

MEMORANDUM

June 14, 2021

From: Johnathan Stone, Chair of State Bar of Texas (SBOT) Administration of Rules of Evidence Committee (AREC).

To: The Texas Supreme Court Advisory Committee (SCAC).

Re: Proposed amendments to Tex. R. Evid. 404(b).

BACKGROUND

Texas R. Evid. 404(b) and Fed. R. Evid. 404(b) were substantially the same. Last year, the Federal rule was amended.

DISCUSSION

The comments to Fed. R. Evid. 404(b) succinctly explain the revisions as follows:

2020 Amendments

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 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.

RECOMMENDATION

AREC recommends amending Rule 404(b) to track the changes to the federal rule.

Expanding the prosecutor’s notice obligations under Rule 404(b) will promote important protections for defendants in criminal cases. AREC believes the existing requirement that defendants request notice is an unnecessary impediment and should be deleted.

Restyling the phrase “other crimes, wrongs, or acts” clarifies that Rule 404(b) applies to other acts and not the acts charged.

Finally, the requirement that prosecutors disclose only the “general nature” of the bad act should be deleted in light of the expanded notice obligations.

Accordingly, AREC respectfully recommends that Rule 404(b) be amended to track the changes to the federal rule. Below is a redlined version of the proposed rule change:

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

(b) ~~Other Crimes, Wrongs, or Other Acts.~~

- (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:~~
- (3) **Notice in a Criminal Case. In a criminal case, the prosecutor must:**
 - (A) provide reasonable notice ~~of the general nature~~ of any such evidence that the prosecutor intends to offer at trial, so that the defendant has a fair opportunity to meet it; and
 - (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.

Kind regards,

/s/Johnathan Stone
JOHNATHAN STONE
Chair, AREC