

To: Secretary, Advisory Committee on Rules
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Re: Evidence Rule 404(b)
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Pursuant to Supreme Court Rule 51(c)(1), I offer this suggestion to amend New Hampshire Rule of Evidence 404(b).

(b) Other Crimes, Wrongs, or Acts.

[(1)] Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that the person acted 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.

[(2) Evidence of other crimes, wrongs, or acts is admissible under this subsection only if: (i) it is relevant for a purpose other than proving the person's character or disposition; (ii) 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; and (iii) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice.]

This suggestion is intended to codify and amend the three-part test adopted by the New Hampshire Supreme Court for admitting evidence under Rule 404(b): "(1) the evidence must be relevant for a purpose other than proving the defendant's character or disposition; (2) there must be clear proof that the defendant committed the act; and (3) the probative value of the evidence must not be substantially outweighed by its prejudice to the defendant."

State v. Ericson, 159 N.H. 379, 387-88 (N.H. 2009). The amendment is not intended to change prongs 1 and 3 of the test, but is intended to modify the second prong.

The New Hampshire Supreme Court has explained that “clear proof” is more than proof by a preponderance of the evidence, State v. Michaud, 135 N.H. 723, 728 (1992), — the court reversed the admission of 404(b) evidence in that case because the “State’s proffer . . . was inadequate to prove convincingly that” the defendant committed the prior bad act. Id. (emphasis added). Similarly, the court has said that “clear proof” is provided when the State presents evidence “firmly establishing” that the defendant committed the prior bad act. State v. Lesnick, 141 N.H. 121, 126 (1996). The court has said that this determination must not be left to the jury — the finding of clear proof is a preliminary question for the trial judge under Rule 104(a). Michaud, 135 N.H. at 729.

This standard, however, nowhere appears in the Rules of Evidence. Indeed, it is arguably inconsistent with the structure of the Rules. As the United States Supreme Court explained in a unanimous opinion rejecting the view that Federal Evidence Rule 404(b) requires the trial judge to make a preliminary finding that the act occurred either by a preponderance or by clear and convincing evidence: “We reject petitioner’s position, for it is inconsistent with the structure of the Rules of Evidence and with the plain language of Rule 404(b). Article IV of the Rules of Evidence deals with the relevancy of evidence. Rules 401 and 402 establish the broad principle that relevant evidence -- evidence that makes the existence of any fact at issue more or less probable -- is admissible unless the Rules provide otherwise. Rule 403 allows the trial judge to exclude relevant evidence if, among other things, “its probative value is substantially outweighed by the danger of unfair prejudice.” Rules 404 through 412 address specific types of evidence that have generated problems. Generally, these latter Rules do not flatly prohibit the introduction of such evidence, but instead limit the purpose for which it may be introduced. Rule 404(b), for example, protects against

the introduction of extrinsic act evidence when that evidence is offered solely to prove character. The text contains no intimation, however, that any preliminary showing is necessary before such evidence may be introduced for a proper purpose. If offered for such a proper purpose, the evidence is subject only to general strictures limiting admissibility such as Rules 402 and 403. Petitioner's reading of Rule 404(b) as mandating a preliminary finding by the trial court that the act in question occurred . . . superimposes a level of judicial oversight that is nowhere apparent from the language of that provision” Huddleston v. United States, 485 U.S. 681, 687-88 (1988).

The same analysis would appear to apply to the NH Evidence Rules. Furthermore, by requiring that the trial judge find that it has been “firmly established” that the person committed the prior bad acts, it appears that the judge must in some cases make credibility determinations, a task better left to the jury, one might argue. Cf. Michaud, 135 N.H. at 728 (intimating that even though two witnesses testified that they did not commit the prior bad act, the trial judge erred to the extent he considered that clear proof that neither of them in fact committed it). The proper task for the trial judge, it can be argued, is to ensure that the evidence is relevant, and that its relevance is not outweighed by the danger of unfair prejudice. Prior bad acts will be relevant only if the jury can reasonably find both that the prior acts occurred and that the person in question committed them. As long as there is sufficient evidence to permit the jury to make those findings, then the second prong of the test ought to be considered to have been satisfied. Evidence Rule 104(b) fits nicely with this view, as it provides that when the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition. Accordingly, it is my suggestion that the second prong of the test under New Hampshire Evidence Rule 404(b) be amended consistent with the overall structure of the rules. The United States Supreme Court has ruled that Federal Evidence Rule 404(b) permits evidence to be admitted “if there is sufficient evidence to support a

finding by the jury that the defendant committed the similar act.”
Huddleston, 485 U.S. at 685. I suggest that NH Evidence Rule 404(b)
be amended to adopt this standard in place of the current “clear proof”
standard.

(To comply with Supreme Court Rule 51(c), I further note that I do
not request to be heard by the Advisory Committee on Rules and I do
not believe expedited consideration of this proposal is justified by
exceptional circumstances.)