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. At the meeting the Committee discussed ongoing projects involving possible amendments to Rules 106, 404(b), 615, and 702.

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.

● It agreed to continue its consideration of possible amendments to Rule 106.

● It agreed to continue its consideration of a possible amendment to Rule 615.

● It agreed to continue its consideration of possible amendments to Rule 702 and also to explore ways to address problems regarding forensic expert evidence that might not involve rule amendments.

A full description of all of these matters can be found in the draft minutes of the Committee meeting, attached to this Report. The amendment to Rule 404(b) proposed as an action item can also be found as an attachment to this Report.

II. Action Item

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

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

1) Requiring the prosecutor not only to articulate a proper purpose but to explain how the bad act evidence proves that purpose without relying on a propensity inference.

2) Limiting admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.

3) Limiting the "inextricably intertwined" doctrine, under which bad act evidence is not covered by Rule 404(b) because it proves a fact that is inextricably intertwined with the charged crime.

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

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

The Committee did recognize, however, that important protection for defendants in criminal cases could be promoted by expanding the prosecutor's notice obligations under Rule 404(b). The Department of Justice proffered language that would require the prosecutor to "articulate 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 Committee determined that the current requirement that the prosecutor must disclose only the "general nature" of the bad act should be deleted, in light of the prosecution's expanded notice obligations under the DOJ proposal. And the Committee easily determined that the existing requirement that the defendant request notice was an unnecessary impediment and should be deleted.

Finally, the 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 other acts and not the acts charged.

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

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

The proposed amendments to Rule 404(b) ---as well as the Committee Note, the summary of public comment, and the GAP report --- are attached to this Report.

III. Information Items

A. Possible Amendment to Rule 106

At the suggestion of Hon. Paul Grimm, the Committee is considering whether Rule 106 --- the rule of completeness --- should be amended. Rule 106 provides that if a party introduces all or part of a written or recorded statement in such a way as to create a misimpression about the

statement, then the opponent may require admission of a completing statement that would correct the misimpression. Judge Grimm suggests that Rule 106 should be amended in two respects: 1) to provide that a completing statement is admissible over a hearsay objection; and 2) to provide that the rule covers oral as well as written or recorded statements.

The Committee is continuing to consider various alternatives for an amendment to Rule 106. One option is to clarify that the completing statement should be admissible over a hearsay objection because it is properly offered to provide context to the initially proffered statement. Another option is to state that the hearsay rule should not bar the completing statement, but that it should be up to the court to determine whether it is admissible for context or more broadly as proof of a fact. The final consideration will be whether to allow unrecorded statements to be admissible for completion, or rather to leave it to parties to convince courts to admit such statements under other principles, such as the court's power under Rule 611(a) to exercise control over evidence.

B. Possible Amendment to Rule 615

The Committee is considering problems raised in the case law and in practice regarding the scope of a Rule 615 order: does it apply only to exclude witnesses from the courtroom (as stated in the text of the rule) or can it extend outside the confines of the courtroom to prevent prospective witnesses from obtaining or being provided trial testimony? Most courts have held that a Rule 615 order extends to prevent access to trial testimony outside of court, but other courts have read the rule as it is written. The Committee has been considering an amendment that would clarify the extent of an order under Rule 615. Committee members have noted that where parties can be held in contempt for violating a court order, some clarification of the operation of sequestration outside the actual trial setting itself could be helpful. The Committee's investigation of this problem is consistent with its ongoing efforts to ensure that the Evidence Rules are keeping up with technological advancement, given the increasing witness access to information about testimony through news, social media, or daily transcripts.

At its Spring, 2019 meeting, the Committee resolved that if a change is to be made to Rule 615, it should provide that a court order that extends beyond courtroom exclusion would be discretionary, not mandatory. One issue that the Committee still has to work through is how an amendment will treat preparation of excluded witnesses by trial counsel.

C. Forensic Expert Testimony, Rule 702, and *Daubert.*

The Committee has been exploring how to respond to the recent challenges to and developments regarding forensic expert evidence since its Symposium on forensics and *Daubert* held at Boston College School of Law in October, 2017. A Subcommittee on Rule 702 was appointed to consider possible treatment of forensics, as well as the weight/admissibility question discussed below. The Subcommittee, after extensive discussion, recommended against certain courses of action. The Subcommittee found that: 1. It would be difficult to draft a freestanding rule

on forensic expert testimony, because any such amendment would have an inevitable and problematic overlap with Rule 702; 2) It would not be advisable to set forth detailed requirements for forensic evidence either in text or Committee Note because such a project would require extensive input from the scientific community, and there is substantial debate about what requirements are appropriate; and 3) It would not be advisable to publish a "best practices manual" for forensic evidence because such a manual could not be issued formally by the Committee, and would involve the same science-based controversy of what standards are appropriate.

The Committee agreed with these suggestions by the Rule 702 Subcommittee. But the Subcommittee did express interest in considering an amendment to Rule 702 that would focus on one important aspect of forensic (and other) expert testimony --- the problem of overstating results (for example, by stating an opinion as having a "zero error rate", where that conclusion is not supportable by the methodology). The Committee has heard extensively from DOJ on the efforts it is now employing to regulate the testimony of its forensic experts. The Committee continues to consider a possible amendment on overstatement of expert opinions.

In addition, the Committee, led by the Subcommittee's efforts, is considering other ways to provide assistance to courts and litigants in meeting the challenges of forensic evidence. These include assisting the Federal Judicial Center in judicial education. In this regard, the Committee is holding a miniconference on October 25, 2019 at Vanderbilt Law School. The Committee has invited seven judges who have recently dealt with *Daubert* issues in complex cases. The goal of the miniconference it to determine "best practices" for managing *Daubert* issues. The result will be a publication that will be distributed to federal judges and practitioners.

D. *Crawford v. Washington* and the Hearsay Exceptions in the Evidence Rules

As previous reports have noted, the Committee continues to monitor case law developments after the Supreme Court's decision in *Crawford v. Washington*, in which the Court held that the admission of "testimonial" hearsay violates the accused's right to confrontation unless the accused has an opportunity to cross-examine the declarant.

The Reporter regularly provides the Committee a case digest of all federal circuit cases discussing *Crawford* and its progeny. The goal of the digest is to enable the Committee to keep current on developments in the law of confrontation as they might affect the constitutionality of the Federal Rules hearsay exceptions. If the Committee determines that it is appropriate to propose amendments to prevent one or more of the Evidence Rules from being applied in violation of the Confrontation Clause, it will propose them for the Standing Committee's consideration --- as it did previously with the 2013 amendment to Rule 803(10).

IV. Minutes of the Spring, 2019 Meeting

The draft of the minutes of the Committee's Spring, 2019 meeting is attached to this report at Tab B. These minutes have not yet been approved by the Committee.

APPENDIX

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PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE[1]

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; ~~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 in red; matter to be omitted is lined through.

(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.

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 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.

Changes Made After Publication and Comment

The Committee changed "non-propensity" purpose to "permitted" purpose in the text. Also, the provision on notice was changed to clarify that the "fair opportunity" requirement applies to notice given at trial after a finding of good cause. And two clarifications to the operation of the good cause exception were added to the Committee Note.

Summary of Public Comment

EV-2018-0004-0003. Donald Wilkerson, NA. Addresses the change from "crimes, wrongs or other acts" back to "other crimes, wrongs or acts." He argues that the change "would allow a prosecutor to argue, otherwise inappropriately, that, evidence, any evidence, of the crime charged is admissible to prove the defendant's bad character and that he acted in accordance with that bad character when he committed the crime charged."

EV-2018-0004-0004. Ann Paiewonsky, Paiewonsky Law Firm, PLLC. Argues that "[t]here is nothing in this amended rule that imposes a right and an obligation that defendant receive a fair opportunity to meet the evidence when it is first presented during trial" because the fair opportunity to meet the evidence language "only addresses notice before trial, not during trial."

EV-2018-0004-0006. The Federal Magistrate Judge's Association. Generally supports the proposed amendment. It has some concern about the lack of "specificity" in the requirement that disclosure be made sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence. It notes that some courts have standing orders that notice must be provided 7 to 14 days before trial and that the "such orders are helpful." The Association suggests that "after the rule as proposed has been in effect for a period of time, the committee might consider whether a further amendment, setting a presumptive specific amount of time in advance of trial by which the required disclosures must be made, is warranted."

EV-2018-0004-0007. The Federal Courts Committee of the Association of the Bar of the City of New York. States that the Advisory Committee's attention to Rule 404(b) is "welcome" and supports the proposed changes. The Federal Courts Committee believes that the articulation requirement in the notice provision will result in "more thoughtful and better reasoned evidentiary arguments" and that by requiring the government to articulate a valid, non-character purpose, "improper admission of Rule 404(b) evidence should become less frequent." It suggests, however, two further changes to Rule 404(b): 1) an amendment to "clarify that if a defendant agrees to concede a particular issue or element within the rubric of the rule, then the district court should give weight to this concession when deciding whether to prohibit the admission of Rule 404(b) on that issue or element"; and 2) an amendment that would expressly state that Rule 404(b) applies in civil cases, and that would extend the existing notice requirement to civil cases.