robbery. Get it?

If you do not, you are in good company. It is difficult to imagine that a jury can - as the judge instructs it -- limit its consideration of prior crimes to their reflection on the defendant's likelihood of lying as a witness (to which prior crimes are only marginally relevant), but at the same time ignore the implications of a criminal history for whether he committed the offense with which he is charged (to which it is arguably more relevant).

The many defendants who fail to testify because they have a prior criminal record have voted with their feet on the question of whether juries can handle the limiting instruction at issue.

A More Logical Direction for the Law of Character Evidence

Many people find quite frustrating the rule that character evidence may not be offered to prove behavior in conformity with that character. It seems logical to them that a robber is more likely to commit robbery than a person who has never robbed. Nonetheless, we recognize that a prior bad act is not powerful evidence that out of the whole universe of suspects, the defendant -- and not

someone else -- committed this particular crime.

Yet the law does not trust jurors to digest these fairly basic concepts. And then we turn around and ask for the impossible when the defendant-witness testifies on his own behalf - demanding that the jury make the fine distinction described above, between using past crimes to evaluate the credibility of a denial, and using them to assess guilt.

A better approach would be to admit character evidence in criminal cases but also explain our concerns to jurors -- or allow the attorneys to explain them. This would relieve the frustration of those who trust juries to handle relevant information and not overvalue it.

It would also relieve the pressure on criminal defendants (whether in child molestation cases or other types of cases) to stay off the witness stand if they have a prior record.

Defendants should feel free to testify, and ironically, if their character is fair game no matter what they do, then they will feel free to testify. Juries can then hear of prior convictions, hear testimony from the defendant, and decide the cases with more, rather than less, information relevant to their task.

Alternatively, if we truly believe that jurors are incapable of doing that, then we must seriously rethink the limiting instructions that permeate our law of evidence and that allow jurors to hear all sorts of prejudicial information that they are subsequently asked not to consider for its full effect.

Sherry F. Colb, a FindLaw columnist, is Professor and Frederick B. Lacey Scholar at Rutgers Law School in Newark. Her columns on criminal law and procedure, among other subjects, may be found in the archive of her work on this site.

SENATE SUBSTITUTE FOR

HOUSE BILL NO. 4937

A bill to amend 1927 PA 175, entitled

"The code of criminal procedure,"

(MCL 760.1 to 777.69) by adding section 27a to chapter VIII.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

CHAPTER VIII

SEC. 27A. (1) NOTWITHSTANDING SECTION 27, IN A CRIMINAL CASE IN WHICH THE DEFENDANT IS ACCUSED OF COMMITTING A LISTED OFFENSE AGAINST A MINOR, EVIDENCE THAT THE DEFENDANT COMMITTED ANOTHER LISTED OFFENSE AGAINST A MINOR IS ADMISSIBLE AND MAY BE CONSIDERED FOR ITS BEARING ON ANY MATTER TO WHICH IT IS RELEVANT. IF THE PROSECUTING ATTORNEY INTENDS TO OFFER EVIDENCE UNDER THIS SECTION, THE PROSECUTING ATTORNEY SHALL DISCLOSE THE EVIDENCE TO THE DEFENDANT AT LEAST 15 DAYS BEFORE THE SCHEDULED DATE OF TRIAL OR AT A LATER TIME AS ALLOWED BY THE COURT FOR GOOD CAUSE SHOWN,

INCLUDING THE STATEMENTS OF WITNESSES OR A SUMMARY OF THE SUBSTANCE OF ANY TESTIMONY THAT IS EXPECTED TO BE OFFERED.

(2) AS USED IN THIS SECTION:

(A) "LISTED OFFENSE" MEANS THAT TERM AS DEFINED IN SECTION 2 OF THE SEX OFFENDERS REGISTRATION ACT, 1994 PA 295, MCL 28.722.

(B) "MINOR" MEANS AN INDIVIDUAL LESS THAN 18 YEARS OF AGE.

Enacting section 1. This amendatory act takes effect January 1, 2006.

Mich. listed offenses =

750.145a Enticing
750.145b Soliciting
750.145c child porn
750.158 Sodomy if victim <18
750.167 indecent exposure/prostitution/etc. - disorderly if victim <18
750.335a
.338 gross indecency (between men
.338a " female
.338b " male/female
.349 Kidnapping if victim <18
.350 Enticing
.448 Soliciting prostitution if victim <18
.445 Pandering
.520b 1st o SA
c 2nd o SA
d 3rd o SA
g 4th o SA
g Assault w/ intent to commit sexual conduct

3rd or subsequent viol.

Rule **413**. Evidence of Similar Crimes in Sexual Assault Cases

(a) In a criminal case in which the defendant is accused of an offense of sexual assault, evidence of the defendant's commission of another offense or offenses of sexual assault is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "offense of sexual assault" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code; Sexual Abuse
18 USC 2241 = sexual assault

(2) contact, without consent, between any part of the defendant's body or an object and the genitals or anus of another person;

(3) contact, without consent, between the genitals or anus of the defendant and any part of another person's body;

(4) deriving sexual pleasure or gratification from the infliction of death, bodily injury, or physical pain on another person; or

(5) an attempt or conspiracy to engage in conduct described in paragraphs (1)-(4).

Notes

Rule **414**. Evidence of Similar Crimes in Child Molestation Cases

(a) In a criminal case in which the defendant is accused of an offense of child molestation, evidence of the defendant's commission of another offense or offenses of child molestation is admissible, and may be considered for its bearing on any matter to which it is relevant.

(b) In a case in which the Government intends to offer evidence under this rule, the attorney for the Government shall disclose the evidence to the defendant, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

(d) For purposes of this rule and Rule 415, "child" means a person below the age of fourteen, and "offense of child molestation" means a crime under Federal law or the law of a State (as defined in section 513 of title 18, United States Code) that involved--

(1) any conduct proscribed by chapter 109A of title 18, United States Code, that was committed in relation to a child;

(2) any conduct proscribed by chapter 110 of title 18, United States Code; 42 USC 2251
Sexual Exploitation of Children (enticement)

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

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

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

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

Notes

Rule **415**. Evidence of Similar Acts in Civil Cases Concerning Sexual Assault or Child Molestation

(a) In a civil case in which a claim for damages or other relief is predicated on a party's alleged commission of conduct constituting an offense of sexual assault or child molestation, evidence of that party's commission of another offense or offenses of sexual assault or child molestation is admissible and may be considered as provided in Rule 413 and Rule 414 of these rules.

(b) A party who intends to offer evidence under this Rule shall disclose the evidence to the party against whom it will be offered, including statements of witnesses or a summary of the substance of any testimony that is expected to be offered, at least fifteen days before the scheduled date of trial or at such later time as the court may allow for good cause.

(c) This rule shall not be construed to limit the admission or consideration of evidence under any other rule.

Notes

NOTES TO RULE 413

HISTORY:

(Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle § 320935(a), 108 Stat. 2136.)

EFFECTIVE DATE OF SECTION:

This rule became effective July 9, 1995, pursuant to § 320935(d) of Act Sept.13, 1994, P.L. 103-322, which appears as a note to this rule.

OTHER PROVISIONS:

Effectiveness, implementation, recommendations, and application.

Act Sept. 13, 1994, P.L. 103-322, Title XXXII, Subtitle I, § 320935(b)--(e), 108 Stat. 2137, provide:

"(b) Implementation. The amendments made by subsection (a) [adding Rules 413--415] shall become effective pursuant to subsection (d).

"(c) Recommendations by Judicial Conference. Not later than 150 days after the date of enactment of this Act, the Judicial Conference of the United States shall transmit to Congress a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault and child molestation. The Rules Enabling Act shall not apply to the recommendations made by the Judicial Conference pursuant to this section.

"(d) Congressional action. (1) If the recommendations described in subsection (c) are the same as the amendment made by subsection (a) [adding Rules 413--415], then the amendments made by subsection (a) shall become effective 30 days after the transmittal of the recommendations.

"(2) If the recommendations described in subsection (c) are different than the amendments made by subsection (a) [adding Rules 413--415], the amendments made by subsection (a) shall become effective 150 days after the transmittal of the recommendations unless otherwise provided by law.

"(3) If the Judicial Conference fails to comply with subsection (c), the amendments made by subsection (a) [adding Rules 413--415] shall become effective 150 days after the date the recommendations were due under subsection (c) unless otherwise provided by law.

"(e) Application. The amendments made by subsection (a) [adding Rules 413--415] shall apply to proceedings commenced on or after the effective date of such amendments.".

[The report submitted to Congress on Feb. 9, 1995 (note to this rule) pursuant to subsec. (c) of this note contained recommendations different from the amendments made by § 320935(a) of Act Sept. 13, 1994, P.L. 103-322, adding FRE 413 through 415, thus delaying the effective date of such rules until 150 days after transmittal of the report unless otherwise provided by law.]

Report of Judicial Conference of United States on admission of character evidence in certain sexual misconduct cases.

The report of the Judicial Conference of the United States on the admission of character evidence in certain sexual misconduct cases, submitted to Congress on Feb. 9, 1995, in accordance with § 320935(c) of the Violent Crime Control and Law Enforcement Act of 1994 (§ 329035(c) of Act Sept. 13, 1994, P.L. 103-322 (note to this rule)), provides:

"I. INTRODUCTION

"This report is transmitted to Congress in accordance with the Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322 (September 13, 1994). Section 320935 of the Act invited the Judicial Conference of the United States within 150 days (February 10, 1995) to submit 'a report containing recommendations for amending the Federal Rules of Evidence as they affect the admission of evidence of a defendant's prior sexual assault or child molestation crimes in cases involving sexual assault or child molestation.'

"Under the Act, new Rules 413, 414, and 415 would be added to the Federal Rules of Evidence. These Rules would admit evidence of a defendant's past similar acts in criminal and civil cases involving a sexual assault or child molestation offense for its bearing on any matter to which it is relevant. The effective date of new Rules 413-415 is contingent in part upon the nature of the recommendations submitted by the Judicial Conference.

"After careful study, the Judicial Conference urges Congress to reconsider its decision on the policy questions underlying the new rules for reasons set out in Part III below.

"If Congress does not reconsider its decision on the underlying policy questions, the Judicial Conference recommends incorporation of the provisions of new Rules 413-415 as amendments to Rules 404 and 405 of the Federal Rules of Evidence. The amendments would not change the substance of the congressional enactment but would clarity drafting ambiguities and eliminate possible constitutional infirmities.

"II. BACKGROUND

"Under the Act, the Judicial Conference was provided 150 days within which to make and submit to Congress alternative recommendations to new Evidence Rules 413-415. Consideration of Rules 413-415 by the Judicial Conference was specifically excepted from the exacting review procedures set forth in the Rules Enabling Act (codified at 28 U.S.C. §§ 2071-2077). Although the Conference acted on these new rules on an expedited basis to meet the Act's deadlines, the review process was thorough.

"The new rules would apply to both civil and criminal cases. Accordingly, the Judicial Conference's Advisory Committee on Criminal Rules and the Advisory Committee on Civil Rules reviewed the rules at separate meetings in October 1994. At the same time and in preparation for its consideration of the new rules, the Advisory Committee on Evidence Rules sent out a notice soliciting comment on new Evidence Rules 413, 414, and 415. The notice was sent to the courts, including all federal judges, about 900 evidence law professors, 40 women's rights organizations, and 1,000 other individuals and interested organizations.

"III. DISCUSSION

"On October 17-18, 1994, the Advisory Committee on Evidence Rules met in Washington, D.C. It considered the public responses, which included 84 written comments, representing 112 individuals, 8 local and 8 national legal organizations. The overwhelming majority of judges, lawyers, law professors, and legal organizations who responded opposed new Evidence Rules 413, 414, and 415. The principal objections expressed were that the rules would permit the admission of unfairly prejudicial evidence and contained numerous drafting problems not intended by their authors.

"The Advisory Committee on Evidence Rules submitted its report to the Judicial Conference Committee on Rules of Practice and Procedure (Standing Committee) for review at its January 11-13, 1995 meeting. The committee's report was unanimous except for a dissenting vote by the representative of the Department of Justice. The advisory committee believed that the concerns expressed by Congress and embodied in new Evidence Rules 413, 414, and 415 are already adequately addressed in the existing Federal Rules of Evidence. In particular, Evidence Rule 404(b) now allows the admission of evidence

against a criminal defendant of the commission of prior crimes, wrongs, or acts for specified purposes, including to show intent, plan, motive, preparation, identity, knowledge, or absence of mistake or accident.

"Furthermore, the new rules, which are not supported by empirical evidence, could diminish significantly the protections that have safeguarded persons accused in criminal cases and parties in civil cases against undue prejudice. These protections form a fundamental part of American jurisprudence and have evolved under long-standing rules and case law. A significant concern identified by the committee was the danger of convicting a criminal defendant for past, as opposed to charged, behavior or for being a bad person.

"In addition, the advisory committee concluded that, because prior bad acts would be admissible even though not the subject of a conviction, mini-trials within trials concerning those acts would result when a defendant seeks to rebut such evidence. The committee also noticed that many of the comments received had concluded that the Rules, as drafted, were mandatory--that is, such evidence had to be admitted regardless of other rules of evidence such as the hearsay rule or the Rule 403 balancing test The committee believed that this position was arguable because Rules 413-415 declare without qualification that such evidence 'is admissible.' In contrast, the new Rule 412, passed as part of the same legislation, provided that certain evidence 'is admissible if it is otherwise admissible under these Rules.' Fed. R. Evid. 412(b)(2). If the critics are right, Rules 413-415 free the prosecution from rules that apply to the defendant--including the hearsay rule and Rule 403. If so, serious constitutional questions would arise.

"The Advisory Committees on Criminal and Civil Rules unanimously, except for representatives of the Department of Justice, also opposed the new rules. Those committees also concluded that the new rules would permit the introduction of unreliable but highly prejudicial evidence and would complicate trials by causing mini-trials of other alleged wrongs. After the advisory committees reported, the Standing Committee unanimously, again except for the representative of the Department of Justice, agreed with the view of the advisory committees.

"It is important to note the highly unusual unanimity of the members of the Standing and Advisory Committees, composed of over 40 judges, practicing lawyers, and academicians, in taking the view that Rules 413-415 are undesirable. Indeed, the only supporters of the Rules were representatives of the Department of Justice.

"For these reasons, the Standing Committee recommended that Congress reconsider its decision on the policy questions embodied in new Evidence Rules 413, 414, and 415.

"However, if Congress will not reconsider its decision on the policy questions, the Standing Committee recommended that Congress consider an alternative draft recommended by the Advisory Committee on Evidence Rules. That Committee drafted proposed amendments to existing Evidence Rules 404 and 405 that would both correct ambiguities and possible constitutional infirmities identified in new Evidence Rules 413, 414, and 415 yet still effectuate Congressional intent. In particular, the proposed amendments:

"(1) expressly apply the other rules of evidence to evidence offered under the new rules;

"(2) expressly allow the party against whom such evidence is offered to use similar evidence in rebuttal;

"(3) expressly enumerate the factors to be weighed by a court in making its Rule 403 determination;

"(4) render the notice provisions consistent with the provisions in existing Rule 404 regarding criminal cases;

"(5) eliminate the special notice provisions of Rules 413-415 in civil cases so that notice will be required as provided in the Federal Rules of Civil Procedure; and

"(6) permit reputation or opinion evidence after such evidence is offered by the accused or defendant.

"The Standing Committee reviewed the new rules and the alternative recommendations. It concurred with the views of the Evidence Rules Committee and recommended that the Judicial Conference adopt them.

"The Judicial Conference concurs with the views of the Standing Committee and urges that Congress reconsider its policy determinations underlying Evidence Rules 413-415. In the alternative, the attached amendments [this note] to Evidence Rules 404 and 405 are recommended, in lieu of new Evidence Rules 413, 414, and 415. The alternative amendments to Evidence Rules 404 and 405 are accompanied by the Advisory Committee Notes [this note], which explain them in detail.

ATTACHMENT

"Rule 404. Character Evidence Not Admissible To Prove Conduct; Exceptions; Other Crimes
[New matter is italicized and matter to be omitted is lined through.]

* * * * *

"(4) Character in sexual misconduct cases. Evidence of another act of sexual assault or child molestation, or evidence to rebut such proof or an inference therefrom, if that evidence is otherwise admissible under these rules, in a criminal case in which the accused is charged with sexual assault or child molestation, or in a civil case in which a claim is predicated on a party's alleged commission of sexual assault or child molestation.

"(A) In weighing the probative value of such evidence, the court may, as part of its rule 403 determination, consider:

"(i) proximity in time to the charged or predicate misconduct:

"(ii) similarity to the charged or predicate misconduct:

"(iii) frequency of the other acts:

"(iv) surrounding circumstances:

"(v) relevant intervening events: and

"(vi) other relevant similarities or differences.

"(B) In a criminal case in which the prosecution intends to offer evidence under this subdivision, it must disclose the evidence, including statements of witnesses or a summary of the substance of any testimony, at a reasonable time in advance of trial, or during trial if the court excuses pretrial notice on good cause shown.

"(C) For purposes of this subdivision,

"(i) 'sexual assault' means conduct--or an attempt or conspiracy to engage in conduct--of the type proscribed by chapter 109A of title 18, United States Code [18 USCS §§ 2241 et seq.], or conduct that involved deriving sexual pleasure or ratification from inflicting death, bodily injury, or physical pain on another person irrespective of the ace of the victim - regardless of whether that conduct would have subjected the actor to federal jurisdiction.

"(ii) 'child molestation' means conduct--or an attempt or conspiracy to engage in conduct--of the type proscribed by chapter 110 of title 18, United States Code [18 USCS §§ 2251 et seq.], or conduct, committed in relation to a child below the ace of 14 years, either of the type proscribed by chapter 109A of title 18, United States Code [18 USCS §§ 2241 et seq.], or that involved deriving sexual

pleasure or gratification from inflicting death, bodily injury, or physical pain on another person - regardless of whether that conduct would have subjected the actor to federal jurisdiction.

"(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith *except as provided in subdivision (a)* . . . .

"Note to Rule 404(a)(4)

"The Committee has redrafted Rules 413, 414 and 415 which the Violent Crime Control and Law Enforcement Act of 1994 conditionally added to the Federal Rules of Evidence. [Congress provided that the rules would take effect unless within a specified time period the Judicial Conference made recommendations to amend the rules that Congress enacted.] These modifications do not change the substance of the congressional enactment. The changes were made in order to integrate the provisions both substantively and stylistically with the existing Rules of Evidence; to illuminate the intent expressed by the principal drafters of the measure; to clarify drafting ambiguities that might necessitate considerable judicial attention if they remained unresolved; and to eliminate possible constitutional infirmities.

The Committee placed the new provisions in Rule 404 because this rule governs the admissibility of character evidence. The congressional enactment constitutes a new exception to the general rule stated in subdivision (a). The Committee also combined the three separate rules proposed by Congress into one subdivision (a)(4) in accordance with the rules' customary practice of treating criminal and civil issues jointly. An amendment to Rule 405 has been added because the authorization of a new form of character evidence in this rule has an impact on methods of proving character that were not explicitly addressed by Congress. The stylistic changes are self-evident. They are particularly noticeable in the definition section in subdivision (a)(4)(C) in which the Committee eliminated, without any change in meaning, graphic details of sexual acts.

"The Committee added language that explicitly provides that evidence under this subdivision must satisfy other rules of evidence such as the hearsay rules in Article VIII [FRE (USCS, Title 28 Appx) 801 et seq.] and the expert testimony rules in Article VII [FRE (USCS, Title 28 Appx) 701 et seq.]. Although principal sponsors of the legislation had stated that they intended other evidentiary rules to apply, the Committee believes that the opening phrase of the new subdivision 'if otherwise admissible under these rules' is needed to clarify the relationship between subdivision (a)(4) and other evidentiary provisions.

"The Committee also expressly made subdivision (a)(4) subject to Rule 403 balancing in accordance with the repeatedly stated objectives of the legislation's sponsors with which representatives of the Justice Department expressed agreement. Many commentators on Rules 413-415 had objected that Rule 403's applicability was obscured by the actual language employed.

"In addition to clarifying the drafters' intent, an explicit reference to Rule 403 may be essential to insulate the rule against constitutional challenge. Constitutional concerns also led the Committee to acknowledge specifically the opposing party's right to offer in rebuttal character evidence that the rules would otherwise bar, including evidence of a third person's prior acts of sexual misconduct offered to prove that the third person rather than the party committed the acts in issue.

"In order to minimize the need for extensive and time-consuming judicial interpretation, the Committee listed factors that a court may consider in discharging Rule 403 balancing. Proximity in time is taken into account in a related rule. See Rule 609(b). Similarity, frequency and surrounding circumstances have long been considered by courts in handling other crimes evidence pursuant to Rule 404(b). Relevant intervening events, such as extensive medical treatment of the accused between the time of the prior proffered act and the charged act, may affect the strength of the propensity inference for which the evidence is offered. The final factor --'other relevant similarities or differences'--is added in recognition of the endless variety of circumstances that confront a trial court in rulings on admissibility. Although subdivision (4)(A) explicitly refers to factors that bear on probative value, this enumeration does not eliminate a judge's responsibility to take into account the other factors mentioned in Rule 403 itself--'the danger of unfair prejudice, confusion of the issues, . . . misleading the jury, . . . undue delay, waste of time, or needless presentation of cumulative evidence.' In addition, the Advisory Committee Note to Rule 403 reminds judges that 'The availability of other means of proof may also be an appropriate factor.'

"The Committee altered slightly the notice provision in criminal cases. Providing the trial court with some discretion to excuse pretrial notice was thought preferable to the inflexible 15-day rule provided in Rules 414 and 415. Furthermore, the formulation is identical to that contained in the 1991 amendment to Rule 404(b) so that no confusion will result from having two somewhat different notice provisions in the same rule. The Committee eliminated the notice provision for civil cases stated in Rule 415 because it did not believe that Congress intended to alter the usual time table for disclosure and discovery provided by the Federal Rules of Civil Procedure.

"The definition section was simplified with no change in meaning. The reference to 'the law of a state' was eliminated as unnecessarily confusing and restrictive. Conduct committed outside the United States ought equally to be eligible for admission. Evidence offered pursuant to subdivision (a)(4) must relate to a form of conduct proscribed by either chapter 109A or 110 of title 18, United States Code, regardless of whether the actor was subject to federal jurisdiction.

"Rule 405. Methods of Proving Character[New matter is italicized and matter to be omitted is lined through.]

(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion *except as provided in subdivision (c) of this rule.* On cross-examination, inquiry is allowable into relevant specific instances of conduct.

* * * * *

"(c) Proof in sexual misconduct cases. In a case in which evidence is offered under rule 404(a)(4), proof may be made by specific instances of conduct, testimony as to reputation, or testimony in the form of an opinion, except that the prosecution or claimant may offer reputation or opinion testimony only after the opposing party has offered such testimony.

"**Note to Rule 405(c)**

"The addition of a new subdivision (a)(4) to Rule 404 necessitates adding a new subdivision (c) to Rule 405 to govern methods of proof. Congress clearly intended no change in the preexisting law that precludes the prosecution or a claimant from offering reputation or opinion testimony in its case in chief to prove that the opposing party acted in conformity with character. When evidence is admissible pursuant to Rule 404(a)(4), the proponents proof must consist of specific instances of conduct. The opposing party, however, is free to respond with reputation or opinion testimony (including expert testimony if otherwise admissible) as well as evidence of specific instances. In a criminal case, the admissibility of reputation or opinion testimony would, in any event, be authorized by Rule 404(a)(1). The extension to civil cases is essential in order to provide the opponent with an adequate opportunity to refute allegations about a character for sexual misconduct. Once the opposing party offers reputation or opinion testimony, however, the prosecution or claimant may counter using such methods of proof.".

10/6/05

Questions for Luke

(1) Which crimes should this apply to?
1st O SA of a child
1st O SA of an adult

(2) Do crimes have to be similar
yes

(3) Assume the bill applies to evidence related to any person, not just defendant – for ex if A wants to put in evidence of other crimes committed by another suspect
– fine

(4) Presume that other evidence rules still apply ie relevance & cumulative/prejudice/delay
– yes

10/28

State of Wisconsin

2005 – 2006 LEGISLATURE

LRB–3785/?

RLR:

In 10/11/05

PRELIMINARY DRAFT – NOT READY FOR INTRODUCTION

Gen. Cat.

AN ACT ...; **relating to:** admitting evidence of other crimes in certain criminal proceedings.

Analysis by the Legislative Reference Bureau

Under current law, evidence that a person committed a prior criminal act is not admissible in a court proceeding for the purpose of proving that the person has a propensity to commit crimes or has a character or disposition that makes him or her more likely to commit a crime. However, evidence of a prior criminal act may be admitted for other purposes, including to prove motive, opportunity, intent, identity, or absence of mistake.

This bill provides that in a criminal proceeding in which a person is accused of committing a first-degree sexual assault or a first-degree sexual assault of a child, evidence that a person committed another first-degree sexual assault or first-degree sexual assault of a child, which is similar to the alleged offense, may be admitted to prove the character of the person in order to show that the person acted in conformity with demonstrated character traits, so long as the evidence is not barred by any other rule of evidence.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

SECTION 1. 904.04 (2) of the statutes is renumbered 904.04 (2) (a) and amended to read:

904.04 **(2)** (a) OTHER CRIMES, WRONGS, OR ACTS. ~~Evidence~~ Except as provided in par. (b), evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted in conformity therewith. This subsection does not exclude the evidence when offered for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

History: Sup. Ct. Order, 59 Wis. 2d R1, R75 (1973); 1975 c. 184; 1991 a. 32.

SECTION 2. 904.04 (2) (b) of the statutes is created to read:

904.04 **(2)** (b) In a criminal proceeding alleging a violation of s. 940.225 (1) or 948.02 (1), sub. (1) and par. (a) do not prohibit admitting evidence that a person committed a violation of s. 940.225 (1) or 948.02 (1) or a comparable offense in another jurisdiction, that is similar to the alleged violation, as evidence of the person's character in order to show that the person acted in conformity therewith.

SECTION 3. Initial applicability.

(1) This act first applies to criminal actions commenced on the effective date of this subsection.

(END)

State of Wisconsin
LEGISLATIVE REFERENCE BUREAU

RESEARCH APPENDIX -

PLEASE DO NOT REMOVE FROM DRAFTING FILE

Date Transfer Requested: 01/19/2006 (Per: RLR)

☞Appendix A

☞ The 2005 drafting file for LRB 05–3785/**1**

has been copied/added to the 2005 drafting file for

LRB 05–4449

☞ The attached 2005 draft was incorporated into the new 2005 draft listed above. For research purposes, this cover sheet and the attached drafting file were copied, and added, as a appendix, to the new 2005 drafting file. If introduced this section will be scanned and added, as a separate appendix, to the electronic drafting file folder.

☞ This cover sheet was added to rear of the original 2005 drafting file. The drafting file was then returned, intact, to its folder and filed.

Emery, Lynn

From: Emerson, Anne
Sent: Thursday, January 26, 2006 3:49 PM
To: LRB.Legal
Subject: FW: Draft review: LRB 05-3785/1 Topic: Admitting evidence of prior crimes

It has been requested by <Emerson, Anne> that the following draft be jacketed for the ASSEMBLY:

FW: Draft review: LRB 05-3785/1 Topic: Admitting evidence of prior crimes