FIRST DISTRICT APPELLATE PROJECT
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UNCHARGED ACTS:
EVIDENCE CODE SECTIONS 1101, 1108, & 1109

Jeremy Price
Staff Attorney

Evidence Code section 1101, subdivision (b)

The Statute

Evidence Code section 1101, subdivision (b), permits "the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

While Evidence Code section 1101, subdivision (a), prohibits admission of a person's character, whether in the form of opinion, reputation evidence, or evidence of specific acts, to prove a person's conduct on a specified occasion, Evidence Code section 1101, subdivision (b) allows for admission of evidence of a person's prior acts when offered to prove a fact other than his or her disposition to commit the contested act. Such prior misconduct evidence may be offered to prove such facts as motive, opportunity, intent, preparation, plan, knowledge, identity, the absence of mistake or accident or lack of a reasonable belief that a person consented to engaging in a sexual act.

Similarity Requirements

In *People v. Ewoldt* (1994) 7 Cal.4th 380, 401, the California Supreme Court held that evidence of a defendant's uncharged misconduct is relevant where the uncharged misconduct and the charged offense are sufficiently similar to support the inference that they are manifestations of a common design or plan. The court distinguished between the nature and degree of similarity required in order to establish a common design or plan, as opposed to that required to prove intent or identity.

The court found the least degree of similarity between the uncharged act and charged offense is required to prove intent. (*Id*. at p. 402.) In order to be admissible to prove intent, the uncharged misconduct must be sufficiently similar to support the inference that the defendant "'probably harbored the same intent in each instance.' [citation omitted.]" (*Ibid*.)

A greater degree of similarity is required to prove existence of a common design or plan. "To establish the existence of a common design or plan, the common features must indicate the existence of a plan rather than a series of similar spontaneous acts, but the plan thus revealed need not be distinctive or unusual." (*Id*. at p. 403.) Prior bad acts may

be admitted if they demonstrate "circumstantially that the defendant committed the charged offense pursuant to the same design or plan he or she used in committing the uncharged acts. Unlike evidence of uncharged acts used to prove identity, the plan need not be unusual or distinctive; it need only exist to support the inference that the defendant employed that plan in committing the charged offense." (*Ibid*.)

Finally, the court stated that the greatest degree of similarity is required to prove identity. For identity to be established, the uncharged conduct and the charged offense must share common features that are sufficiently distinctive so as to support the inference that the same person committed both acts. (*Id*. at p. 403.) "'The pattern and characteristics of the crimes must be so unusual and distinctive as to be like a signature.'" (*Ibid*.)

Uncharged Conduct Must Be Proven By a Preponderance of the Evidence

Before the trier of fact may consider evidence of an uncharged act pursuant to Evidence Code section 1101, subdivision (b), the prosecution must prove by a preponderance of the evidence that the defendant in fact committed the uncharged act(s) in question. (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.)

Admission of Uncharged Acts Subject to Evidence Code section 352 Balancing

Importantly, the California Supreme Court has also held that evidence that meets the requirements of Evidence Code section 1101, subdivision (b), must still be subjected to a weighing under Evidence Code section 352 prior to being admitted. (*Id*. at p. 404.) *Ewoldt* reasoned: "Evidence of uncharged offenses 'is so prejudicial that its admission requires extremely careful analysis. [Citations.]' (*People v. Smallwood* (1986) 42 Cal.3d 415, 428, 228 Cal.Rptr. 913, 722 P.2d 197; see also *People v. Thompson* (1988) 45 Cal.3d 86, 109, 246 Cal.Rptr. 245, 753 P.2d 37.) 'Since "substantial prejudicial effect [is] inherent in [such] evidence," uncharged offenses are admissible only if they have substantial probative value.' (*People v. Thompson* (1980) 27 Cal.3d 303, 318, 165 Cal.Rptr. 289, 611 P.2d 883, italics in original, fn. omitted.) [¶] Although the evidence of defendant's uncharged criminal conduct in this case is relevant to establish a common design or plan, to be admissible such evidence 'must not contravene other policies limiting admission, such as those contained in Evidence Code section 352. [Citations.]' (*People v. Thompson*, *supra*, 45 Cal.3d at p. 109, 246 Cal.Rptr. 245, 753 P.2d 37.) We thus proceed to examine whether the probative value of the evidence of defendant's uncharged offenses is 'substantially outweighed by the probability that its admission [would] ... create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.' (Evid. Code, § 352.)"

The following factors should be considered when determining whether evidence otherwise admissible under Evidence Code section 1101, subdivision (b), should nonetheless be excluded pursuant to Evidence Code section 352:

- the materiality of the fact to be proved or disproved;
- the probative value of the other crimes evidence to prove or disprove the facts;
- the existence of any rule or policy requiring exclusion even if the evidence is relevant; and
- the remoteness in time of the uncharged act(s).

Uncharged Acts Need Not Pre-Date Charged Acts

Although evidence admitted pursuant to Evidence Code section 1101, subdivision (b), is often referred to as "prior" acts evidence, evidence of a subsequent as well as a prior offense is admissible. (*People v. Balcom* (1994) 7 Cal.4th 414, 422-423, 425.)

Defendant May Stipulate to Elements of Charged Offense to Avoid Admission into Evidence of Uncharged Ones

In an effort to preclude the prosecution from introducing evidence pursuant to Evidence Code section 1101, subdivision (b), the defendant may stipulate to certain elements put into doubt by his or her plea of not guilty. (*People v. Bruce* (1989) 208 Cal.App.3d 1099, 1103-1106.) The prosecution need not accept the stipulation, but an offer to stipulate may make the proffered evidence less probative and more cumulative, weighing in favor of exclusion under Evidence Code section 352. (*People v. Thornton* (2000) 85 Cal.App.4th 44, 49.)

Admission of Uncharged Acts Evidence Reviewed for Abuse of Discretion

On appeal, appellate courts review a trial court's ruling under Evidence Code section 1101 for abuse of discretion. (*People v. Roldan* (2005) 35 Cal.4th 646, 705.)

Harmless Error Standard

Although California appellate courts routinely apply the state harmless error test found in *People v. Watson* (1956) 46 Cal.2d 818 to claims of improperly admitted evidence pursuant to Evidence Code section 1101, in order to preserve the issue for federal review and to gain the more defense-friendly federal *Chapman* harmless error standard, appellate counsel should federalize the claim as a due process violation, perhaps citing *McKinney v. Rees* (9th Cir. 1993) 993 F.2d 1378, 1385.

Examples of Erroneous Admission of Uncharged Acts

In each of the following published cases, appellate courts found error in the admission of uncharged acts pursuant to Evidence Code section 1101, subdivision (b):

- *People v. Avitia* (2005) 127 Cal.App.4th 185, 193
- *People v. Felix* (1993) 14 Cal.App.4th 997, 1008
- *People v. Bergschneider* (1989) 211 Cal.App.3d 144, 162
- *People v. Bruce* (1989) 208 Cal.App.3d 1099
- *People v. Valentine* (1988) 2907 Cal.App.3d 697
- *People v. Harvey* (1984) 163 Cal.App.3d 90, 101

There have been a couple of recent unpublished victories in this area in the First District as well:

- *People v. Colombo*, 2007 WL 2330716
- *People v. Joachim*, 2008 WL 1801348

Uncharged Acts and Jury Selection

Division Three of the First District issued an interesting opinion in this area just last month in *People v. Jerome*, 2009 WL 1101597. Before jury selection in the defendant's kidnapping and robbery case, the trial court ruled that the prosecution could introduce evidence of the defendant's prior arrest for robbery under Evidence Code section 1101, subdivision (b), to show the defendant's intent and a common plan or scheme. The defendant was never prosecuted for this incident, and defense counsel objected to the admission of evidence concerning it. During voir dire, the trial court prohibited defense counsel from asking potential jurors about their ability to follow a judge's instructions about the limited purpose for which such prior acts evidence would come in. Following the defendant's convictions, defense counsel brought a new trial motion based on the trial court's preclusion of defense counsel's proposed voir dire questions. Applying the federal *Chapman* prejudice standard, the Court of Appeal reversed the defendant's convictions and sentence, holding that it was prejudicial error to restrict counsel from asking such questions in voir dire. The defendant had a right to explore whether jurors could remain fair and impartial arbiters if they heard he was involved in a similar uncharged incident, and could restrict their consideration of that incident to its proper evidentiary role or proof of intent and common plan or scheme but not his guilt of the charged offense.

CALCRIM no. 375

The Judicial Council instruction to be given when evidence of uncharged acts are admitted is found at CALCRIM no. 375, which provides:

> <Introductory Sentence Alternative A—evidence of other offense admitted>
>
> [The People presented evidence that the defendant committed ((another/other) offense[s]/the offense[s] of <insert description of alleged offense[s]>) that (was/were) not charged in this case.]
>
> <Introductory Sentence Alternative B—evidence of other act admitted>
>
> [The People presented evidence (of other behavior by the defendant that was not charged in this case/that the defendant <insert description of alleged conduct admitted under Evid. Code, § 1101(b)>).]
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the (uncharged offense[s]/act[s]). Proof by a preponderance of the evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.
>
> If the People have not met this burden, you must disregard this evidence entirely.
>
> If you decide that the defendant committed the (uncharged offense[s]/act[s]), you may, but are not required to, consider that evidence for the limited purpose of deciding whether or not:
>
> <SELECT SPECIFIC GROUNDS OF RELEVANCE AND DELETE ALL OTHER OPTIONS.>
>
> > <A. Identity>
> > [The defendant was the person who committed the offense[s] alleged in this case](./; or)
> >
> > <B. Intent>

[The defendant acted with the intent to <insert specific intent required to prove the offense[s] alleged> in this case](./; or)

<C. Motive>

[The defendant had a motive to commit the offense[s] alleged in this case](./; or)

<D. Knowledge>

[The defendant knew <insert knowledge required to prove the offense[s] alleged> when (he/she) allegedly acted in this case](./; or)

<E. Accident>

[The defendant's alleged actions were the result of mistake or accident](./; or)

<F. Common Plan>

[The defendant had a plan [or scheme] to commit the offense[s] alleged in this case](./; or)

<G. Consent>

[The defendant reasonably and in good faith believed that <insert name or description of complaining witness> consented](./; or)

<H. Other Purpose>

[The defendant <insert description of other permissible purpose; see Evid. Code, § 1101(b)>.]

[In evaluating this evidence, consider the similarity or lack of similarity between the uncharged (offense[s]/ [and] act[s]) and the charged offense[s].]

Do not consider this evidence for any other purpose [except for the limited

purpose of <insert other permitted purpose, e.g., determining the defendant's credibility>].

[Do not conclude from this evidence that the defendant has a bad character or is disposed to commit crime.]

If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of <insert charge[s]> [or that the <insert allegation[s]> has been proved]. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.

Trial courts must give CALCRIM no. 375 on request when evidence has been admitted pursuant to Evidence Code section 1101, subdivision (b). (*People v. Carpenter* (1997) 15 Cal.4th 312, 382.) However, in the absence of such a request, the court's sua sponte duty to give this instruction only arises in the "occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose." (*People v. Collie* (1981) 30 Cal.3d 43, 63–64.)

Propensity: Evidence Code sections 1108 and 1109

Introduction

"The admission of any evidence that involves crimes other than those for which a defendant is being tried has a 'highly inflammatory and prejudicial effect' on the trier of fact." (*People v. Thompson* (1980) 27 Cal.3d 303, 314 [citations omitted].) In recognition of this effect, Evidence Code section 1101, subdivision (a), "prohibits admission of evidence of a person's character, including evidence of character in the form of specific instances of uncharged misconduct, to prove the conduct of that person on a specified occasion." (*People v. Ewoldt* (1994) 7 Cal.4th 380, 393.)

The rule excluding the use of prior misconduct to show a defendant's propensity to commit the currently charged offense serves at least three key purposes: first, it "relieves the defendant of the often unfair burden of defending against both the charged offense and the other uncharged offenses;" second, it "promotes judicial efficiency by avoiding protracted 'mini-trials' to determine the truth or falsity of the prior charge;" and, third, it "guards against undue prejudice arising from the admission of the defendant's other offenses." (*People v. Falsetta* (1999) 21 Cal.4th 903, 915-916.)

Therefore, the California Supreme Court has "repeatedly warned that the admissibility of this type of evidence must be 'scrutinized with great care.'" (*People v. Thompson*, *supra*, 27 Cal.3d at p. 314 [citations omitted].) Despite this admonition, in adopting Evidence Code sections 1108 and 1109, the Legislature enacted statutes that permit the introduction of evidence of prior acts to show propensity where defendants are charged with sexual offenses, domestic violence, adult or dependent abuse, and child abuse. The California Supreme Court has upheld the constitutionality of Evidence Code section 1108, which deals with the introduction of prior sex offenses to show propensity (*People v. Falsetta*, *supra*, 21 Cal.4th 903), and a number of appellate courts have affirmed the constitutionality of Evidence Code section 1109, which deals with the introduction of prior acts of domestic violence, adult or dependent abuse, and child abuse to show propensity (*People v. Cabrera* (2007) 152 Cal.App.4th 695; *People v. Williams* (2008) 159 Cal.App.4th 141).

The United States Supreme Court has left open the general question of "whether a state law would violate the Due Process Clause if it permitted the use of 'prior crimes' evidence to show propensity to commit a charged crime." (*Estelle v. McGuire* (1991) 502 U.S. 62, 75, fn. 5).

Evidence Code section 1108

Evidence Code section 1108, subdivision (a), provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1108, subd. (a).)

Before the trier of fact may consider evidence of an uncharged sex offense for the purpose of establishing the defendant's propensity to commit such offenses, the prosecution must prove by a preponderance of the evidence that the defendant in fact committed the uncharged sex offense(s) in question. (*People v. Carpenter* (1997) 15 Cal.4th 312, 382; *People v. James* (2000) 81 Cal.App.4th 1343, 1359.)

Moreover, even if the prosecution makes this showing, the challenged evidence may not be admitted if doing so would violate Evidence Code section 352. (Evid. Code, § 1101, subd. (a).) In fact, the statute's requirement that the admission of uncharged sex offenses to show propensity be subjected to a weighing in accordance with Evidence Code section 352 that, in the California Supreme Court's estimation, kept Evidence Code section 1101 from violating the defendant's federal due process rights. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 917 ["we think the trial court's discretion to exclude propensity evidence under section 352 saves section 1108 from defendant's due process challenge"].)

According to *Falsetta*:

> Rather than admit or exclude every sex offense a defendant commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.

(*Ibid*.)

Therefore, while it is strongly recommended that appellate counsel continue to raise federal due process objections to Evidence Code section 1108 on its face, the case-specific challenges to the admission of uncharged sex offenses to show propensity should often focus on these Evidence Code section 352 factors discussed in *Falsetta*.

On appeal, the trial court's admission of evidence pursuant to Evidence Code section 1108 (and Evidence Code section 352) will be reviewed under the deferential abuse of discretion standard. (*People v. Wesson* (2006) 138 Cal.App.4th 959, 969.)

CALCRIM no. 1191

CALCRIM no. 1191 sets forth the Judicial Council's pattern jury instruction to be provided when evidence of uncharged sex offenses is admitted pursuant to Evidence Code section 1108:

> The People presented evidence that the defendant committed the crime[s] of <insert description of offense[s]> that (was/were) not charged in this case. (This/These) crime[s] (is/are) defined for you in these instructions.
>
> You may consider this evidence only if the People have proved by a preponderance of the evidence that the defendant in fact committed the uncharged offense[s]. Proof by a preponderance of the evidence is a different burden of proof from proof beyond a reasonable doubt. A fact is proved by a preponderance of the evidence if you conclude that it is more likely than not that the fact is true.

> If the People have not met this burden of proof, you must disregard this evidence entirely.
>
> If you decide that the defendant committed the uncharged offense[s], you may, but are not required to, conclude from that evidence that the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit [and did commit] <insert charged sex offense[s]>, as charged here. If you conclude that the defendant committed the uncharged offense[s], that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of <insert charged sex offense[s]>. The People must still prove (the/each) (charge/ [and] allegation) beyond a reasonable doubt.
>
> [Do not consider this evidence for any other purpose [except for the limited purpose of <insert other permitted purpose, e.g., determining the defendant's credibility>].]

(CALCRIM no. 1191.)

As the Authority section of the instruction makes clear, propensity evidence alone is not sufficient to support a conviction of the charged offense beyond a reasonable doubt. (*People v. Hill* (2001) 86 Cal.App.4th 273, 277-278.)

Perhaps the most controversial aspect of this instruction is that the jury is instructed not only that it may find "the defendant was disposed or inclined to commit sexual offenses, and based on that decision, also conclude that the defendant was likely to commit" the charged offense, but the jury may also be instructed that it may conclude the defendant "did commit" the charged offense if it makes a finding of disposition. (CALCRIM no. 1191 [fourth paragraph].)

As the instruction's commentary section points out, one appellate court "suggests using more general terms to instruct the jury how they may use evidence of other sexual offenses, 'leaving particular inferences for the argument of counsel and the jury's common sense.'" (CALCRIM no. 1191, quoting *People v. James*, *supra*, 81 Cal.App.4th at p. 1357, fn. 8.) While *James* has generally not been followed by other appellate courts, the Judicial Council has included the following alternative to the fourth paragraph of the instruction modeled on *James*:

> If you decide that the defendant committed the other sexual offense[s], you

> may consider that evidence and weigh it together with all the other evidence received during the trial to help you determine whether the defendant committed <insert charged sex offense>. Remember, however, that evidence of another sexual offense is not sufficient alone to find the defendant guilty of <insert charged sex offense>. The People must still prove (the/each) (charge/ [and] allegation) of <insert charged sex offense> beyond a reasonable doubt.

In *Falsetta*, because the California Supreme Court found no federal constitutional impediment to the admission of uncharged sex offense evidence to show propensity, the Court subjected the alleged instructional errors in that case to the state prejudice standard found in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Falsetta*, *supra*, 21 Cal.4th at p. 925 [finding "very little likelihood that the jury would convict Falsetta based on the prior crimes alone"].)

The Judicial Council has also included some RELATED ISSUES along with CALCRIM no. 1191, including:

- Expert Testimony: Evidence Code section 1108 does not authorize expert opinion evidence of sexual propensity during the prosecution's case-in-chief. (*People v. McFarland* (2000) 78 Cal.App.4th 489, 495–496.)

- Rebuttal Evidence: When the prosecution has introduced evidence of other sexual offenses under Evidence Code section 1108, subdivision (a), the defendant may introduce rebuttal character evidence in the form of opinion evidence, reputation evidence, and evidence of specific incidents of conduct under similar circumstances. (*People v. Callahan* (1999) 74 Cal.App.4th 356, 378–379.)

- Subsequent Offenses Admissible: "[E]vidence of subsequently committed sexual offenses may be admitted pursuant to Evidence Code section 1108." (*People v. Medina* (2003) 114 Cal.App.4th 897, 903.)

- Evidence of Acquittal: If the court admits evidence that the defendant committed a sexual offense that the defendant was previously acquitted of, the court must also admit evidence of the acquittal. (*People v. Mullens* (2004) 119 Cal.App.4th 648, 663.)

In *People v. Reliford* (2003) 29 Cal.4th 1007, the California Supreme Court upheld the old CALJIC instruction derived from Evidence Code section 1108, concluding that the instruction did not impermissibly allow the jury to convict the defendant of the charged

offenses under the preponderance-of-the-evidence standard because it could use that standard to find the defendant committed the uncharged act(s) to prove the defendant's propensity. It has been held that "[t]he version of CALJIC No. 2.50.01 considered in *Reliford* is similar in all material respects to . . . CALCRIM No. 1191 . . . in its explanation of the law on permissive inferences and the burden of proof." (*People v. Schnabel* (2007) 150 Cal.App.4th 83, 87, fn. omitted.)

Uncharged Sex Offenses Only Admissible In Cases Where Sex Offense Charged

In *People v. Walker* (2006) 139 Cal.App.4th 782, the defendant was charged with murdering a prostitute. The trial court permitted the prosecution to introduce evidence of the defendant's prior sex offenses against prostitutes pursuant to Evidence Code section 1108 to show propensity. The court also admitted the prior acts evidence pursuant to Evidence Code section 1101, subdivision (b). The Second District Court of Appeal concluded that it was error to introduce the evidence to show propensity pursuant to Evidence Code section 1108 because the defendant was not charged with a sex crime in the current matter. By the statute's own terms, Evidence Code section 1108 limits its applications to "criminal action[s] in which the defendant is accused of a sexual offense . . . ." (Evid. Code, § 1108, subd. (a).) Subdivision (d) of Evidence Code section 1108 then defines the phrase "sexual offense," and murder is not included in the list of sexual offenses. (Evid. Code, § 1108, subd. (d).) The Court of Appeal, however, deemed the error harmless.

Recently, the California Supreme Court declined to approve or disapprove of the analysis in *Walker*. In *People v. Story* (2009) 45 Cal.4th 1282, the California Supreme Court held that an open murder charge prosecuted as first degree murder on a rape-felony-murder theory is a sexual offense under Evidence Code section 1108. *Story* reasoned: "first degree felony murder with rape the underlying felony involves, as an element, conduct proscribed by Penal Code section 261, the statute defining rape, or at least an attempt to engage in that conduct. Accordingly, even assuming, without deciding, that *Walker* was correct in limiting the applicability of section 1108 to offenses in which sexual misconduct is an element or component of the crime itself, the Court of Appeal erred in extending its holding to this case."

Evidence Code section 1109

The Statute

Evidence Code section 1109 permits the introduction of uncharged acts of domestic violence, elder or dependent abuse, and child abuse to show propensity to commit such

acts. The statute is modeled on Evidence Code section 1108, so much of the discussion above pertaining to Evidence Code section 1108 applies to Evidence Code section 1109 as well. Accordingly, this section of these materials will not go into as much detail as the preceding one.

Evidence Code section 1109's provisions dealing with domestic violence state: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(1).)

Evidence Code section 1109's provisions dealing with elder or dependent abuse state: "Except as provided in subdivision (e) or (f), in a criminal action in which the defendant is accused of an offense involving abuse of an elder or dependent person, evidence of the defendant's commission of other abuse of an elder or dependent person is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(2).)

Evidence Code section 1109's provisions dealing with child abuse state: "Except as provided in subdivision (e) or (f) and subject to a hearing conducted pursuant to Section 352, which shall include consideration of any corroboration and remoteness in time, in a criminal action in which the defendant is accused of an offense involving child abuse, evidence of the defendant's commission of child abuse is not made inadmissible by Section 1101 if the evidence is not inadmissible pursuant to Section 352." (Evid. Code, § 1109, subd. (a)(3).)

Uncharged Acts More Than 10 Years Old Presumptively Inadmissible

While Evidence Code section 1108 does not contain any limitations on the age of the uncharged conduct, Evidence Code section 1109 does not provide for the admission of uncharged acts more than ten years old "unless the court determines that the admission of this evidence is in the interests of justice." (Evid. Code, § 1109, subd. (e).)

Uncharged Acts Admitted to Prove Propensity May Be Considered With Respect To All Charges

In *People v. Dallas* (2008) 165 Cal.App.4th 940, the appellate court held that when prior acts of child abuse are admissible in connection with one count of a criminal action to show propensity to commit such offenses, the jury is also entitled to consider the prior acts in connection with all counts, subject only to the trial court's discretion to exclude

evidence when its prejudicial effect would outweigh its probative value.

Rare Victory: Charged Acts May Not Be Considered To Prove Propensity

In *People v. Quintanilla* (2005) 132 Cal.App.4th 572, Division Three of the First District Court of Appeal held that Evidence Code section 1109 is limited to evidence of uncharged instances of domestic violence to prove the defendant's propensity to commit such offenses. The appellate court concluded that because evidence of charged offenses is not subject to exclusion based on Evidence Code section 352, those offenses can never be used as propensity evidence pursuant to Evidence Code section 1108 or section 1109. As the Court of Appeal noted, defendants cannot object to the admissibility of the evidence of the other charged offenses on Evidence Code section 352 grounds.

CALCRIM Instructions

The Judicial Council's model instruction for evidence of uncharged domestic violence is found at CALCRIM no. 852. The model instruction for evidence of uncharged elder or dependent abuse is found at CALCRIM no. 853. Those instructions are not reprinted in these materials, as the parts dealing with propensity evidence in general are substantially the same as the corresponding parts of CALCRIM no. 1191 dealing with sex offenses.