<u>MEMORANDUM</u>

To: Advisory Committee on Rules
From: Carolyn Koegler
Re: # 2017-011. New Hampshire Rule of Evidence 404(b)
Date: March 5, 2018

As I am sure you recall, the proposal to amend New Hampshire Rule of Evidence 404(b), governing the admissibility of evidence of other crimes, wrongs or acts, was put out for public hearing in December. The Committee heard from a number of members of the public about the proposal. Because the public hearing was so lengthy, detailed notes about the testimony are not included in the minutes from the December meeting. However, a CD is available at the Supreme Court for anyone who wishes to listen to the testimony. I have listened to the CD and taken notes. I provide those notes here because I believe the Committee might find them helpful as it moves forward with discussion about the issue.

I have done my best to accurately summarize the public hearing testimony here, and hope that you will bring to the Committee's attention any omissions or inaccuracies.

I. Summary of Public Hearing Testimony

- The proposed amendment would codify the three-part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b), but would change the second prong of the test. The second prong currently requires "clear proof" that the person committed the other crime, wrong or act. This proposed amendment would change the second prong to adopt the federal standard to require that "there is sufficient evidence to support a finding by the fact-finder that the other crimes, wrongs or acts occurred and that the person committed them."
- Attorney David Rothstein, Deputy Director, New Hampshire Public Defender addressed the Committee. He stated:
  - Clear proof prong adopted over thirty years ago. There is no suggestion that it has become unworkable or unjust or that it operates to the detriment of either party.
  - Rule is not an "outlier." NH is not the only state that has this standard.
  - Rule performs an important gatekeeping function. For example, suppose a witness says that she is going to say at trial "the defendant, that man sitting there at the defense table, hit me on a prior occasion." But the defense attorney says to the court, "I know that the witness is going to say that, but note that she has

recanted on prior occasions, the discovery indicates that she made an inconsistent statement (*e.g.*, our investigator spoke to a witness and that witness told our investigator that she just wants to get him back, that none of this ever happened)." So the question for the judge then is going to be – do I allow the witness to testify and then have a trial within a trial, or is the judge going to, with this particular witness, be more exacting at a pretrial proceeding, maybe even have the witness come into court and testify about the prior incident, so that the can make an assessment, as a gatekeeper, about whether this should be part of the trial.
  - The purpose of Rule 404(b), as explained in Supreme Court cases, is to guard against someone being convicted based upon things that are not part of the crime with which the defendant has been charged. For example where the testimony of a witness is, "on a prior occasion, he hit me" this is evidence that is very damaging to a defendant. If there has been a prior conviction, then there is clear proof that that happened. In the absence of a prior conviction, additional protection is needed to ensure that there is clear proof that the prior act happened.
  - In response to inquiries made by Judge Delker and Justice Lynn, Attorney Rothstein stated that he believes that in some limited circumstances it should be up to the judge and not the jury to make credibility determinations about whether the witness is telling the truth about the event about which he or she proposes to testify at trial.
- Attorney Richard Samdperil, appearing on behalf of the New Hampshire Association of Criminal Defense Lawyers (NHACDL), addressed the Committee. He stated:
  - NHACDL supports the codification of the three part test for admission under Rule 404(b), but does not believe that the second prong of the test should be changed, for the reasons attorney Rothstein articulated.
  - The standard has been in place for thirty years, it has been the subject of briefing and argument before the Court and the Court has articulated its reasoning for why that is the appropriate standard.
  - His concern is not in examining in a pretrial hearing the authenticity or accuracy of a statement. It is the statement coming in initially and then not finding out until the course of the trial whether the statement is accurate or not.
  - The 404(b) determination is a pretrial determination – it is made at a pretrial hearing. If the standard is changed or lessened, then there is an increased risk that the issue of clear proof or sufficiency of evidence is not addressed until the issue is now in front of a jury.

- There is no suggestion that the current standard is unworkable, unduly burdensome or unjust in any way. It is not clear why there is a need to change it, and why there is a need to change it in this forum, as opposed to the forum of the full Court being presented with the factual context, brief and argument.

- Attorney Michael Iacopino, Brennan and Lenehan, addressed the Committee. He stated:
  - In *State v. Blackey*, 137 NH 91 (1993) the Court quoted an 1867 case explaining why Rule 404(b) exists:
    Over 100 years ago, this court stated an evidentiary rule that was well-settled even then; evidence of a defendant's prior bad acts is "not permitted to show in [a] prisoner a tendency or disposition to commit the crime with which he [or she] is charged. This principal has not lost any strength in the succeeding years and forms the foundation for our present Rule 404(b)."
  - The way we make sure people are convicted only of crimes with which they are charged is through this rule. It is not clear how requiring clear proof, regardless of the evidentiary mechanisms you use to get there, can be too burdensome a requirement.
  - The rule is different from the Federal Rule, but we have a separate state constitution, and sometimes we do things differently in state court.
  - There is no reason to undo a rule that has worked and that has protected an "ancient right."
  - We know that jurors will convict people because they hear evidence of prior bad acts. If the evidence they hear is just sufficient evidence with respect to a prior bad act, and if that is what is going to lead them to convict, is it really proof beyond a reasonable doubt in those circumstances? This would go against the grain of where 404(b) comes from.
  - In response to an inquiry from Justice Lynn, Attorney Iacopino stated that he would not be in favor of a rule that would make clear that the judge has a gatekeeping function on credibility, but that it is really limited because attorney Iacopino does not believe that the role has to be limited.
  - He is comfortable with the judge making an initial determination on credibility. He noted that in the First Circuit, a co-conspirator's statements are admissible under *Petroziolo*. If the prosecution makes out a case that this is a statement in furtherance of a conspiracy and the judge lets it in, there is no hearing to determine whether a statement is in furtherance of a conspiracy. But, at the end of the case, the judge will reassess it, and what happens then if the judge determines that the statement was not in furtherance of the conspiracy, then one of the options is mistrial.

- Note that 404(b) is not a rule applicable only to the defense. It is a rule that goes both ways. If the defense tries to put on the prior bad acts of a witness, the defense has to meet the same standard.

II. Written Comments Submitted

- A comment was submitted by Attorney David Rothstein, Deputy Director of the New Hampshire Public Defender. It was cosigned by Attorney Charles Keefe, President, N.H. Association of Criminal Defense Lawyers. *See* 11/06/17 letter from attorney Rothstein.

III. Public Meeeting

The Committee did not discuss this item.