

Winter, 2020: Update<sup>1</sup>

Significant Amendments to the Federal Rules  
Effective December 1, 2020

Attorney Advertising Material

On December 1, 2020, significant amendments to Federal Rule of Civil Procedure 30(b)(6) and Federal Rule of Evidence 404(b) took effect. Amendments to Federal Rules of Appellate Procedure 35 and 40 also took effect on December 1, 2020. These amendments are discussed below.<sup>2</sup>

Federal Rule of Civil Procedure 30(b)(6) –  
Meet and Confer Requirement Regarding Matters for Examination

Federal Rule of Civil Procedure 30(b)(6) has been amended to require that a party that has served a deposition notice or subpoena under Rule 30(b)(6) and the organization that is the subject of the notice or subpoena “must” “[b]efore or promptly after the notice or subpoena is served” “confer in good faith about the matters for examination.” Fed.R.Civ.P.30(b)(6) (December 1, 2020). Further, a subpoena “must advise a nonparty organization of its duty to confer with the serving party ....” *Id.*

In particular, Rule 30(b)(6) has been amended as follows, with added language underlined and in bold text and deleted language in brackets and bold text:

(6) *Notice or Subpoena Directed to an Organization.* In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must  
**[then]** designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf; and it may set out the matters on which each person designated will testify. **Before or promptly after the notice or subpoena is served, the serving party and the organization must**

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<sup>1</sup> Meyer & O’Connor, LLC, a trial and appellate firm focusing on complex commercial litigation, civil rights and employment litigation, tort and criminal defense, periodically publishes an *Update* addressing significant legal developments as an informational service for clients, friends and acquaintances and as attorney advertising. This *Update* does not constitute legal advice or create an attorney-client relationship with Meyer & O’Connor, LLC. Please direct questions or comments regarding this *Update* to Timothy P. O’Connor, Meyer & O’Connor, LLC, Suite 304, 19 S. LaSalle St., Chicago IL. 60603; (e) [toconnor@meyeroconnor.com](mailto:toconnor@meyeroconnor.com); (p) 312-346-9000

<sup>2</sup> Various amendments to the Federal Rules of Bankruptcy Procedure also took effect on December 1, 2020. Such amendments are beyond the scope of this *Update* and are therefore not discussed herein.

**confer in good faith about the matters for examination.** A subpoena must advise a nonparty organization of its duty **[to make this designation] to confer with the serving party and to designate each person who will testify.** The persons designated must testify about information known or reasonably available to the organization. This paragraph (6) does not preclude a deposition by any other procedure allowed by these rules.

House Document 116-145, pp. 6-7 (Redline of Amendments to Rule 30(b)(6) effective December 1, 2020).

“The duty [to confer] adds to the rule what is considered a best practice – conferring about the matters for examination will certainly improve the focus of the examination and the preparation of the witness.” *Id.*, p. 13 (Report of Judicial Conference, Committee on Rules of Practice and Procedure).

The relevant portions of the Committee Note and the Reports of the Committee on Rules of Practice and Procedure and the Advisory Committee on Civil Rules shed considerable light on the contours of the duty to “confer in good faith about the matters for examination.”

*No Requirement To Confer About “Number And Description Of” Topics Or “Identity” Of Witnesses.*” The duty to “confer in good faith about the matters for examination” does not require that the parties confer regarding “the number and description of matters for examination” or “the identity of each witness the organization will designate to testify.” The initial version of the amendment included a requirement that the parties confer about both of these topics. *Id.*, p. 12 (Report of Judicial Conference, Committee on Rules of Practice and Procedure, discussing initial requirement that parties confer about “the number and description of matters for examination and the identity of each witness the organization will designate to testify”). The requirement to confer about these matters was deleted after receipt of extensive commentary and witness testimony. *Id.*, p. 13 (Report of Judicial Conference, Committee on Rules of Practice and Procedure).

*No Requirement Meet And Confer Be Ongoing.* There is no requirement that the meet and confer be ongoing or iterative. The initial version of the amendment included language that “the conferral must ‘continu[e] as necessary.’” *Id.*, p. 12 (Report of Judicial Conference, Committee on Rules of Practice and Procedure). But this was deleted. *Id.*, p. 13 (Report of Judicial Conference, Committee on Rules of Practice and Procedure). Instead, “[t]he process of conferring *may* be iterative.” *Id.*, p. 8 (Committee Note) (emphasis added).

*No Requirement Of Agreement; Purposes Of The Duty To Confer.* “... [T]he obligation is to confer in good faith about the matters for examination, but the amendment does not require the parties to reach agreement. In some circumstances, it may be desirable to seek guidance from the court.” *Id.*, p. 8 (Committee Note). “Candid exchanges about the purposes the deposition and the organization’s information structure may clarify and focus matters for examination, and enable the organization to designate and to prepare an appropriate witness or witnesses, thereby avoiding later disagreements.” *Id.*, p. 8 (Committee Note). “It may be productive also to discuss ‘process’ issues, such as the timing and location of the deposition, the number of witness and the matters on which each witness will testify, and any other issue that might facilitate the efficiency and productivity of the deposition.” *Id.*, p. 8 (Committee Note). The amendment “facilitates collaborative efforts to

achieve the proportionality goals of the 2015 amendments to Rules 1 and 26(b)(1).” *Id.*, p. 8 (Committee Note).<sup>3</sup>

*Does Not Apply To Deposition By Written Questions Under Rule 31(a)(4)*. The amendment to Rule 30(b)(6) mandating a “duty to confer about the matters for examination does not,” of course, “apply when an organization is deposed [by written questions] under Rule 31(a)(4).” *Id.*, p. 9 (Committee Note).

For more information, see in particular House Document 116-145, which may be found at [https://www.uscourts.gov/sites/default/files/cdoc-116hdoc145\\_0.pdf](https://www.uscourts.gov/sites/default/files/cdoc-116hdoc145_0.pdf). And see generally the Current Rules of Practice & Procedure Page of the website of the United States Courts, which may be found at <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>.

#### Federal Rule of Evidence 404(b) – Mandatory, Expanded Notice Requirement

Under amendments effective December 1, 2020, a prosecutor must, as a matter of course, provide “in writing before trial” “reasonable notice” of evidence of any other “[c]rimes, [w]rongs, or [a]cts” that the prosecutor intends to offer and must “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.” *See* Fed. R. Evid. 404(b) (December 1, 2020).<sup>4</sup> The requirement that a defendant must request notice of Rule 404(b) evidence and the specifications that such notice need not be in writing and need merely describe the “general nature” of such evidence have been stricken with the exception that notice “during trial” upon a showing of “good cause” still can be “in any form” and thus need not be in writing. Finally, “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. No substantive change is intended.” House Document, 116-144, p. 10 (Committee Note).

In particular, Rule 404(b) has been amended as follows, with added language underlined and in bold text and deleted language in brackets and bold text:

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<sup>3</sup> “Rule 1 ... [was] ... amended [in 2015] to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, *so the parties share the responsibility to employ the rules in the same way.*” Federal Rule of Civil Procedure 1, Committee Note to 2015 Amendment (emphasis added). Rule 26 likewise was amended in 2015 to “restore... the proportionality factors to their original place in defining the scope of discovery. *This change reinforce[d] the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.*” Federal Rule of Civil Procedure 26, Committee Note to 2015 Amendment (emphasis added).

<sup>4</sup> Perhaps somewhat incongruously, the Committee Note refers to an obligation to “articulate a non-propensity purpose for which the evidence is offered” even though the phrase “non-propensity purpose” was stricken from an initial draft of the amendment in favor of the phrase “permitted purpose.” *See* House Document, 116-144, p. 8 (Committee Note) and p. 12 (Report of Judicial Conference, Committee on Rules of Practice and Procedure). On a different note but in the same vein, the Advisory Committee on Evidence Rules opined that “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 ... ignores 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 the use of the well-known ‘doctrine of chances’ to prove the unlikelihood that two unusual acts could have both been accidental.” *See* House Document, 116-144, p. 15 (Report of Advisory Committee on Evidence Rules).

(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:]**

**(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.

*Id.*, pp. 6-7 (Redline of Amendments to Rule 404(b) effective December 1, 2020).

Again, the relevant portions of the Committee Note and the Reports of the Committee on Rules of Practice and Procedure and the Advisory Committee on Evidence Rules shed considerable light on the contours of the revised notice requirement and the amendments generally.

*“Good Cause” Exception Applies To Timing Of Disclosure Of Permitted Purpose And Supportive Reasoning, Not Just Timing Of Notice As A Whole.* “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,” *id.*, p. 9 (Committee Note); that is, upon a showing of good cause, the government can provide belated notice of a new “permitted purpose” and supportive reasoning for evidence that already has been the subject of a timely pretrial notice that articulated a different “permitted purpose” and supportive reasoning. “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.” *Id.*, p. 9 (Committee Note).

*Timing Of Notice; Possible Protective Measures Where Notice Is Belated For Good Cause.* While no exact deadline by which pretrial notice must be provided is specified, such notice “must be provided” sufficiently in advance of trial so “as to allow the defendant a fair opportunity to meet the evidence ...” *Id.*, p. 8 (Committee Note). Further, “[w]hen 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,” such as making the witness available to the opponent before the

evidence is introduced or allowing the opponent additional time to prepare to address the evidence. *Id.*, pp. 8-9 (Committee Note).

*No Substantive Change; Notice Amendment Based Upon Language Submitted By DOJ.* The amendments make no “substantive” change to Rule 404(b). As the Committee on Rules of Practice and Procedure noted, the Advisory Committee on Evidence Rules decided against “substantive amendment of Rule 404(b) because any such amendment would make the rule more complex without rendering substantial improvement.” *Id.*, p. 11 (Report of Judicial Conference, Committee on Rules of Practice and Procedure); *see also id.*, p. 15 (Report of Advisory Committee on Evidence Rules, discussing decision that “it would not propose substantive amendments to Rule 404(b)” and reasons therefor). The amendment that ultimately was made was based on language submitted by the Department of Justice. *Id.*, pp. 11-12 (Report of Judicial Conference, Committee on Rules of Practice and Procedure).

*Word “Other” Restored To Prior Location; Confirms Rule 404(b) Applies To Crimes, Wrongs, Acts Other Than Those At Issue.* “[T]he 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.” *Id.*, p. 10 (Committee Note).

For more information, see in particular House Document 116-144, which may be found at [https://www.uscourts.gov/sites/default/files/cdoc-116hdoc144\\_0.pdf](https://www.uscourts.gov/sites/default/files/cdoc-116hdoc144_0.pdf). And see generally the Current Rules of Practice & Procedure Page of the website of the United States Courts, which may be found at <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>.

Federal Rules of Appellate Procedure 35, 40 –  
Length Limits for Responses to Petitions for Panel Rehearing, En Banc Determination

Federal Rules of Appellate Procedure 35, which governs petitions for hearing or rehearing en banc, and 40, which governs petitions for panel rehearing, previously placed limits on the length of such petitions without placing any limits on the length of responses to such petitions. Both rules have been amended to provide that the length limitations that apply to petitions for en banc determination and for panel rehearing now also apply to responses thereto. *See* Fed. R. App. P. 35(e) (“[t]he length limits in Rule 35(b)(2) apply to a response”), 40(a)(3) (“[i]f a response is requested, the requirements of Rule 40(b) apply to the response”) (December 1, 2020).<sup>5</sup>

For more information, see in particular House Document 116-119, which may be found at [https://www.uscourts.gov/sites/default/files/cdoc-116hdoc119\\_0.pdf](https://www.uscourts.gov/sites/default/files/cdoc-116hdoc119_0.pdf). And see generally the Current Rules of Practice & Procedure Page of the website of the United States Courts, which may be found at <https://www.uscourts.gov/rules-policies/current-rules-practice-procedure>.

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<sup>5</sup> In addition to setting forth length requirements, Rule 40(b) also requires that petitions for panel rehearing “comply in form with Rule 32” and that “[c]opies ... be served and filed as Rule 31 prescribes,” which requirements the newly amended Rule 40(a)(3) likewise now imposes upon responses to petitions for panel rehearing.