

THE COURTS

Title 225—RULES OF EVIDENCE

[225 PA. CODE ART. IV]

Proposed Amendment of Pa.R.E. 404(b)

The Committee on Rules of Evidence is considering proposing to the Supreme Court of Pennsylvania the amendment of Pennsylvania Rule of Evidence 404(b) concerning the prosecution’s notice of intended use of evidence of other crimes, wrongs, or acts in criminal cases for the reasons set forth in the accompanying explanatory report. Pursuant to Pa.R.J.A. No. 103(a)(1), the proposal is being published in the *Pennsylvania Bulletin* for comments, suggestions, or objections prior to submission to the Supreme Court.

Any reports, notes, or comments in the proposal have been inserted by the Committee for the convenience of those using the rules. They neither will constitute a part of the rules nor will be officially adopted by the Supreme Court.

Additions to the text of the proposal are bolded and underlined; deletions to the text are bolded and bracketed.

The Committee invites all interested persons to submit comments, suggestions, or objections in writing to:

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All communications in reference to the proposal should be received by February 1, 2021. E-mail is the preferred method for submitting comments, suggestions, or objections; any e-mailed submission need not be reproduced and resubmitted via mail. The Committee will acknowledge receipt of all submissions.

*By the Committee on
Rules of Evidence*

FREDERICK N. FRANK,
Chair

Annex A

TITLE 225. RULES OF EVIDENCE

ARTICLE IV. RELEVANCE AND ITS LIMITS

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

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(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.* 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. In a criminal case this

evidence is admissible only if the probative value of the evidence outweighs its potential for unfair prejudice.

(3) *Notice in a Criminal Case.* In a criminal case the prosecutor must provide reasonable **written** notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the [**general nature**] **specific nature, permitted use, and reasoning for the use** of any such evidence the prosecutor intends to introduce at trial.

Comment

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Pa.R.E. 404(b)(1) is identical to F.R.E. 404(b)(1). It prohibits the use of evidence of other crimes, wrongs, or acts to prove a person’s character.

Pa.R.E. 404(b)(2), like F.R.E. 404(b)(2), contains a non-exhaustive list of purposes, other than proving character, for which a person’s other crimes, wrongs, or acts may be admissible. But it differs in [**several aspects. First, that** Pa.R.E. 404(b)(2) requires [**that**] the probative value of the evidence [**must**] **to** outweigh its potential for prejudice. When weighing the potential for prejudice of evidence of other crimes, wrongs, or acts, the trial court may consider whether and how much such potential for prejudice can be reduced by cautionary instructions. *See Commonwealth v. LaCava*, [**542 Pa. 160**,] 666 A.2d 221 (Pa. 1995). When evidence is admitted for this purpose, the party against whom it is offered is entitled, upon request, to a limiting instruction. *See Commonwealth v. Hutchinson*, [**571 Pa. 45**,] 811 A.2d 556 (Pa. 2002). [**Second, the federal rule requires the defendant in a criminal case to make a request for notice of the prosecutor’s intent to offer evidence of other crimes, wrongs or acts. This issue is covered in Pa.R.E. 404(b)(3) which is consistent with prior Pennsylvania practice in that the requirement that the prosecutor give notice is not dependent upon a request by the defendant.**]

Official Note: Adopted May 8, 1998, effective October 1, 1998; Comment revised November 2, 2001[;], effective January 1, 2002; rescinded and replaced January 17, 2013, effective March 18, 2013; **amended** , **2021, effective** , **2021.**

Committee Explanatory Reports:

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Final Report explaining the January 17, 2013 rescission and replacement published with the Court’s Order at 43 Pa.B. 651 (February 2, 2013).

Final Report explaining the , **2021 amendment of paragraph (b) published with the Court’s Order at 51 Pa.B.** (, **2021).**

REPORT

Proposed Amendment of Pa.R.E. 404(b)

The Committee on Rules of Evidence is considering proposing the amendment of Pennsylvania Rule of Evidence 404(b). Effective December 1, 2020, Federal Rule of Evidence 404(b) was amended to primarily impose additional notice requirements on the prosecution in criminal cases when evidence of other crimes, wrongs, or acts is sought to be introduced. F.R.E. 404(b)(3) requires the

prosecution to give the defendant pretrial written notice describing the specific act and explain the relevance of the prior bad act for a non-propensity purpose. This is heightened from the previous requirements that the defendant request notice from the prosecutor and for the notice to be of the general nature of the evidence. The amendment also provides a good cause exception for the pretrial written notice requirement.

Pa.R.E. 404(b)(3) currently requires pretrial notice to the defendant, but is silent on whether the notice must be in writing. *See also Commonwealth v. Mawhinney*, 915 A.2d 107 (Pa. Super. 2006) (no requirement under Pa.R.E. 404(b) that notice be in writing). Further, the notice must be of the general nature of the prior act sought to be introduced at trial.

The Committee believes there is merit in requiring notice from the prosecutor to be in writing, as well as the notice containing additional information, *i.e.*, the nature, purpose, and reason for the evidence. Such a requirement appeared reasonable, fair to the defendant, and would not unduly burden the prosecution. Moreover, these changes should facilitate pretrial resolution of contested issues.

Accordingly, the Committee proposes amending Pa.R.E. 403(b)(3) to require written notice of the specific nature of the other crime, wrong, or act, the permitted use of the evidence under paragraph (b)(2), and the reasoning for its use. All comments, concerns, and suggestions concerning this proposal are welcome.

[Pa.B. Doc. No. 20-1807. Filed for public inspection December 24, 2020, 9:00 a.m.]
