

## Alabama Rules of Evidence

### Article IV. Relevancy and Its Limits

#### Rule 404.

#### **Character evidence not admissible to prove conduct; exceptions; other crimes, wrongs, or acts.**

(a) *Character evidence generally.* Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) CHARACTER OF ACCUSED. In a criminal case, evidence of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2)(A)(i), evidence of the same trait of character of the accused offered by the prosecution;

(2) CHARACTER OF VICTIM.

(A) In Criminal Cases. (i) Evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or (ii) evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor.

(B) In Civil Cases. Evidence of character for violence of the victim of assaultive conduct offered on the issue of self-defense by a party accused of assaultive conduct, or evidence of the victim's character for peacefulness to rebut the same. Whenever evidence of character for violence of the victim of assaultive conduct, offered by a party accused of such assaultive conduct, is admitted on the issue of self-defense, evidence of character for violence of the party accused may be offered on the issue of self-defense by the victim and evidence of the accused party's character for peacefulness may be offered to rebut the same.

(3) CHARACTER OF WITNESS. Evidence of the character of a witness, as provided in Rules 607, 608, 609, and 616.

(b) *Other crimes, wrongs, or acts.* (1) *Prohibited Uses.* Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith.

(2) *Permitted Uses.* This evidence may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

(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, so that the defendant has a fair opportunity to meet it;

(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.

[Amended 8-15-2013, eff. 10-1-2013; Amended 3-3-2023, eff 5-1-2023.]

### Advisory Committee's Notes

This rule undertakes to answer the basic question of when evidence of character may be admissible. Once character evidence is determined to be admissible under (a), one generally must consult Ala.R.Evid. 405 for the appropriate medium through which the character may be proven – i.e., reputation, opinion, or conduct. It is intended that Rule 404(b) will be applicable in civil as well as criminal cases.

**Section (a). Character evidence generally.** Rule 404, like its federal counterpart, begins with what may be termed a “general exclusionary rule of character.” As a general rule, whether in civil or criminal cases, character evidence is not admissible when offered to prove that a person is of a particularly good or bad character and that the person acted in conformity with that character on the occasion that is the basis of the litigation. This exclusionary rule has been long recognized in Alabama case law. See C. Gamble, *Character Evidence: A Comprehensive Approach* 3 (1987). In a criminal case, for example, the prosecution may not take the initiative to prove the accused’s bad character as a basis for the jury to infer that the accused committed the now-charged crime. *Ex parte Cofer*, 440 So.2d 1121 (Ala.1983); *Ex parte Killough*, 438 So.2d 333 (Ala.1983); C. Gamble, *McElroy’s Alabama Evidence* § 27.02(1) (4th ed. 1991). Likewise, a party to a civil action may not prove an opponent’s bad character for negligence as a basis for the factfinder to infer that the opponent was negligent on the occasion that serves as the basis of the cause of action. *Smith v. Civil Service Bd. of the City of Florence*, 52 Ala.App. 44, 289 So.2d 614 (1974); *Babcock v. Smith*, 285 Ala. 557, 234 So.2d 573 (1970).

**Subsection (a)(1). Character of accused.** The criminally accused is provided special dispensation from the general exclusionary rule regarding character. Under the power historically granted by a principle that has come to be termed the “mercy rule,” the criminal defense may prove the accused’s good character. The accused’s evidence of good character may serve as circumstantial proof that the accused did not commit the crime charged. *Michelson v. United States*, 335 U.S. 469, 479 (1948).

This right of the defense to prove the accused’s good character, as evidence of innocence, has long existed under Alabama law. See, e.g., *Beird v. State*, 215 Ala. 27, 109 So. 161 (1926); *Felix v. State*, 18 Ala. 720 (1851). See also C. Gamble, *Character Evidence: A Comprehensive Approach* 48 (1987). The mediums of proof through which the accused may evidence good character remain unchanged. The criminal defendant will continue to be

permitted to prove good character through general reputation as a whole. *Elmore v. State*, 216 Ala. 247, 113 So. 33 (1927); C. Gamble, *McElroy's Alabama Evidence* § 27.01(2) (4th ed. 1991). Contra Fed.R.Evid. 404(a)(1). The defense, of course, may limit reputation testimony to a trait that is pertinent to the crime charged. However, this is not required. Unlike the corresponding Federal Rule of Evidence, this rule does not permit a character witness to give an opinion of the accused's character. The character witness may testify as to reputation only. *Jones v. State*, 53 Ala.App. 690, 304 So.2d 34, cert. denied, 293 Ala. 261, 304 So.2d 38 (1974). See C. Gamble, *McElroy's Alabama Evidence* § 27.01(1) (4th ed. 1991).

If the criminal defense chooses to prove the accused's good character through one of the permissible mediums, the prosecution may rebut with evidence of bad character. That right of rebuttal has received historic recognition under Alabama evidence law. *Bedsole v. State*, 274 Ala. 603, 150 So.2d 696 (1963); *Pierce v. State*, 228 Ala. 545, 154 So. 526 (1934). The rebuttal evidence, like the accused's evidence of good character, must be offered through the medium of reputation. Because the mercy rule is a right of special dispensation afforded the criminal defendant, the defendant is allowed some measure of power to limit the breadth of the rebuttal. When the defense offers proof of the accused's reputation for a particular trait, for example, the rebuttal testimony should be confined to the same trait or to a similar one. *Thorn v. State*, 450 So.2d 179 (Ala.Crim.App.1984); *Martin v. State*, 90 Ala. 602, 8 So. 858 (1891), overruled by *Williams v. State*, 140 Ala. 10, 37 So. 228 (1903).

It should be noted that the accused does not open the door for the prosecution to offer evidence of bad character, as set forth in Rules 404(a)(1) and 405(a), by taking the witness stand in his or her own behalf. Such testimony by the accused, however, would subject the accused to impeachment. Ala.R.Evid. 404(a)(3).

**Subsection (a)(2). Character of victim.** This subsection, as does its counterpart under the Federal Rules of Evidence, permits evidence of a victim's character. It provides another exception to the Rule 404(a) exclusion under which evidence of a person's character is generally excluded when offered to prove that the person acted in conformity therewith on a particular occasion. As to a victim of rape or assault with intent to rape, it is important to note that any Rule 404(a)(2) principles are preempted by contrary provisions found in the "rape shield" principle of Rule 412.

Admissibility of a victim's character generally arises in both criminal and civil cases as described hereinafter.

**(A) In criminal cases.** In a criminal case, the accused may offer evidence that a victim of an alleged crime had a pertinent trait. Such evidence usually is offered in cases of homicide or assault where the accused pleads self-defense. In these cases, the character evidence is offered as a base from which circumstantially to infer that the victim was the first aggressor. Additionally, and not by virtue of the present rule, evidence that the victim had a bad character may go to show that the accused had reasonable grounds upon which to apprehend that the victim was about to do the accused immediate and serious bodily harm.

Generally, the evidence of a victim's character allowed by this subsection must be in the form of testimony regarding reputation or testimony stating an opinion, in accordance with Rule 405(a). See *Government of the Virgin Islands v. Carino*, 631 F.2d 226 (3d Cir.1980); *United States v. Kills Ree*, 691 F.2d 412 (8th Cir.1982); E. Cleary, *McCormick on Evidence* § 193 (3d

ed. 1984). Compare *Higginbotham v. State*, 262 Ala. 236, 78 So.2d 637 (1955) (holding that the accused in a homicide case may not prove the victim's bad character via specific prior acts of misconduct); C. Gamble, *McElroy's Alabama Evidence* § 26.01(1) (4th ed. 1991). Such proof would come through the testimony of a character witness for the defense who relates either the victim's general reputation for a pertinent trait or the witness's own opinion of the victim's character for the pertinent trait.

Alabama case law permits a person charged with homicide or assault to prove, in support of a self-defense claim, that the alleged victim had a bad general reputation for violence. *Williams v. State*, 506 So.2d 368 (Ala.Crim.App.1986), cert. denied, 506 So.2d 372 (Ala.1987); *Bankston v. State*, 358 So.2d 1040 (Ala.1978). See also C. Gamble, *McElroy's Alabama Evidence* § 33.01(1) (4th ed. 1991); H. Henry, Annotation, *Admissibility of Evidence as to Other's Character or Reputation for Turbulence on Question of Self-Defense by One Charged With Assault or Homicide*, 1 A.L.R.3d 571 (1965). Unlike preexisting Alabama law, however, Rule 404(a)(2) contains no requirement that, as a condition precedent to admitting proof of the victim's character for a pertinent trait, other evidence in the case must tend to show that the accused acted in self-defense. See *Smith v. State*, 466 So.2d 1026 (Ala.Crim.App.1985); *Wright v. State*, 252 Ala. 46, 39 So.2d 395 (1949). Allowing the accused to prove the victim's character for a pertinent trait via a witness's opinion, as opposed to proof in the form of general reputation, would be new to Alabama law. This rule would have no effect upon that body of Alabama law allowing the admission, under appropriate circumstances, of evidence of collateral difficulties between the victim and the accused. See, e.g., *Walker v. State*, 523 So.2d 528 (Ala.Crim.App.1988); *Akers v. State*, 399 So.2d 929 (Ala.Crim.App.1981). See also C. Gamble, *McElroy's Alabama Evidence* § 45.06 (4th ed. 1991). Likewise unaffected is that line of Alabama precedent under which the accused in a homicide or assault case, where there is evidence of self-defense, may offer evidence that the victim had made prior threats to injure the one now accused. See *Rutledge v. State*, 88 Ala. 85, 7 So. 335 (1889). See also C. Gamble, *McElroy's Alabama Evidence* § 262.01(9) (4th ed. 1991); W. Schroeder, J. Hoffman, & R. Thigpen, *Alabama Evidence* § 4-4 (1987).

Once the accused has offered evidence to prove the victim's character for a pertinent trait, the victim's character for that trait then becomes material. Such materiality opens the door for the prosecution to present its own evidence of the victim's character that tends to rebut the evidence offered by the defense. This right of rebuttal has historically been afforded the prosecution in Alabama. The only change in that rebuttal right made by Rule 404(a)(2) is to permit, in appropriate instances, evidence of the victim's character to be offered in the form of opinion evidence. See *Dockery v. State*, 269 Ala. 564, 114 So.2d 394 (1959); *Jimmerson v. State*, 133 Ala.18, 32 So. 141 (1902).

Under Rule 404(a)(2)(A)(i), in any homicide prosecution, where the accused claims self-defense and offers evidence that the victim was the first aggressor, the door is open for the state to rebut with evidence of the victim's character for peacefulness. Unlike Rule 404(a)(2)(A)(i), which permits rebuttal with evidence of the victim's character only after the accused has offered evidence of the victim's character, Rule 404(a)(2)(A)(ii) allows the prosecutor to prove that the victim possessed the trait of peacefulness, no matter what kind of evidence is used by the accused to prove that the victim was the first aggressor in support of a claim of self-defense in a homicide case. The triggering evidence that permits rebuttal by evidence of the victim's character could be evidence of nothing more than a prior threat by the victim against the accused. See 1A J. Wigmore, *Wigmore on Evidence* § 63 (Tillers rev. 1983); E. Cleary,

McCormick on Evidence § 193 (3d ed. 1984). This right of rebuttal is new to the law of Alabama; heretofore, only when the accused has presented evidence that the victim was of bad character has the prosecution been free to offer evidence of good character to rebut the evidence that the victim had been the first aggressor. See C. Gamble, *McElroy's Alabama Evidence* § 33.03(1), 33.03(5) (4th ed. 1991).

**(B) In civil cases.** Rule 404(a)(2)(A) applies only to criminal cases. Rule 404(a)(2)(B), on the other hand, affirms the preexisting line of Alabama authority that permits the civil defendant, when self-defense is at issue, to present evidence that an assault victim had a bad general reputation in regard to peace and quiet, violence, or similar trait. *Butler v. Hughes*, 264 Ala. 532, 88 So.2d 195 (1956); *Cain v. Skillin*, 219 Ala. 228, 121 So. 521 (1929). See also C. Gamble, *McElroy's Alabama Evidence* §§ 33.01(1), 34.01 (4th ed. 1991). Under Rule 404(a)(2)(B), the victim's character for a pertinent trait is also provable via the character witness's opinion. See Ala.R.Evid. 405(a).

**Subsection (a)(3). Character of witness.** This subsection, like its counterpart under the Federal Rules of Evidence, recognizes a third exception to the Rule 404(a) principle calling for the general exclusion of character evidence. Such evidence is admissible when relevant to the credibility of a witness, as provided in Rules 607, 608, 609, and 616. This admissibility of character evidence for impeachment is consistent with preexisting Alabama law. See C. Gamble, *Character Evidence: A Comprehensive Approach* 56 (1987) (observing that whenever a witness takes the stand, whether the witness is a party or not, a limited aspect of the witness's character is placed in issue – i.e., propensity for telling the truth). See also *Smitherman v. State*, 521 So.2d 1050 (Ala.Crim.App.1987), cert. denied, 521 So.2d 1062 (Ala.1988); C. Gamble, *McElroy's Alabama Evidence* § 140.01 (dealing with impeachment by evidence of reputation), and § 145.01 (dealing with impeachment by evidence of a criminal conviction) (4th ed. 1991).

**Section (b). Other crimes, wrongs, or acts.** Rule 404(a) establishes the concept, applicable in both criminal and civil cases, that evidence of collateral conduct generally is inadmissible when offered to prove that the person committing the conduct is of a certain character and, consequently, acted in keeping with that character on the occasion of the act now at issue in the litigation. Section (b), like its federal counterpart, makes a specific application of the general principle of Rule 404(a); it provides specifically that evidence of collateral crimes, wrongs, or other acts is not admissible to prove character as a basis for implying that conduct on a particular occasion was in conformity with it. Such a general exclusionary rule, applicable to character evidence in the form of specific conduct, has long been embraced by the evidence law of Alabama. See, e.g., *Ex parte Killough*, 438 So.2d 333 (Ala.1983) (first appellate decision specifically recognizing McElroy language referring to this as a “general exclusionary rule”); *Jackson v. Lowe*, 48 Ala.App. 633, 266 So.2d 891 (1972) (recognizing application of this general exclusionary rule in civil cases); *Roberson v. Ammons*, 477 So.2d 957 (Ala.1985). See also C. Gamble, *McElroy's Alabama Evidence* § 69.01(1) (recognizing the general exclusionary rule as applied in criminal cases) and § 34.01 (discussing the general exclusionary rule applied in civil cases) (4th ed. 1991); J. Colquitt, *Alabama Law of Evidence* § 4-4 (1990) (discussing the general exclusionary rule and ways to circumvent it).

The general rule excluding character evidence does not bar evidence of specific acts when that evidence is offered for some purpose other than the impermissible one of proving action in conformity with a particular character. While section (b) does not purport to provide an exhaustive listing of proper purposes, it states that proper purposes may include proving such

things as motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. Admitting evidence of specific conduct for a limited purpose, other than to prove character and conformity therewith, is consistent with preexisting Alabama law in both criminal and civil cases. *Sessions Co. v. Turner*, 493 So.2d 1387 (Ala.1986) (other misrepresentations held admissible to prove prerequisite knowledge in fraud case); *Averette v. State*, 469 So.2d 1371 (Ala.Crim.App.1985) (evidence admissible in criminal case to prove knowledge); *Ex parte Cofer*, 440 So.2d 1121 (Ala.1983) (dealing with intent as a purpose for admitting evidence of the accused's collateral crimes); *Nicks v. State*, 521 So.2d 1018 (Ala.Crim.App. 1987) (evidence of other crimes admissible to prove plan, design, or scheme), *aff'd*, 521 So.2d 1035 (Ala.), *cert. denied*, 487 U.S. 1241 (1988); *Ford v. State*, 514 So.2d 1057 (Ala.Crim.App.) (dealing with motive as a permissible purpose for admitting evidence of the accused's collateral crimes), *cert. denied*, 514 So.2d 1060 (Ala.1987); *Ex parte Arthur*, 472 So.2d 665 (Ala.1985) (containing an instructive discussion of the identity purpose). See also C. Gamble & F. James III, *Perspectives on the Evidence Law of Alabama: A Decade of Evolution, 1977-1978*, 40 Ala.L.Rev. 95, 126 (1988); C. Gamble, *Character Evidence: A Comprehensive Approach* 14 (1987); W. Schroeder, *Evidentiary Use in Criminal Cases of Collateral Crimes and Acts: A Comparison of the Federal Rules and Alabama Law*, 35 Ala.L.Rev. 241 (1984); C. Gamble, *Prior Crimes as Evidence in Present Criminal Trials*, 1 Campbell L. Rev. 1 (1979); E. Zipp, *Annotation, Admissibility of Evidence of Other Crimes, Wrongs or Acts Under Rule 404(b) of Federal Rules of Evidence, in Civil Cases*, 64 A.L.R.Fed. 648 (1983).

The "provided" clause of section (b) requires pretrial notice to the accused of the prosecution's intent to use evidence of collateral misconduct. This "provided" clause is based upon an amendment to the corresponding federal rule adopted in 1991. See Fed.R.Evid. 404(b).

#### **Advisory Committee's Notes to Amendment to Rule 404(a) Effective October 1, 2013**

Subsection (a)(1). Character of Accused. Two amendments have been made to subsection (a)(1) of Rule 404. First, the rule has been amended to clarify that the "mercy rule," as set forth in subsection (a)(1), does not apply in civil cases. The amendment resolves any dispute that has or may arise in caselaw over whether the exception in Rule 404(a)(1) permits the use of circumstantial character evidence in civil cases. The use of circumstantial character evidence is generally discouraged because it carries serious risks of prejudice, confusion, and delay. See *Michelson v. United States*, 335 U.S. 469, 476 (1948) ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. See C. Gamble, *Gamble's Alabama Rules of Evidence* § 404(a)(1)(A) (2d ed. 2002); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 27.01 (6th ed. 2009). But that is because the accused, whose liberty is at stake, may need "some counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules* § 4.12, p. 186 (3d ed. 2009). See also H. Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom*, 130 U. Pa. L. Rev. 845, 855 (1982) (the rule prohibiting use of circumstantial character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the fact-finder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

Nothing in the amendment is intended to affect the scope of Rule 404(b). Although Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

The second amendment to Rule 404(a)(1) provides that when the accused attacks the character of an alleged victim under Rule 404(a)(2)(A)(i), the door is opened to an attack on the same character trait of the accused. See Fed. R. Evid. 404(a)(1) (Advisory Committee's Notes). Current law does not allow the prosecution to introduce negative character evidence of the accused unless the defense first introduces evidence of the accused's good character. See 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 27.02(1) (6th ed. 2009) ("The prosecution generally may not take the initiative, in its case in chief, to introduce any kind of evidence as to the accused's bad character in order to show conformity with that character on the occasion of the charged crime.").

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the prosecution has evidence that the accused has a violent character, but is not allowed to offer that evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim. See Fed. R. Evid. 404(a)(1) (Advisory Committee's Notes).

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by evidence of other sexual behavior or sexual offenses under Rule 412.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. See *Brooks v. State*, 263 Ala. 386, 82 So. 2d 553 (1953) (victim's reputation admitted as tending to show accused's apprehension of peril); 1 C. Gamble & R. Goodwin, *McElroy's Alabama Evidence* § 63.01 (6th ed. 2009); and C. Gamble, *Gamble's Alabama Rules of Evidence* § 404(a)(2)(A) (2d ed. 2002) (practice pointer #6). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or Rule 609.

It should be noted that Rule 405(a), which regulates appropriate methods for proving character, has also been amended. Rule 405(a), as amended, adds opinion as an available method for proving the accused's character pursuant to Rule 404(a)(1). See Ala. R. Evid. 405(a) (Advisory Committee's Notes).

Subsection (a)(2)(B). Character of Victim in Civil Cases. As noted above, Rule 404(a)(1) has been amended to provide that when the accused in a criminal case attacks the character of an alleged victim under Rule 404(a)(2)(A)(i), the door is opened to an attack on the same

character trait of the accused. Ala. R. Evid. 404(a)(1); see Fed. R. Evid. 404(a)(1) (Advisory Committee's Notes). Without this evidence, as a matter of fairness, it was thought that the jury would possess only part of the information needed for an informed assessment of the probabilities as to who was the initial aggressor. As a similar means of fairness, Rule 404(a)(2)(B) is amended to provide that when a civil party pleading self-defense is permitted to prove the assault victim's bad character for violence, then the door is opened for the opposing party to prove the assaulting party's character for violence and for the assaulting party to rebut such evidence with evidence of his or her good character for peacefulness.

### **Advisory Committee's Notes to Amendment to Rule 404(b) Effective May 1, 2023**

Rule 404(b) has been amended to keep this rule consistent with the corresponding federal rule, which was amended in 2020. The rule as amended imposes additional notice requirements on the prosecution in a criminal case when Rule 404(b) evidence is offered.

The notice provision of Rule 404(b) has been changed in several ways: First, subpart (3)(A) requires the prosecution to provide reasonable notice of Rule 404(b) evidence that the prosecution intends to offer at trial so that the defendant has a fair opportunity to meet it. Before this amendment, prosecutors were required to disclose only the "general nature" of Rule 404(b) evidence, which was not a tough burden to meet. Because prosecutors were not required to disclose the specific details of the Rule 404(b) evidence, the notice often provided very little benefit to defendants. Under the amended rule, prosecutors should describe the specific Rule 404(b) evidence intended to be offered with sufficient detail so the defendant can adequately prepare to respond to such evidence.

Second, subpart (3)(B) requires the prosecution to identify the "nonconformity" purpose for which the Rule 404(b) evidence is being offered and to explain how the evidence is relevant to prove that purpose. Notice that simply provides a "laundry list" of the permitted purposes listed in Rule 404(b)(2) with no explanation as to how the evidence is relevant for each of those purposes is not sufficient.

Third, part (3)(C) requires that pretrial notice of a prosecutor's intent to use Rule 404(b) evidence be in writing. As stated by the Advisory Committee that recommended the 2020 amendments to the corresponding federal rule, "[r]equiring the notice to be in writing provides certainty and reduces arguments about whether notice was actually provided." Advisory Committee Notes to 2020 Amendments to Rule 404(b), Fed. R. Evid.

Fourth, subpart (3)(C) also requires notice to be provided before trial in sufficient time to allow the defendant a fair opportunity to meet the evidence. Similar notice provisions are found in other rules. See, e.g., Ala. R. Evid. 609(b) (containing notice requirement for offering evidence of convictions that are more than 10 years old for impeachment purposes); Ala. R. Evid. 902(11) (containing notice requirement when using affidavit or sworn testimony to authenticate domestic records of regularly conducted activity). The Advisory Committee that recommended the 2020 amendments to the corresponding federal rule stressed the importance of advance notice as follows, which applies equally to the amendment to Ala. R. Evid. 404(b):

"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 ['nonconformity'] 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."

Advisory Committee Notes to 2020 Amendments to Rule 404(b), Fed. R. Evid.

Fifth, "the amendment eliminates the requirement that the defendant must make a request before notice is provided." *Id.* Thus, the prosecution now has an affirmative obligation to provide the Rule 404(b)(3) notice.

Finally, Alabama law has long provided that "[t]he pretrial notice requirement remains obligatory upon the prosecution even when it intends to offer the collateral crimes, wrongs, or acts under theories other than Rule 404(b), such as for impeachment or rebuttal." 1 C. Gamble et al., *McElroy's Alabama Evidence* § 69.02(9) (7th ed. 2020). See *Ex parte Lawrence*, 776 So. 2d 50, 53 (Ala. 2000). Nothing in this amendment is intended to affect this interpretation of the prosecution's notice requirements.

**Note from reporter of decisions:** The order amending Rule 404(a), Rule 405(a), Rule 407, Rule 408, Rule 412, Rule 510, Rule 608(b), Rule 703, Rule 801(d), Rule 803(6), Rule 804(b), and Rule 1103, Ala. R. Evid., and adopting Rule 902(11) and (12), Ala. R. Evid., and the Advisory Committee's Notes to the amendment or adoption of these rules, effective October 1, 2013, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_\_\_ So. 3d.

**Note from the reporter of decisions:** The order amending Rule 404(b), Alabama Rules of Evidence, and adopting the Advisory Committee's Notes thereto, effective May 1, 2023, is published in that volume of *Alabama Reporter* that contains Alabama cases from \_\_ So. 3d."