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**COMMENT ON PRELIMINARY DRAFT OF PROPOSED AMENDMENTS
TO THE FEDERAL RULES OF EVIDENCE
BY THE FEDERAL COURTS COMMITTEE**

The New York City Bar Association greatly appreciates the opportunity for public comment provided by the Judicial Conference’s Committee on Rules of Practice and Procedure on the proposed amendments to the Federal Rules of Evidence proposed by the Advisory Committee on Evidence Rules (the “Advisory Committee”). The Association, founded in 1870, has over 24,000 members practicing throughout the nation and in more than fifty foreign jurisdictions. The Association includes among its membership many lawyers in every area of law practice, including lawyers generally representing plaintiffs and those generally representing defendants; lawyers in large firms, in small firms, and in solo practice; and lawyers in private practice, government service, public defender organizations, and in-house counsel at corporations. The Association’s Committee on Federal Courts (the “Federal Courts Committee”) addresses substantive and procedural issues relating to the practice of law in the federal courts. The Federal Courts Committee respectfully submits the following comments on the proposed amendment:

**I. COMMENT ON PROPOSED REVISION TO FEDERAL RULE OF EVIDENCE
404(B)**

The Advisory Committee has proposed revisions to Rule 404(b) which require the prosecutor in a criminal case to articulate the non-propensity use for which the Rule 404(b) evidence is offered. The Advisory Committee has also re-styled the rule to make clear that it applies to acts other than those charged.

The Advisory Committee’s attention to Rule 404(b) is welcome. The Advisory Committee’s report has recognized that “[s]everal Circuit courts have suggested that the rule needs to be more carefully applied, and have set forth criteria for that more careful application.” The report then explains that after careful consideration, it determined not to propose “substantive amendments to Rule 404(b), because they would make the Rule more complex without rendering substantial improvement.” Instead, the Committee offered a procedural amendment relating to the prosecutor’s notice obligations.

We support these changes, but we recommend a more thorough and substantive change to Rule 404(b) that would (i) give weight in determining the admissibility of prior bad acts evidence to a defendant’s agreement to concede the issue or element for which the evidence is offered, and (ii) clarify when and how the rule should be applied in civil litigation.

a. Amendment to Rule 404(B) Is Appropriate because Evidence Admitted under This Rule Is so Frequently Litigated, and Its Admission Often Leads to Appellate Reversal

The admissibility of evidence pursuant to Rule 404(b) is frequently litigated. One study has concluded that Rule 404(b) “has resulted in the highest number of published appellate decisions of any Federal Rule of Evidence.”¹ This conclusion comes as no surprise to experienced trial lawyers. Understandably, prosecutors view Rule 404(b) evidence as relevant and persuasive, as it allows them to tell the jury that the defendant has committed another crime in the past and/or to present a more complete story to a jury. Even with limiting instructions, Rule 404(b) evidence can be outcome determinative of guilt, or, in civil cases, liability, in part due to the risk that the jury may improperly rely on the evidence to conclude that the defendant has a propensity to commit crime.² Given the fact-specific nature of admissibility determinations and the possibility for unfair prejudice arising from incorrectly admitted evidence, the admission of Rule 404(b) evidence can often lead to reversal on appeal.³ There are also Circuit splits relating to Rule 404(b) on a host of issues. For example, even the framework for analysis of an objection under Rule 404(b) is viewed differently in different Circuits, with some courts referring to Rule 404(b) as a rule of “inclusion,” while others see it as a rule of exclusion with limited exceptions.⁴

We support the proposed amendment to the rule that would require prosecutors to give notice and to articulate how the evidence is relevant without relying on a propensity inference.⁵

¹ James DeCleene, *A Prosecutor’s Guide to Character Evidence: When Is Uncharged Possession Evidence Probative of a Defendant’s Intent to Distribute?*, 98 MARQ. L. REV. 1383, 1384 (2015) (citing Edward J. Imwinkelried, *The Use of Evidence of an Accused’s Uncharged Misconduct to Prove Mens Rea: The Doctrines Which Threaten to Engulf the Character Evidence Prohibition*, 51 OHIO ST. L.J. 575, 577 (1990)); see also Constance E. Widenhouse, *What’s the Purpose? Making Sense of Rule 404(b)*, North Carolina Office of Indigent Defense Services, 2011 Spring Conference, available at: [http://www.ncids.org/Defender%20Training/2011SpringConference/MakingSenseRule404\(B\).pdf](http://www.ncids.org/Defender%20Training/2011SpringConference/MakingSenseRule404(B).pdf) (“not only [is 404(b)] one of the most litigated rules of evidence but one of the most difficult to apply correctly”). (All websites cited in this report were last visited on February 15, 2019.)

² Jeffrey Cole, *“Bad Acts” Evidence in Civil Cases under Rule 404(b): It’s Not Just for Prosecutors Anymore*, 37 LITIGATION JOURNAL 47, (Issue 3 Spring 2011) (calling 404(b) evidence the “darling of the modern prosecutor’s nursery”).

³ E.g., *United States v. Rosemond*, 841 F.3d 95 (2d Cir. 2016); *United States v. Gomez*, 763 F.3d 845 (7th Cir. 2014) (en banc); *United States v. Caldwell*, 760 F.3d 267 (3d Cir. 2014); *United States v. Hall*, 858 F.3d 254 (4th Cir. 2017); *United States v. Baker*, 432 F.3d 1189 (11th Cir. 2005); *United States v. Bell*, 516 F.3d 432 (6th Cir. 2008).

⁴ Daniel J. Capra & Liesa L. Richter, *Character Assassination: Amending Federal Rule of Evidence 404(b) to Protect Criminal Defendants*, 118 COLUM. L. REV. 769, 772 & n. 6 (2018) (citing to *United States v. Geddes*, 844 F.3d 983, 989 (8th Cir. 2017) (“This rule is one ‘of inclusion rather than exclusion and admits evidence of other crimes or acts relevant to any issue in the trial unless it tends to prove only criminal disposition.’”); compare with *Repak*, 852 F.3d at 240 (“Rule 404(b) is a rule of general exclusion”) (internal citations omitted).

⁵ The Third Circuit has addressed this issue recently in *United States v. Repak*, where the admission of 404(b) evidence was ultimately upheld, but the court admonished the trial court for not carefully considering the non-propensity purpose behind admitting the evidence. 852 F.3d 230 (3d Cir. 2017) (stating that both the “Government and District court ... failed to explain how the Government’s proffered evidence was relevant to [the defendant’s] mental state”).

By making this an express requirement, we believe that more thoughtful and better reasoned evidentiary arguments and decisions would result. By requiring the government to articulate a valid, non-propensity purpose for the admission of the evidence, improper admission of Rule 404(b) evidence should become less frequent. Further, when such evidence is admitted, defendants should be better positioned to rebut or address such evidence. However, given the frequency with which Rule 404(b) is litigated and the uncertainty of its application across appellate courts, we believe more should be done to clarify the rule and its prohibitions.

b. When Deciding whether to Admit Rule 404(B) Evidence, Courts Should Give Weight to a Defendant’s Concession of the Issue or Element that the Evidence Is Offered to Support

One notable Circuit split that we recommend addressing in a revision of Rule 404(b) concerns whether a defendant “contests” an element that the prosecution must prove, and thus opens the door to admitting Rule 404(b) evidence to prove that element (often the defendant’s mental state or intent). In the Seventh Circuit, the trial court must balance “the degree to which the non-propensity issue actually is disputed in the case” against the “probative value of other-act evidence.”⁶ In the Seventh and Third Circuits, to “actively contest” an element of the offense, the defendant must do more than just generally deny the charges.⁷ However, in the Fifth, Sixth, Eighth, Ninth, Eleventh, and D.C. Circuits, pleading “not guilty” itself is enough to put the defendant’s state of mind at issue and thus allows a path to admit other acts evidence through the exceptions to 404(b).⁸

We recommend that Rule 404(b) be amended 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) evidence on that issue or element. Rule 404(b) evidence carries with it special risks of prejudice to defendants because the line between a permitted use of “other bad acts” and propensity evidence is not always distinct. To be sure, the government should obviously be given wide latitude to prove its case through any admissible evidence. At the same time, courts should be discouraged from allowing the government to offer cumulative or unnecessary evidence when such evidence carries the unique risks that are posed by Rule 404(b) evidence.

We draw inspiration in this proposal from the rule laid out in *Old Chief v. United States*, where the Supreme Court overturned the defendant’s conviction under the federal felon-in-possession statute after the prosecution was permitted to admit evidence of his prior conviction for felony assault.⁹ The government was required to prove that the defendant had a felony

⁶ *United States v. Gomez*, 763 F.3d 845, 857 (7th Cir. 2014); see also *United States v. Caldwell*, 760 F.3d 267, 283 (3d Cir. 2014) (the defendant’s plea of not guilty did not put knowledge or intent at issue, as he denied the conduct entirely).

⁷ *Caldwell*, *supra* n. 3.

⁸ E.g. *United States v. Olguin*, 643 F.3d 384 (5th Cir. 2011); *United States v. Hardy*, 643 F.3d 143 (6th Cir. 2011); *United States v. Smith*, 789 F.3d 923 (8th Cir. 2015); *United States v. Jones*, 982 F.2d 380 (9th Cir. 1992); *United States v. Smith*, 741 F.3d 1211 (11th Cir. 2013); *United States v. Douglas*, 482 F.3d 591 (D.C. Cir. 2007).

⁹ 519 U.S. 172, 175 (1997).

conviction, and Old Chief agreed to stipulate to the conviction without disclosing the details of the crime. But the prosecution rejected the offer and the trial judge allowed the details of the conviction, including the name of the victim, into evidence.¹⁰ The Supreme Court held that while the prosecution “is entitled to prove its case free from any defendant’s option to stipulate the evidence away,” the district court abused its discretion under Rule 403 by admitting evidence without balancing its probative value against the unfair prejudice in light of any available substitutes.¹¹

We recommend that a revised Rule 404(b) consider applying the reasoning in *Old Chief*. When the defendant is willing to agree to concede a particular issue or element within the rubric of Rule 404(b), the district court, in its discretion, should consider prohibiting Rule 404(b) evidence to be offered on that issue or element. This presents the defendant with a choice: allow the government to prove the issue or element with “prior bad acts,” or ask the judge to consider precluding the admission of such evidence by resolving the dispute through a stipulation. Such an amendment should reduce the possibility of unfair prejudice by allowing a defendant to weigh the risks of each possible path, and require the judge to consider alternatives to allowing in potentially prejudicial evidence. Of course, should a defendant be equivocal in their concession, or make arguments or present evidence that is inconsistent with that concession, the judge should not hesitate to allow the Rule 404(b) evidence to be admitted. This is only intended to benefit the defendant who makes a wholehearted concession, accompanied, where appropriate, by an instruction from the court to the jury that a particular issue is not being contested at trial.

We do not view this as a significant change to the traditional “inclusionary” approach that courts have followed with respect to the admissibility of Rule 404(b) evidence, but as a codification of the Rule 403 balancing that courts are already required to conduct when considering the admissibility of any evidence. It is meant to bring clarity, transparency and structure to that analysis.

We are aware that the Advisory Committee considered a related idea: to “limit[] admissibility of bad acts offered to prove intent or knowledge where the defendant has not actively contested those elements.” The Advisory Committee declined to propose such an amendment out of concern that “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.” We believe that by framing the issue not as one turning on whether there is an active dispute but rather on what the defendant is willing to agree to concede at trial, the concern raised by the Advisory Committee is addressed. As noted, the concession of an issue must be genuine and not strategic, merely designed to exclude admissible evidence.

c. Rule 404(B) Evidence Is Most Often Litigated in Criminal Proceedings, but Additional Guidance on Its Use Is also Needed in the Civil Context

While civil practitioners have historically made less recourse to Rule 404(b) than have criminal practitioners, civil trial lawyers have acknowledged the Rule’s usefulness outside the

¹⁰ *Id.* at 175-76

¹¹ *Id.* at 191.

criminal context—especially given the “inclusionary thrust” perceived in the Federal Rules of Evidence.¹² Magistrate Judge Jeffrey Cole wrote in a 2011 article that Rule 404(b) is now being used in a wide array of civil cases, including antitrust suits, securities litigation, and copyright infringement cases.¹³

However, there is a frequent misunderstanding that Rule 404(b) is not available in the civil context. And even for those who recognize its applicability in the civil context, there are competing perceptions among some in the civil bar that the standard for admitting Rule 404(b) evidence in civil cases is higher or different than in criminal cases, or, conversely, that Rule 404(b) evidence is too easily admitted in both civil and criminal cases.¹⁴ Clarity and consistency in the civil sphere, just as in the criminal sphere, would be welcomed.

We think that the Advisory Committee should indicate expressly (i) that the rule applies in civil cases when a party seeks to offer prior bad acts or crimes engaged in by the opposing party, and (ii) whether the standard for admissibility is the same as in criminal cases. In addition, we think that the notice provisions under subsection (3) of Rule 404(b) should apply in civil cases, with the modification that such notice should be provided no later than during pretrial discovery, and that there should be a showing of good cause for lack of timely notice. The Committee may also want to include a parallel change in Federal Rule of Civil Procedure 26 to encourage parties to automatically set a schedule for seeking the admission of 404(b) at an early point in the litigation, such as at the Rule 26(f) conference.

d. Proposed Revision

Based on the foregoing considerations, the following additional proposed revisions are suggested:

(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. If admissibility of such is challenged, the court must consider, as part of its discretionary review pursuant to Rule 403, whether the purpose for which the evidence is submitted is conceded at trial.

(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 at trial;
- (B)** articulate in the notice the non-propensity purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose; and
- (C)** do so in writing sufficiently ahead of trial to give the defendant a fair opportunity to meet the evidence — or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

¹² Cole, *supra* n. 2 at 47.

¹³ *Id.* at 49.

¹⁴ *Id.* at 48.

(5) Notice in a Civil Case. In a civil case, the proponent of Rule 404(b) evidence must:

(A) provide reasonable written notice of any such evidence that such party may offer at trial prior to the completion of pre-trial fact discovery, or such later time as permitted by the court; and

(B) articulate in the notice the non-propensity purpose for which the evidence is offered and the reasoning that supports the purpose.

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