

AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

COMMUNICATION

FROM

THE CHIEF JUSTICE, THE SUPREME COURT
OF THE UNITED STATES

TRANSMITTING

AN AMENDMENT TO THE FEDERAL RULES OF EVIDENCE THAT
HAS BEEN ADOPTED BY THE SUPREME COURT, PURSUANT TO
28 U.S.C. 2072



AUGUST 7, 2020.—Referred to the Committee on the Judiciary and ordered
to be printed

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WASHINGTON : 2020

SUPREME COURT OF THE UNITED STATES,
Washington, DC, April 27, 2020.

Hon. NANCY PELOSI,
Speaker of the House of Representatives,
Washington, DC.

DEAR MADAM SPEAKER: I have the honor to submit to the Congress an amendment to the Federal Rules of Evidence that has been adopted by the Supreme Court of the United States pursuant to Section 2072 of Title 28, United States Code.

Accompanying the amended rule are the following materials that were submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code: a transmittal letter to the Court dated October 23, 2019; a redline version of the rule with committee note; an excerpt from the September 2019 report of the Committee on Rules of Practice and Procedure to the Judicial Conference of the United States; and an excerpt from the May 2019 report of the Advisory Committee on Evidence Rules.

Sincerely,

JOHN G. ROBERTS, Jr.,
Chief Justice.

April 27, 2020

SUPREME COURT OF THE UNITED STATES

ORDERED:

1. The Federal Rules of Evidence are amended to include an amendment to Rule 404.

[*See infra* pp. — — —.]

2. The foregoing amendment to the Federal Rules of Evidence shall take effect on December 1, 2020, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. THE CHIEF JUSTICE is authorized to transmit to the Congress the foregoing amendment to the Federal Rules of Evidence in accordance with the provisions of Section 2074 of Title 28, United States Code.

**PROPOSED AMENDMENT TO THE
FEDERAL RULES OF EVIDENCE**

**Rule 404. Character Evidence; Other Crimes, Wrongs,
or Acts**

* * * * *

(b) Other Crimes, Wrongs, or Acts.

(1) *Prohibited Uses.* Evidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident.

(3) *Notice in a Criminal Case.* In a criminal case, the prosecutor must:

(A) provide reasonable notice of any such evidence that the prosecutor intends to offer

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at trial, so that the defendant has a fair opportunity to meet it;

(B) articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and

(C) do so in writing before trial—or in any form during trial if the court, for good cause, excuses lack of pretrial notice.



THE CHIEF JUSTICE
OF THE UNITED STATES
Presiding

JUDICIAL CONFERENCE OF THE UNITED STATES

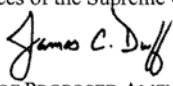
WASHINGTON, D.C. 20544

JAMES C. DUFF
Secretary

October 23, 2019

MEMORANDUM

To: Chief Justice of the United States
Associate Justices of the Supreme Court

From: James C. Duff 

RE: TRANSMITTAL OF PROPOSED AMENDMENT TO THE FEDERAL RULES OF EVIDENCE

By direction of the Judicial Conference of the United States, pursuant to the authority conferred by 28 U.S.C. § 331, I transmit herewith for consideration of the Court a proposed amendment to Rule 404 of the Federal Rules of Evidence, which was approved by the Judicial Conference at its September 2019 session. The Judicial Conference recommends that the amendment be adopted by the Court and transmitted to the Congress pursuant to law.

For your assistance in considering the proposed amendment, I am transmitting: (i) a copy of the affected rule incorporating the proposed amendment and accompanying committee note; (ii) a redline version of the same; (iii) an excerpt from the September 2019 Report of the Committee on Rules of Practice and Procedure to the Judicial Conference; and (iv) an excerpt from the May 2019 Report of the Advisory Committee on Evidence Rules.

Attachments

* * * * *

(1) ***Prohibited Uses.*** Evidence of a any other crime, wrong, or ~~other~~ act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) ~~*Permitted Uses; Notice in a Criminal Case.*~~ This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. ~~On request by a defendant in a criminal case, the prosecutor must:~~

¹ New material is underlined; matter to be omitted is lined through.

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16 (3) Notice in a Criminal Case. In a criminal case, the

17 prosecutor must:

18 (A) provide reasonable notice ~~of the general~~

19 ~~nature~~ of any such evidence that the

20 prosecutor intends to offer at trial, so that

21 the defendant has a fair opportunity to meet

22 it; and

23 (B) articulate in the notice the permitted

24 purpose for which the prosecutor intends to

25 offer the evidence and the reasoning that

26 supports the purpose; and

27 (C) do so in writing before trial—or in any form

28 during trial if the court, for good cause,

29 excuses lack of pretrial notice.

Committee Note

Rule 404(b) has been amended principally to impose additional notice requirements on the prosecution in a criminal case. In addition, clarifications have been made to the text and headings.

The notice provision has been changed in a number of respects:

- The prosecution must not only identify the evidence that it intends to offer pursuant to the rule but also articulate a non-propensity purpose for which the evidence is offered and the basis for concluding that the evidence is relevant in light of this purpose. The earlier requirement that the prosecution provide notice of only the “general nature” of the evidence was understood by some courts to permit the government to satisfy the notice obligation without describing the specific act that the evidence would tend to prove, and without explaining the relevance of the evidence for a non-propensity purpose. This amendment makes clear what notice is required.
- The pretrial notice must be in writing—which requirement is satisfied by notice in electronic form. *See* Rule 101(b)(6). Requiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided.
- Notice must be provided before trial in such time as to allow the defendant a fair opportunity to meet the evidence, unless the court excuses that requirement upon a showing of good cause. *See* Rules 609(b), 807, and 902(11). Advance notice of Rule 404(b) evidence is important so that the parties and the court have adequate opportunity to assess the evidence, the purpose for which it is offered, and whether the requirements of Rule 403 have been satisfied—even in cases in which a final determination as to the admissibility of the evidence must await trial. When

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notice is provided during trial after a finding of good cause, the court may need to consider protective measures to assure that the opponent is not prejudiced. *See, e.g., United States v. Lopez-Gutierrez*, 83 F.3d 1235 (10th Cir. 1996) (notice given at trial due to good cause; the trial court properly made the witness available to the defendant before the bad act evidence was introduced); *United States v. Perez-Tosta*, 36 F.3d 1552 (11th Cir. 1994) (defendant was granted five days to prepare after notice was given, upon good cause, just before voir dire).

- The good cause exception applies not only to the timing of the notice as a whole but also to the timing of the obligations to articulate a non-propensity purpose and the reasoning supporting that purpose. A good cause exception for the timing of the articulation requirements is necessary because in some cases an additional permissible purpose for the evidence may not become clear until just before, or even during, trial.
- Finally, the amendment eliminates the requirement that the defendant must make a request before notice is provided. That requirement is not found in any other notice provision in the Federal Rules of Evidence. It has resulted mostly in boilerplate demands on the one hand, and a trap for the unwary on the other. Moreover, many local rules require the government to provide notice of Rule 404(b) material without regard to whether it has been requested. And in many cases, notice is provided

when the government moves *in limine* for an advance ruling on the admissibility of Rule 404(b) evidence. The request requirement has thus outlived any usefulness it may once have had.

As to the textual clarifications, the word “other” is restored to the location it held before restyling in 2011, to confirm that Rule 404(b) applies to crimes, wrongs, and acts “other” than those at issue in the case; and the headings are changed accordingly. No substantive change is intended.

REPORT OF THE JUDICIAL CONFERENCE**COMMITTEE ON RULES OF PRACTICE AND PROCEDURE****TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES:**

* * * * *

FEDERAL RULES OF EVIDENCE***Rule Recommended for Approval and Transmission***

The Advisory Committee submitted a proposed amendment to Rule 404, with a recommendation that it be approved and transmitted to the Judicial Conference. The proposed amendment was published for public comment in August 2018.

Rule 404(b) is the rule that governs the admissibility of evidence of other crimes, wrongs, or acts. Several courts of appeal have suggested that the rule needs to be more carefully applied and have set forth criteria for more careful application. In its ongoing review of the developing case law, the Advisory Committee determined that it would not propose substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.

However, the Advisory Committee did recognize that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under the rule. The DOJ proffered language that would require the prosecutor to describe in the notice "the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose." In addition, the Advisory Committee determined that the

current requirement that the prosecutor must disclose only the “general nature” of the bad act should be deleted considering the prosecution’s expanded notice obligations under the DOJ proposal, and that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the Advisory Committee determined that the restyled phrase “crimes, wrongs, or other acts” should be restored to its original form: “other crimes, wrongs, or acts.” This would clarify that Rule 404(b) applies to crimes, wrongs, and acts other than those charged.

The comments received were generally favorable. The Advisory Committee considered those comments, as well as discussion at the June 2018 Standing Committee meeting, and made minor changes to the proposed amendment, including changing the term “non-propensity purpose” to “permitted purpose.”

The Standing Committee voted unanimously to adopt the recommendations of the Advisory Committee.

* * * * *

Recommendation: That the Judicial Conference approve the proposed amendment to Evidence Rule 404 * * * and transmit it to the Supreme Court for consideration with a recommendation that it be adopted by the Court and transmitted to Congress in accordance with the law.

* * * * *

Respectfully submitted,

A handwritten signature in black ink that reads "David G. Campbell". The signature is written in a cursive style with a large, stylized "D" and "C".

David G. Campbell, Chair

Jesse M. Furman
Daniel C. Girard
Robert J. Giuffra Jr.
Susan P. Graber
Frank M. Hull
William J. Kayatta Jr.

Peter D. Keisler
William K. Kelley
Carolyn B. Kuhl
Jeffrey A. Rosen
Srikanth Srinivasan
Amy J. St. Eve

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

DAVID G. CAMPBELL
CHAIR
REBECCA A. WOMELDORF
SECRETARY

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DONALD W. MOLLOY
CRIMINAL RULES

DEBRA ANN LIVINGSTON
EVIDENCE RULES

MEMORANDUM

TO: Hon. David G. Campbell, Chair
Committee on Rules of Practice and Procedure

FROM: Hon. Debra A. Livingston, Chair
Advisory Committee on Evidence Rules

RE: Report of the Advisory Committee on Evidence Rules

DATE: May 30, 2019

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on May 3, 2019, in Washington, D.C.

* * * * *

The Committee made the following determinations at the meeting:

- It unanimously approved the proposed amendment to Rule 404(b) and is submitting it to the Standing Committee for final approval.

* * * * *

II. Action Item

7 A. Proposed Amendment to Rule 404(b), for Final Approval

8 The Committee has been monitoring significant developments in the case law on Rule
9 404(b), governing admissibility of other crimes, wrongs, or acts. Several Circuit courts have
10 suggested that the rule needs to be more carefully applied and have set forth criteria for that more
11 careful application. The focus has been on three areas:

- 12 1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the
13 bad act evidence proves that purpose without relying on a propensity inference.
- 14 2) Limiting admissibility of bad acts offered to prove intent or knowledge where the
15 defendant has not actively contested those elements.
- 16 3) Limiting the “inextricably intertwined” doctrine, under which bad act evidence is not
17 covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the
18 charged crime.

19 Over several meetings, the Committee considered a number of textual changes to address
20 these case law developments. At its April, 2018 meeting the Committee determined that it would
21 not propose substantive amendments to Rule 404(b) to accord with the developing case law,
22 because they would make the Rule more complex without rendering substantial improvement.
23 Thus, any attempt to define “inextricably intertwined” is unlikely to do any better than the courts
24 are already doing, because each case is fact-sensitive, and line-drawing between “other” acts and
25 acts charged will always be indeterminate. Further, any attempt to codify an “active dispute” raises
26 questions about how “active” a dispute would have to be, and is a matter better addressed by
27 balancing probative value and prejudicial effect. Finally, an attempt to require the court to establish
28 the probative value of a bad act by a chain of inferences that did not involve propensity would add
29 substantial complexity, while ignoring that in some cases, a bad act is legitimately offered for a
30 proper purpose but is nonetheless bound up with a propensity inference --- an example would be
31 use of the well-known “doctrine of chances” to prove the unlikelihood that two unusual acts could
32 have both been accidental.

33 The Committee also considered a proposal to provide a more protective balancing test for
34 bad acts offered against defendants in criminal cases: that the probative value must outweigh the
35 prejudicial effect. While this proposal would have the virtue of flexibility and would rely on the
36 traditional discretion that courts have in this area, the Committee determined that it would result
37 in too much exclusion of important, probative evidence.

38 The Committee did recognize, however, that important protection for defendants in
39 criminal cases could be promoted by expanding the prosecutor’s notice obligations under Rule
40 404(b). The Department of Justice proffered language that would require the prosecutor to
41 “articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the
42 evidence and the reasoning that supports the purpose.” In addition, the Committee determined that

43 the current requirement that the prosecutor must disclose only the “general nature” of the bad act
 44 should be deleted, in light of the prosecution’s expanded notice obligations under the DOJ
 45 proposal. And the Committee easily determined that the existing requirement that the defendant
 46 request notice was an unnecessary impediment and should be deleted.

47 Finally, the Committee determined that the restyled phrase “crimes, wrongs, or other acts”
 48 should be restored to its original form: “*other* crimes, wrongs, or acts.” This would clarify that
 49 Rule 404(b) applies to other acts and not the acts charged.

50 The proposal to amend Rule 404(b), focusing mainly on a fortified notice requirement in
 51 criminal cases, was released for public comment in August, 2018. The public comment was sparse,
 52 but largely affirmative. At its May, 2019 meeting, the Committee considered the public comments,
 53 as well as comments made at the Standing Committee meeting of June, 2018. The Committee
 54 made minor changes to the proposal as issued for public comment --- the most important change
 55 being that the term “non-propensity purpose” in the text was changed to “permitted purpose.”

56 *The Committee unanimously approved proposed amendments to the notice provision of*
 57 *Rule 404(b), and the textual clarification of “other” crimes, wrongs, or acts. The Committee*
 58 *recommends that these proposed changes, and the accompanying Committee Note, be approved*
 59 *by the Standing Committee and referred to the Judicial Conference.*

* * * * *

