

**AMENDMENTS TO THE FEDERAL RULES
OF EVIDENCE**

COMMUNICATION

FROM

**THE CHIEF JUSTICE OF THE
UNITED STATES**

TRANSMITTING

**AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE AS
ADOPTED BY THE COURT, PURSUANT TO 28 U.S.C. 2076**



**MAY 1, 1991.—Referred to the Committee on the Judiciary and ordered to
be printed**

U.S. GOVERNMENT PRINTING OFFICE

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 30, 1991

Dear Mr. Speaker:

By direction of the Supreme Court of the United States, I have the honor to submit to the Congress amendments to the Federal Rules of Evidence which have been adopted by the Supreme Court pursuant to Section 2072 of Title 28, United States Code.

Accompanying these rules are excerpts from the report of the Judicial Conference of the United States containing the Advisory Committee Notes submitted to the Court for its consideration pursuant to Section 331 of Title 28, United States Code.

Sincerely,



Honorable Thomas S. Foley
Speaker of the House of Representatives
Washington, DC 20015

(III)

SUPREME COURT OF THE UNITED STATES

April 30, 1991

ORDERED

1. That the Federal Rules of Evidence for the United States District Courts be, and they hereby are, amended by including therein amendments to Evidence Rules 404(b) and 1102.

[See infra., pp. _____ .]

2. That the foregoing amendments to the Federal Rules of Evidence shall take effect on December 1, 1991, and shall govern in all proceedings thereafter commenced and, insofar as just and practicable, all proceedings then pending.

3. That THE CHIEF JUSTICE be, and he hereby is, authorized to transmit to the Congress the foregoing amendments to the Federal Rules of Evidence in accordance with the provisions of Section 2072 of Title 28, United States Code.

**AMENDMENTS TO THE
FEDERAL RULES OF EVIDENCE**

**Rule 404. Character Evidence not Admissible to
Prove Conduct; Exceptions; Other Crimes**

* * * * *

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that upon request by the accused, the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

Rule 1102. Amendments

Amendments to the Federal Rules of Evidence may be made as provided in section 2072 of title 28 of the United States Code.

EXCERPT FROM THE
REPORT OF THE JUDICIAL CONFERENCE
COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
MARCH 1991

I. Amendments to the Rules of Practice and Procedure

B. Federal Rules of Evidence

The Advisory Committee on the Federal Rules of Criminal Procedure has submitted to your Committee proposed amendments to Evidence Rule 404(b) as well as a technical amendment to Evidence Rule 1102. The proposed amendment to Rule 404(b) would add a pretrial notice requirement for the use of certain character evidence in criminal cases. The proposed amendment to Rule 1102 would change an incorrect reference in the rule. The amendment to Rule 404(b) of the Federal Rules of Evidence was circulated for public comment and minor changes made to the Advisory Committee Notes in response thereto. Because the proposed amendment to Rule 1102 is purely technical, your Committee recommends its adoption without public comment.

These proposed amendments are set out in Appendix B, and are accompanied by Advisory Committee Notes and a report explaining their purpose and intent.

Recommendation 2: That the Judicial Conference approve amendments to Rules 404(b) and 1102 of the Federal Rules of Evidence and transmit them to the Supreme Court for its consideration with the recommendation that they be approved and transmitted to Congress pursuant to law.

PROPOSED AMENDMENTS
TO THE
FEDERAL RULES OF EVIDENCE*

Rule 404. Character Evidence not Admissible to
Prove Conduct; Exceptions; Other Crimes

* * * * *

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2 other crimes, wrongs, or acts is not admissible to
3 prove the character of a person in order to show
4 action in conformity therewith. It may, however,
5 be admissible for other purposes, such as proof of
6 motive, opportunity, intent, preparation, plan,
7 knowledge, identity, or absence of mistake or
8 accident~~-,~~ provided that upon request by the
9 accused, the prosecution in a criminal case shall
10 provide reasonable notice in advance of trial, or
11 during trial if the court excuses pretrial notice
12 on good cause shown, of the general nature of any
13 such evidence it intends to introduce at trial.

*New matter is underlined; matter to be omitted is
lined through.

FEDERAL RULES OF EVIDENCE

COMMITTEE NOTE

Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such evidence by the defense, see, e.g., United States v. McClure, 546 F.2d 670 (5th Cir. 1990) (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare Fla. Stat. Ann § 90.404(2)(b) (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. Fla. Stat. Ann § 90.404(2)(b) (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, 18 U.S.C. § 3500,

FEDERAL RULES OF EVIDENCE

3

et. seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under Federal Rule of Criminal Procedure 16.

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see United States v. Williams, 900 F.2d 823 (5th Cir. 1990) (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston, -----U.S. -----, 108 S.Ct 1496 (1988).

Rule 1102. Amendments

1 Amendments to the Federal Rules of Evidence may
2 be made as provided in section 2076 2072 of title
3 28 of the United States Code.

COMMITTEE NOTE

The amendment is technical. No substantive change is intended.