

**PROPOSED REVISIONS TO THE RULES OF EVIDENCE
PROPOSAL 2022-014**

March 7, 2022

The Rules of Evidence Committee has recommended amendments to Rule 11-404 NMRA for the Supreme Court's consideration.

If you would like to comment on the proposed amendments set forth below before the Court takes final action, you may do so by either submitting a comment electronically through the Supreme Court's web site at <http://supremecourt.nmcourts.gov/open-for-comment.aspx> or sending your written comments by mail, email, or fax to:

Sally A. Paez, Deputy Clerk of Court
New Mexico Supreme Court
P.O. Box 848
Santa Fe, New Mexico 87504-0848
nmsupremecourtclerk@nmcourts.gov
505-827-4837 (fax)

Your comments must be received by the Clerk on or before April 6, 2022, to be considered by the Court. Please note that any submitted comments may be posted on the Supreme Court's web site for public viewing.

11-404. Character evidence; crimes or other acts.

A. Character evidence.

(1) ***Prohibited uses.*** Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) ***Exceptions for a defendant or victim in a criminal case.*** The following exceptions apply in a criminal case:

(a) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(b) subject to the limitations in Rule [~~11-413~~11-412] NMRA, a defendant may offer evidence of a victim's pertinent trait, and if the evidence is admitted, the prosecutor may

(i) offer evidence to rebut it, and

(ii) offer evidence of the defendant's same character trait, and

(c) in a homicide case, the prosecutor may offer evidence of the victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

(3) ***Exceptions for a witness.*** Evidence of a witness's character may be admitted under Rules 11-607, 11-608, and 11-609 NMRA.

B. Crimes, wrongs, or other acts.

(1) **Prohibited uses.** Evidence of a 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. ~~[In a criminal case, the prosecution must]~~

(3) **Notice in a criminal case.** In a criminal case, the prosecution 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

~~(b)~~(c) do so in writing before trial – or in any form during trial if the court, for good cause, excuses lack of pretrial notice.

[Approved, effective July 1, 1973; as amended, effective April 1, 1976; December 1, 1993; as amended by Supreme Court Order No. 06-8300-025, effective December 18, 2006; by Supreme Court Order No. 07-8300-035, effective February 1, 2008; by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012; as amended by Supreme Court Order No. _____, effective for all cases pending or filed on or after _____.]

Committee commentary. — The language of Rule 11-404 NMRA was amended in 2012 to be consistent with the restyling of the Federal Rules of Evidence to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on admissibility.

Paragraph B(2) of this rule, unlike the federal rule, does not require the defendant to request the prosecution to provide notice of intent to introduce evidence under this paragraph. Instead, it requires the prosecution in a criminal case to provide notice of evidence the prosecution intends to offer under this paragraph regardless of any request.

[As amended by Supreme Court Order No. 12-8300-015, effective for all cases pending or filed on or after June 16, 2012.]



New Mexico
Courts

Amy Feagans <supajf@nmcourts.gov>

[nmsupremecourtclerk-grp] Comments on proposed rules

1 message

Smith, Caitlin <caitlin.smith@lopdm.us>

Mon, Mar 14, 2022 at 4:58 PM

Reply-To: caitlin.smith@lopdm.us

To: "nmsupremecourtclerk@nmcourts.gov" <nmsupremecourtclerk@nmcourts.gov>

Hi all,

I am attaching a comment on some of the proposed rule changes.

Caitlin C.M. Smith

Appellate Attorney

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(505) 395-2830



NEW MEXICO
LAW OFFICES OF THE
PUBLIC DEFENDER

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March 14, 2022

Sally A. Paez, Deputy Clerk
New Mexico Supreme Court
P.O. Box 848
Santa Fe, NM 87504

Dear Ms. Paez:

I writing to share comments on several of the rule changes proposed by the Supreme Court on March 7, 2022. My comments are based on my perspective as an appellate attorney with the Law Offices of the Public Defender, but the comments below are my own and do not represent the department as a whole.

Proposal 2022-009:

Rule 5-201

The proposed change to Rule 5-201(C) would add two sentences: “Any offenses that are included in the bind-over order but not set forth in the criminal information shall be dismissed without prejudice. The court shall enter an order of dismissal on those offenses.”

This is a helpful change. It avoids the problem in which defendants prepare for preliminary hearing based on the charges in the information, then wind up with additional charges added by the judge, even though there was no notice of them. This change ensures that defendants have notice of the charges that will be bound over, and it is consistent with the values of due process.

Rules 6-202 & 7-202

The proposal would add the following language to Rules 6-202(D)(1) and 7-202(D)(1): “A finding of no probable cause shall not prevent the prosecution from proceeding either by indictment or criminal information filed in the district court.”

This language is in tension with *State v. White*, 2010-NMCA-043, 232 P.3d 450. *White*, ¶ 16, says that it is improper for the State to bring a case to preliminary hearing before two judges in a row and “allow one magistrate to overrule another magistrate on the issue of probable cause after a review of the same evidence.” *White* addressed successive preliminary hearings before co-equal judges, while the proposed rule would apply to preliminary hearings in different courts, but the principle behind *White* should still apply: prosecutors should not be permitted to bring the same evidence to a second judge in the hope of getting a different outcome.

I suggest either eliminating the proposed language or replacing it with “A finding of no probable cause shall not prevent the prosecution from proceeding in the district court either by indictment or, if additional evidence is produced, by information.”

Proposal 2022-014:

The proposed new Rule 11-404(B)(3) would require prosecutors not only to notify defendants that they will be using 404(B) evidence, but also to “articulate in the notice the permitted purpose for which the prosecutor intends to offer the evidence and the reasoning that supports the purpose.”

This is an excellent change that addresses a real problem. When I review trial records, I often see 404(B) notices that say the prosecution plans to use the evidence to establish “motive, opportunity, intent, preparation, plan, knowledge, absence of mistake, lack of accident, or any other permissible purpose.” That kind of broad notice does not give the defense a theory of admissibility to which it can respond, nor does it allow the trial court to assess the issue with any confidence during motions in limine.

By requiring the prosecution to articulate a purpose for 404(B) evidence, this rule should reduce surprises and improve the quality of argument around 404(B) issues in the trial courts.

Thank you for your consideration of these suggestions.

Sincerely,

/s/Caitlin Smith

Caitlin C.M. Smith
Appellate Attorney
Law Offices of the Public Defender