Other Similar Incidents

Attacking the Admission of OSI Evidence

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Strategies to help remove the threat of highly prejudicial evidence.

In product liability lawsuits, plaintiffs frequently seek to admit evidence of other incidents involving the same product alleged to be defective in that particular case. Although the stated rationale for the admission of this evidence can vary, the practical reality is that one of the primary reasons plaintiffs seek to admit "other similar incident" ("OSI") evidence is because of the considerable influence it can have on a jury in hearing of other catastrophic injuries that have previously occurred. Accordingly, limiting, if not preventing, the use of OSI evidence is critical to maintaining an even playing field at trial. The battle against OSI evidence begins in written discovery and continues with a motion *in limine*, the OSI hearing and at trial. This article will address each phase of the fight against the admission of OSI evidence.

Discovery

Defining the Population of Other Incidents through Written Discovery

The initial discovery propounded to the plaintiff will establish the universe of other incidents that are at issue. Clear interrogatories requesting the plaintiff's defect theories and the plaintiff's version of the facts of the incident are crucial. If vague responses are given, follow up with the plaintiff's counsel to get this basic information. Courts often will refer to the plaintiff's theory and adopt the plaintiff's version of the facts to establish the profile of the subject incident, which will be compared to each other incident. It is critical to have as many facts as possible to acquire a clear understanding of the alleged defects in order to make a detailed comparison.

In the interrogatories, request the list of other incidents that the plaintiff contends to be substantially similar, including the date of the incident, the names of the claimants, the make and model of product involved, a description of each incident, information as to whether a lawsuit was filed as a result (if so, request the date of filing and style of the case), a list of the documents related to each incident in the plaintiff's possession, custody, or control

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(including reports, notes, photographs, pleadings, or depositions), and a list of the witnesses on whom the plaintiff will rely to prove the facts of each incident. Also, for each other incident, ask whether the product was in its "as-designed" condition immediately prior to the incident, and on what grounds the plaintiff contends the product to be substantially similar.

What is similar versus "substantially" similar is left to the trial judge's discretion.

In requests for production, ask for all documents upon which the plaintiff will rely in responding to the preceding interrogatory or that will otherwise be relied upon to prove substantial similarity.

Defining the Relevant Substantial Similarity Factors through Opposing Counsel's Experts

Using experts to narrow the field of allegedly similar incidents is perhaps the biggest challenge, but can yield the greatest reward in opposing the admission of this evidence. State and federal court cases have enumerated different factors for their respective substantial similarity tests. For example, the Eleventh Circuit's substantial similarity test factors are: "First, conditions substantially similar to the occurrence in question must have caused the prior accident. Second, the prior accident must not have occurred too remote in time." *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988); *see also Hessen v. Jaguar Cars, Inc.*, 915 F.2d 641, 649–50 (11th Cir. 1990). These factors are necessarily vague. The degree of similarity of the "conditions" is dependent upon the unique facts of each case. To define what substantial similarity means in your case, you must develop a list of concrete, case-specific, relevant factors.

The following process may be helpful in defining the relevant factors. First, start with the plaintiff's defect theory and incident facts of your case. Consider, as an example, an automobile rollover case in which the vehicle rolled over at highway speeds on flat, dry pavement. In this example, the plaintiff claims that the subject vehicle rolled over because its design allegedly made the vehicle unreasonably unstable.

Second, develop a list of factors other than the design that *could have* contributed to this type of incident. It may be helpful to consult your own expert in drafting this list. In the rollover example, the relevant factors may be the condition of the relevant components (*e.g.*, tires, suspension, etc.), relevant after-market components, and the relevant accident conditions (*e.g.*, What caused the roll? Conditions could include a rim trip, furrow trip in soil, transition trip, collision with object or other vehicles, pavement conditions, slopes in the terrain, vehicle load, and driver inputs).

Third, use the plaintiff's experts to confirm for the trial judge that the factors are indeed relevant—that each factor could have contributed to the type of incident involved in the case. At deposition, it is a good idea to first ask the plaintiff's experts (generally the design expert or accident reconstruction expert) to list the factors, other than design, that could cause this type of incident. The response to this question may provide additional factors not listed. Then attempt to have the expert admit that the factors identified on your list could contribute to this type of incident. To accomplish this, ask if each factor could have caused even a non-defective product to have a similar accident. In the rollover example, another way to ask these questions would be "could [each factor] affect the rollover propensity of a vehicle."

Using the plaintiff's expert (as opposed to a defense expert) as the source for relevant similarity factors avoids giving the trial judge another layer of complexity. A defense expert's testimony could conflict with plaintiff's expert's testimony as to the list of relevant factors which forces the judge to resolve a battle of expert testimony. This is unnecessary as most opposing experts will admit the relevant factors because a failure to do so could be used against them at trial. For example, a jury would likely not find a plaintiff's expert credible who denies that the rollover propensity of a vehicle would be affected by oversized tires or a broken suspension.

As explained in further detail below, the list of case-specific relevant factors is critical to the motion *in limine* and oral arguments at the substantial similarity hearing.

Motion *in limine*

A compelling motion *in limine* to exclude evidence of other accidents is obviously a fundamental component of the defense against OSI evidence. Having a firm grasp of the facts of each other incident—or revealing that the relevant circumstances have not been proven—will often determine the success of a motion to preclude OSI evidence. The goal is to demonstrate to the court not only that the substantive facts are not substantially similar, but also that the sources of those facts are unreliable. It is also important to demonstrate to the court the risk of severe prejudice to the defendant versus the relatively minor probative value to the issues in the case.

File Motion *in limine* Regarding Other Incidents Well in Advance of Trial

Not all trial judges have presided over substantial similarity hearings. A timely-filed motion *in limine* outlining the basic law and suggesting a procedure for the hearing will allow the judge the time to schedule the hearing and prepare. It also forces opposing counsel to outline in their response brief how they plan to attempt to prove substantial similarity. The motion *in limine* will serve as a roadmap for the OSI hearing.

It may be helpful to cover the following topics in the motion *in limine*: 1) plaintiff bears the burden of proof to prove substantial similarity; 2) other incidents generally are not admissible and are only admissible for certain purposes if proven to be substantially similar; 3) substantial similarity must be proven by competent admissible evidence; 4) substantial similarity is a legal determination to be made by the court, not plaintiff's experts; and 5) define the substantial similarity factors listed by case law and explain what they mean in the specific case.

Attack Purported Relevance of OSI Evidence

In product liability cases, OSI evidence can be admitted for various purposes, including to show notice, feasibility of an alternative design, or the existence of a defect. *Lovett v. Union Pacific Railroad Co.*, 201 F.3d 1074, 1081(8th Cir. 2000); *Borden, Inc. v. Florida East Coast Ry.*, 772 F.2d 750, 755 (11th

Cir. 1985). In each case, regardless of the rationale the plaintiff's counsel espouses, the evidence should be strictly limited to those cases that are *substantially* similar *and* that tend to establish the disputed issue of fact. Because OSI evidence invites the jury to focus on events that do not involve this plaintiff (or, perhaps, even this defendant), dissimilar incidents are of no value in assisting the jury in deciding the case. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988) ("[a]s the circumstances and conditions of the other accidents become less similar to the accident under consideration, the probative value of such evidence decreases"); *Bittner v. American Honda Motor Co.*, 533 N.W.2d 476, 485 (Wis. 1995) (The "similarity of product and similarity of circumstance renders the comparison probative of the material issues in dispute"). Therefore, a motion *in limine* should attack both the stated basis for the evidence (what is the plaintiff trying to prove?) and the alleged similarity of those incidents. For example, it is not sufficient that the incident establishes feasibility of an alternative design if the circumstances of the incident were not substantially similar.

Substantial Similarity

Substantial similarity can involve issues related to products, time, place and circumstance. *First Security Bank v. Union Pacific Railroad Co.*, 152 F.3d 877, 879 (8th Cir. 1998). What is similar versus "substantially" similar is left to the trial judge's discretion. However, a motion *in limine* should highlight the fact that mere "similarity" is not enough—consideration should be given to the qualifying adjective also: "substantial" means something. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988).

Substantial Similarity of the Product

Plaintiffs may attempt to introduce evidence of other incidents involving products other than the specific model of the product at issue, including competitors' products. Although to be admissible the other incidents need not involve the identical model of the product at issue, at the very least, the other incidents should involve the same allegedly defective component in a product of the same design. *Cf., Cole v. Kartridg Parks Co.*, 840 F.2d 602, 604 (8th Cir. 1988) (The district court did not abuse its discretion in preventing the plaintiff from discovering any information about other injuries involving manufacturer's products except to the extent that injuries involved same or similar models of sausage packing machines that were similar to the plaintiff's.)

The advantage that defense counsel have in this fight is that they have access to manufacturer representatives who are intimately familiar with not only the product, but also competitor's products, usually much more so than the litigation experts hired by the plaintiff's counsel. In-house engineers can be invaluable assets in developing lists of differences between the product involved in the other incidents and the product at issue in your case. The greater the number of relevant design differences you can point out to the trial judge, the more effective the motion *in limine* will be.

Moreover, when the incident evidence is in the form of compiled data, many times there is no way to tell whether the products involved in the other incidents that were studied are sufficiently similar to be admitted into evidence. There may be many potential differences in the products themselves that can be raised to distinguish the products, and these differences should be explained and brought to the attention of the trial judge.

Substantial Similarity of Circumstances and Causes

The circumstances of the incidents sought to be admitted must logically relate to the circumstances in the case at issue. OSI evidence lacking similar circumstances should not be admitted even where the other incidents were caused by the same defect. Thus, in order for the court to make a finding of substantial similarity, the court "must be apprised of the specific facts of previous accidents." *Barker v. Deere & Co.*, 60 F.3d 158, 163 (3d Cir. 1995).

For example, the Eighth Circuit Court of Appeals upheld the district court's ruling precluding the admission of 44 other incidents of hinge failure on a ladder because the incidents were either after the date of the plaintiff's accident or did not involve a similar ladder position as that of the ladder when the plaintiff was injured. *Crump v. Versa Products, Inc.*, 400 F.3d 1104 (8th Cir. 2005). Even where plaintiff's counsel provides some details of the other incidents, the motion *in limine* should point out the unanswered questions relating to the circumstances of the other incidents or other possible scenarios for the details provided, including actions of the claimants.

As stated above, where the OSI evidence is in the form of compilations or summaries, the motion should call attention to the fact that these summaries lack sufficient detail to be admissible, because there is little, if any, detail of the circumstances involved. The court should preclude admission of the OSI evidence where the compiled data contains factual differences, omissions, and inconsistencies. *Nesbitt v. Sears, Roebuck and Co.*, 415 F. Supp. 2d 530, 537 (E.D.Pa. 2005) (precluding admission of radial saw manufacturer's internal studies of prior accidents in their entirety to demonstrate inadequacy of warnings, causation, or foreseeability of a safety device where the studies contain "factual differences, omissions, and inconsistencies"); *see also Bryte v. American Household, Inc.*, 429 F.3d 469, 479 (4th Cir. 2006) ("As the district court correctly held, there was no proof that the facts in this case were the same or similar to what transpired in other cases, so there was no showing of the same accident in similar products.")

OSI Evidence to Establish Notice

Plaintiffs may also seek to admit OSI evidence to show that a defendant had notice of the alleged dangerous condition of the product. Some courts have relaxed the substantial similarity requirement when the sole purpose of the OSI evidence is to establish notice. *E.g., Cardenas v. Dorel Juvenile Group, Inc.*, 239 F.R.D. 611, 633 (D. Kan. 2005) ("Evidence proffered to illustrate the existence of a dangerous condition necessitates a high degree of similarity; the requirement is relaxed, however, when the evidence of other accidents is submitted to prove notice or awareness of the potential defect"). Initially, it should be argued that a lesser standard when OSI evidence is offered for notice is simply not logical—if the incidents are not substantially similar, how can one be notice of the other? *Moseley v. General Motors Corp.*, 213 Ga. App. 875, 878, 447 S.E.2d 302, 307 (1994) ("If the relative defects are not similar, how can one be notice of the other?").

However, even if OSIs are admitted to prove notice, this does not mean that every detail of the OSI evidence can be admitted.

The evidence must logically tend to demonstrate that the manufacturer had knowledge of the alleged defect, and the evidence cannot "raise extraneous controversial points, lead to a confusion of the issues, and present undue prejudice disproportionate to its usefulness." *Crump v. Versa Products, Inc.*, 400 F.3d 1104, 1109 (8th Cir. 2005); *Olson v. Ford Motor Company*, 410 F. Supp. 2d 855, 862–64 (D.N.D. 2006) (certain customer complaints admitted to show notice, but details of complaints precluded as waste of time, confusing to jury and prejudicial to defendant).

It is important note that when "notice" is the purported rationale, defense counsel is provided with the opportunity to limit in time the admission of other incidents, strictly, regardless of substantial similarity, because all incidents subsequent to the plaintiff's incident should be excluded. *Mercer v. Pittway Corp.*, 616 N.W.2d 602, 615 (Iowa 2000). Moreover, in many cases, all incidents that post-date the sale of the product at issue should be excluded, even where they pre-dated the plaintiff's particular accident, absent a showing of the manufacturer's duty or ability to notify the plaintiff at issue. For example, when a product has never been registered or is no longer in the hands of the original owner, a manufacturer is powerless to alert the user of an alleged defect, so notice of the defendant's awareness of an alleged defect should be irrelevant.

Moreover, depending on the circumstances of the case, it might be a wise strategic decision for a defendant simply to admit knowledge of the hazard. Every product has certain inherent hazards, and if the product can be shown to be reasonably safe for its intended use, the fact that a manufacturer may be aware of the potential for certain uncommon accidents is not particularly compelling to a jury. Admitting knowledge of a potential alleged hazard will not only prevent these other incidents from being brought out at trial, but may serve to bolster the manufacturer's (and its attorney's) credibility with the jury. Once admitted, the notice issue is out of the case, and the OSI evidence should be excluded if proffered only on the issue of notice.

Hearsay Objections

When evidence of other incidents is offered in the form of accident reports, statistical compilations, complaints and other materials containing information provided by out-of-court declarants, the motion *in limine* should raise an objection based on hearsay. These materials are often of no value other than to prove the truth of the matters asserted in them, and accordingly should be excluded. *E.g., Olson v. Ford Motor Company*, 410 F. Supp. 2d 855, 861 (D.N.D. 2006) (precluding admission of customer complaints to show defective condition of brakes where the purpose for which the evidence was offered hinged on the truth of the assertions in the complaints); *Toups v. Sears Roebuck & Co.*, 499 So.2d 344 (La. App. 4th 1986), *rev. on other grounds*, 507 So. 2d 809 (article summarizing study of other injuries associated with water heaters was properly excluded where the article was hearsay in that it was offered to provide truth of the matter asserted without providing defendants the opportunity to cross-examine the author; article did not qualify as a learned treatise because the expert who relied on the article was unable to testify how the statistics were gathered or able to ensure their reliability).

Probative Value Substantially Outweighed by the Danger of Unfair Prejudice

While "undue prejudice" arguments are not particularly successful, in OSI battles unfair prejudice is a genuine concern with OSI evidence and should be given appropriate attention. This is especially true when the plaintiff seeks to march in injured witnesses or disgruntled consumers to testify about their experiences with the product. Not only is this testimony severely prejudicial, it can significantly lengthen the trial, it is generally unduly repetitive, and it is confusing to the jury. Because each incident is really a case within a case, having the jury focused on OSI evidence can result in complicating a trial that is complex in its own right. Accordingly, the motion *in limine* should point out to the court that the marginal probative value of this evidence must be weighted against the real and substantial danger that the evidence will mislead the jury and unfairly prejudice the defendant.

The OSI Hearing

Prior to deciding the motion *in limine*, most courts will hold a substantial similarity hearing outside the presence of the jury. *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 688 (11th Cir. 1984) (proponent of other incident evidence must first prove substantial similarity outside the presence of the jury). At the hearing, the trial court is in the difficult position of: 1) deciding exactly what evidence is competent and admissible to prove similarity; 2) determining what "substantial similarity" actually means in a particular case; and 3) weighing the probative value, if any, of such evidence against the prejudice inherent in the admission of such evidence. Frequently, the plaintiff's counsel will attempt to exploit the vague meaning of substantial similarity, ignore rules of evidence, and bombard the court with numerous other incidents in an attempt to push at least a few incidents past the gatekeeper. Failure to assist the trial judge diligently with these challenges can make the substantial similarity hearing proceed more like a "no-holds-barred brawl" than a hearing on the admission of evidence.

Preparation for Substantial Similarity Hearing

Prior to the hearing, send a letter to opposing counsel to confirm the accuracy and completeness of the plaintiff's discovery responses regarding other incidents and ask if the plaintiff intends to bring any witnesses to the hearing.

If possible, schedule a telephone conference with the judge to discuss the court's procedure for conducting the hearing. Keep in mind that the plaintiff may seek to have the court address the incidents in groups, thereby glossing over the uniqueness of each incident. It is better to address each incident one at a time because proving substantial similarity requires a mini-trial to prove that the same alleged defect caused a similar incident. *Nachsteim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1269 (7th Cir. 1988), *quoting Kelsay v. Consol. Rail Corp.*, 749 F.2d 437, 443 (7th Cir. 1984).

Preparing a chart to give to the judge at the hearing is an important and powerful demonstrative tool that highlights the distinctiveness of each incident. A suggested format is to list the subject incident at the left followed by the names of the other incidents in the top horizontal row. In the vertical columns list the date, the make and model of the product, the list of documents relied upon to prove similarity, and follow with the case-specific factors previously identified.

Because, as the proponent of the evidence, the plaintiff bears the burden of proof, stating that "no information" exists for a factor belies substantial similarity to the same extent that an established difference does.

Battling Overreaching by the Plaintiff's Expert

Because plaintiffs often have experts testify at a substantial similarity hearing, the topic of other incidents should be thoroughly explored at deposition. If the expert states that he or she may provide testimony regarding other incidents, those opinions must meet the requirements of the rules of evidence. It is common practice for a plaintiff to put on an expert who has only reviewed very limited and inadmissible documents (*e.g.*, complaints or police reports) and attempt to have the expert testify as to the basic facts of each other incident. A substantial similarity hearing does not suspend the rules of evidence. *Worsham v. A.H. Robins Co.*, 734 F.2d 676, 686 (11th Cir. 1984) (The trial court reviewed the plaintiff's other incident evidence, which were reports of doctors and company field representatives, as well as the defendant's responses thereto. The trial court deleted irrelevant and hearsay portions of the reports submitted as other incident evidence.). *Id.* at 686. Such an impermissible use of expert testimony must be vigorously opposed.

First, determine the basis of the expert's knowledge about each other incident. If an expert has not done an independent investigation of each other incident, there is a strong basis for a *Daubert* challenge. To give an expert opinion about the product defect in your case, it is likely the expert did significant work to be qualified to opine that a defect existed and that defect *caused* the accident. The expert likely spent numerous hours inspecting the product, inspecting the scene, reviewing depositions, and reviewing other documentary evidence to have a sufficient basis for his or her opinions. The expert must have done the appropriate homework for the testimony to be "based upon sufficient facts or data." Fed. R. Evid. 702. The same work should be required to opine that a product in an other incident was defective and that defect caused the other incident. (Keep in mind that an expert cannot testify that another incident is substantially similar to the subject incident. Substantial similarity is a legal conclusion that is completely the decision of the trial judge.)

Second, determine if the rules of evidence allow the expert to rely upon each document. An expert cannot be a mere conduit for inadmissible evidence. *Pelster v. Ray*, 987 F.2d 514, 525–27 (8th Cir. 1993) (reversing the admission of expert testimony that simply relayed facts to the jury rather than presenting conclusions that were the product of expertise applied to the facts). In other words, while rules of evidence, including the Federal Rules of Evidence, often allow an expert to rely upon inadmissible evidence, this is not without limitation. The inadmissible facts or data must be of a type reasonably relied upon by experts in the particular field. Fed. R. Evid. 703. For example, if relying upon police reports, experts often will admit that in their investigation in other cases they have found basic information in police reports to be incorrect. Therefore, it may not be reasonable to rely upon the police report. Moreover, the Federal Rules of Evidence provide that inadmissible facts relied upon by an expert "shall not be disclosed to the jury... unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. Putting an expert on the stand merely to "parrot" facts from a hearsay document does not "assist the trier of fact." Fed. R. Evid. 702. *See also United States v. Lundy*, 809 F.2d 392, 395–96 (7th Cir. 1987) ("Courts agree that it is improper to permit an expert to testify regarding facts that people of common understanding can easily comprehend.").

While experts may provide helpful testimony at a substantial similarity hearing, experts should not be permitted to circumvent the evidentiary rules of authentication and hearsay or provide testimony which does not qualify as expert testimony.

Trial

Despite defense counsel's best efforts to exclude OSI evidence, it is sometimes inevitable that other accidents involving the same or similar products will be admitted. The first time these will generally be brought out is in the plaintiff's opening statement. Accordingly, defense counsel must be prepared to deal with these accidents up front. It is generally a good idea to at least mention this evidence in your opening. If done effectively, this can take the "sting" out of the plaintiff's dramatic description of the evidence and can serve to bolster your credibility with the jury. If you intend to argue that the other incidents did not occur under similar circumstances, you can allude to that fact and tell the jury that they will learn why those incidents do not bear on the issues in this case. The implication is that the plaintiff's counsel knows the facts of *this* case do not warrant recovery so he is attempting to redirect the jury's attention to other lawsuits that have already been decided. The real issue in the case—whether the particular product that was involved in plaintiff's accident is defective—should be capable of resolution without resorting to OSI evidence, and the fact that plaintiff seeks to rely on extraneous and tangential events should be interpreted by the jury as a sign that plaintiff's case will not stand on its own merits.

Having the jury focused on OSI evidence can result in complicating a trial.

Also consider going on the offensive. While there may have been similar incidents involving the product, it is likely that the number is actually quite small in light of the thousands of hours the product has been used by thousands of product users without incident. At trial, it may be possible to extrapolate the numbers to make this showing.

Cross-examination of the plaintiff's expert is also an opportunity to show the jury the plaintiff's expert's limited knowledge of these incidents and to hammer home the theme that the product is safe given the overwhelming length of time it has been used. Armed with knowledge from your client and bolstered by independent research, defense counsel can ask the plaintiff's expert questions about the number of products on the market and the number of times or hours each would have been used. This will serve to lay the groundwork for defense witnesses

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(expert and corporate) who will demonstrate that accidents are particularly uncommon—this demonstrates the product is safe and not defective. *Ryan v. KDI Sylvan Pools, Inc.*, 121 N.J. 276, 290, 579 A.2d 1241, 1248 (1990) (trial court committed reversible error in excluding defendant manufacturer's proffered evidence concerning the frequency of serious injuries resulting from diving accidents).

If the OSI evidence involves products similar, but not identical, to the product at issue, it may present defense counsel with an opportunity to introduce evidence of competitors' products that might not otherwise be admissible. For example, the fact that other manufacturers utilize a similar product design is not admissible in some jurisdictions, but if the plaintiff's expert testifies about accidents involving competitor's products, this arguably opens the door for defense counsel to review the design not only of the product involved in the OSI reported, but also other similar competitors' designs to demonstrate lack of defect.

Moreover, plaintiff's introduction of OSI evidence may provide the opportunity to introduce a topic that in many jurisdictions is not permitted—the plaintiff's conduct. While evidence of the plaintiff's conduct generally is precluded or severely limited in a strict liability case, this rule does not apply to cross examination of the plaintiff's expert about the circumstances of other incidents. Developing testimony about the injured party's conduct can be an effective way of getting the jury to focus on the plaintiff's actions in this particular case.

Conclusion

The admission of evidence of other similar incidents at trial is at best, uncomfortable, and at worst, severely prejudicial. The threat posed by OSI evidence can be reduced, or eliminated, by a focused and diligent attack very early in the discovery process. Moreover, the success of the fight against OSI evidence can be significantly increased through communication with your client, meticulous preparation in creating a compelling motion *in limine*, and by assisting the trial judge to understand the lack of substantial similarity of the proffered other incidents though use of charts at the OSI hearing. If OSI evidence cannot be completely precluded, your efforts not only will pay dividends in reducing the number of incidents admitted but also prepare you to deal effectively with these incidents. FD