PRIOR BAD ACTS EVIDENCE UNDER NEW JERSEY EVIDENCE RULE 404(B): DEVELOPING THE NOTIFICATION REQUIREMENT AS CREATED BY *STATE V. ROSE*

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I. INTRODUCTION

Both the New Jersey Rules of Evidence ("N.J.R.E.") and the Federal Rules of Evidence ("F.R.E.") disallow the use of crimes, wrongs, or other bad acts, (collectively "prior bad acts evidence,") in order to show actions in conformance with them and allow use of prior bad acts evidence for other purposes, such as motive or intent.[1] The text of F.R.E. 404, however, requires notice to be given to defendants when a prosecutor intends to use prior bad acts evidence. The N.J.R.E. does not have similar explicit language, but the New Jersey Judiciary has read a notice requirement into the analogous state rule in order to provide fairness to defendants. This commentary explores the development of the notice

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1. FED. R. EVID. 404(b); N.J.R. EVID. 404(b).

requirement in New Jersey and explores what constitutes proper notification for that rule as interpreted in *State v. Rose*.[2]

II. THE DEVELOPMENT OF THE NOTIFICATION REQUIREMENT FOR 404(B) EVIDENCE IN NEW JERSEY

F.R.E. 404(b) states that evidence of a "crime, wrong, or other act," is inadmissible to prove that a person acted in accordance with a particular character trait, but the evidence, "may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident."[3] If a criminal defendant so requests, "the prosecutor must: (A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and (B) do so before trial—or during trial if the court, for good cause, excuses lack of pretrial notice."[4] This notice requirement was added with the intention to "reduce surprise and promote early resolution on the issue of admissibility."[5] "The notice requirement is a prerequisite to the admissibility of the Rule 404(b) evidence," thus prior bad acts evidence is inadmissible under the F.R.E. without sufficient notice.[6] Unlike the New Jersey rule, F.R.E. 404(b) is considered a rule of inclusion.[7] The type of evidence addressed by Rule 404(b) is not related to situations where the defendant opens the door under 404(a), nor does it relate to evidence presented under the witness rules related to impeachment of character for truthfulness, bias, or impairment. [8]

N.J.R.E. 404(b) states:

> Except as otherwise provided by Rule 608(b), evidence of other crimes, wrongs, or acts is not admissible to prove the disposition

2. 19 A.3d 985 (N.J. 2011).
3. FED. R. EVID. 404(b)(1)-(2).
4. FED. R. EVID. 404(b)(2)(A)-(B).
5. FED. R. EVID. 404(b) Notes of Advisory Committee on 1991 Amendment.
6. United States v. Long, 814 F. Supp. 72, 73 (1993) (citing 22 CHARLES A. WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE, §5231, at 341-42).
7. United States v. Green, 617 F.3d 233, 244 (3d Cir. 2010); United States v. Scarfo, 850 F.2d 1015, 1019 (3rd Cir. 1988); United States v. Romine, 377 F. Supp. 2d 1129, 1131-32 (D.N.M. 2005); United States v. Cruz, 343 F. Supp. 2d 226, 230 (S.D.N.Y. 2004).
8. United States v. Akpan, 407 F.3d 360, 373-75 (5th Cir. 2005) (holding that 404(b) does not apply in situations where a criminal defendant opened the door for character evidence during their case in chief).

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> of a person in order to show that such person acted in conformity therewith. Such evidence may be admitted for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident when such matters are relevant to a material issue in dispute.[9]

Specific uses "are listed there only in illustration of permissible purposes for which such evidence may be introduced and not as a limitation on permissible purposes."[10] As indicated by the official comments, this rule was meant to follow the analogous federal rule, F.R.E. 404(b), except in its addition of the words "disposition" and the final phrase "when such matters are relevant to a material issue in dispute," which was added to emphasize the prior rule in New Jersey "that ordinarily other crimes evidence is admissible only to prove 'some other fact in issue,' and not a general disposition to commit crimes or other wrongs."[11]

Evidence submitted under subsection (b) can be appropriately admitted during the prosecution's case-in-chief and does not rely on the evidence offered by the defendant;[12] however, N.J.R.E. 404(b) is "a rule of exclusion rather than a rule of inclusion."[13] Permissible uses for such evidence include when it "relates to some other fact in issue… including motive, including intent, including absence of mistake, or accident, or some other issue,"[14] and when the probative value has been weighed against the prejudicial impact of the evidence and no other

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9. N.J.R. EVID. 404(b).

10. RICHARD BIUNNO, HARVEY WEISSBARD & ALAN L. ZEGAS, CURRENT N.J. RULES OF EVIDENCE 248 (2017) [hereinafter, BIUNNO, WEISSBARD & ZEGAS]; *see also* State v. Baluch, 775 A.2d 127, 159 (N.J. Super. Ct. App. Div. 2001) (discussing the admissibility of prior bad acts evidence to "establish motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident or other such matters when relevant to a material issue in dispute").

11. N.J.R. EVID. 404(b) Official Comment.

12. BIUNNO, WEISSBARD & ZEGAS, *supra* note 9 at 251.

13. State v. J.M., 137 A.3d 490, 498 (N.J. Super. Ct. App. Div. 2016) (quoting State v. Willis, 137 A.3d 451, 460 (N.J. 2016)); *see also* State v. Eatman, 774 A.2d 571, 575 (N.J. Super. Ct. App. Div. 2001) ("Suffice it to say that the rule is one of 'exclusion' rather than 'inclusion,' and is intended to bar admission of other crimes when such evidence is offered solely to establish the forbidden inference of propensity or predisposition." (citing State v. Nance, 689 A.2d 1351 (N.J. 1997); State v. Stevens, 558 A.2d 833 (N.J. 1989); State v. Kociolek, 129 A.2d 417 (N.J. 1957))).

14. State v. Oliver, 627 A.2d 144, 154 (N.J. 1993) (quoting State v. Cusick, 530 A.2d 806 (N.J. Super. Ct. App. Div. 1987).

"less-inflammatory evidence can prove the same fact in issue."[15] The admissibility of prior bad acts evidence is determined by a four prong test, articulated in *State v. Cofield*; the evidence must be 1) "relevant to a material issue;" 2) "similar in kind and reasonably close in time to the offense charged;" 3) "clear and convincing;" and 4) "[t]he probative value of the evidence must not be outweighed by its apparent prejudice."[16] The fourth prong is a "careful and pragmatic evaluation of the evidence to determine whether the probative worth of the evidence is outweighed by its potential for undue prejudice," which is a "more exacting" standard than that found in N.J.R.E. 403.[17]

While there is no notice requirement contained in N.J.R.E. 404(b), and there is no evidence that the New Jersey Legislature intended to require notice, the New Jersey Supreme Court decided in 2011 to prospectively include such a requirement so as to afford the parties and courts a chance to determine the admissibility of the 404(b) evidence.[18] New Jersey first addressed the lack of notice requirement in *State v. Rose*, having previously declined to touch on it in *State v. Nance*.[19] In *Rose*, the Court discussed the Third Circuit's ruling in *United States v. Green*,[20] that intrinsic evidence offered as background information would remain admissible provided that notice of an intention to offer such evidence was given and that a balancing of F.R.E. 403 was met.[21] The *Rose* Court stated:

> *Green*'s tight description of intrinsic evidence narrows the field of uncharged misconduct that is excluded from 404(b)'s channeled

15. *Oliver*, 627 A.2d at 149.

16. State v. Cofield, 605 A.2d 230, 235 (N.J. 1992) (citing Abraham P. Ordover, *Balancing the Presumptions of Guilt & Innocence: Rules 404(b), 608(b), & 609(a)*, 38 EMORY L.J. 135, 160 (1989)).

17. State v. Rose, 19 A.3d 985, 997 (N.J. 2011) (holding that the formal rules of evidence in New Jersey will replace the use of res gestae evidence in order to "promote uniformity and predictability in the consideration of evidence") (internal citations omitted). N.J.R.E. 403 requires that, except as otherwise provided, "relevant evidence may be excluded if its probative value is substantially outweighed by the risk of (a) undue prejudice, confusion of issues, or misleading the jury or (b) undue delay, waste of time, or needless presentation of cumulative evidence."

18. *Rose*, 19 A.3d at 1010 (citing *Nance*, 689 A.2d at 1355-56 (omitting notice from listed obligations for Rule's operation)).

19. 689 A.2d at 1355 (declining to rule on a pretrial notice requirement of Rule 404(b) evidence because the issue was not raised by either party).

20. 617 F. 3d 233 (3d Cir. 2010).

21. *Rose,* 19 A.3d at 1009–10.

> analysis. The addition of a notice requirement *for all 404(b) evidence*, which has not been required to date . . . *but which we now endorse and will require prospectively*, will encourage an orderly discussion and analysis of such evidence that will require parties and trial courts to engage in the rigorous and thoughtful analysis of the proper use of such testimony, and thus deter off-the-cuff conclusory explanations to which res gestae claims, and rulings, are prone.[22]

Rose is clearly creating a new requirement for parties to submit notice to opposing counsel of an intention to proffer any 404(b) evidence.

How to properly utilize prior bad acts evidence is important because the impermissible use of prior bad acts evidence can result in dismissal.[23] New Jersey courts must analyze the admissibility of such evidence under *Cofield*,[24] and, if no such analysis is conducted, a reversible error has potentially occurred.[25] Whether an entire case is subject to reversal turns on if there is a "possibility that it led to an unjust verdict."[26]

The standard for reviewing if there was an error in admitting prior bad acts evidence is dependent upon whether there was an objection at the trial level.[27] When there has been no objection at trial, the reviewing court analyzes whether there was "harmless error" in admitting the prior bad acts evidence, as the reversal and retrial of a case creates a hardship.[28] When the court conducts a *Cofield* analysis and weighs the potential for prejudice, the reviewing court analyzes such admission of

22. *Id.* at 1010 (emphasis added).

23. State v. G.V., 744 A.2d 137, 143 (N.J. 2000) ("The *erroneous* admission of evidence of other crimes also carries such a high risk of prejudice as ordinarily to call for reversal." (citing State v. Atkins, 377 A.2d 718 (N.J. Super. Ct. App. Div. 1977), *rev'd on other grounds*, 396 A.2d 1122 (N.J. 1979)).

24. *See supra*, note 16 and accompanying text (discussing the admissibility requirements under *Cofield*).

25. State v. Lykes, 933 A.2d 1274, 1283–84 (2007) (holding that when a proper analysis is not conducted by the trial court, plenary review is proper).

26. State v. Macon, 273 A.2d 1, 7 (N.J. 1971); N.J. CT. R. 2:10-2; *see also* State v. Marrero, 691 A.2d 293 (N.J. 1997) (reversing where an evidentiary ruling resulted in a manifest denial of justice).

27. *Rose*, 19 A.3d at 995 (stating that if there was an objection to the use of prior bad acts evidence or other-crimes evidence, the standard of review is for abuse of discretion, and if there was no objection, the standard of review is plain error).

28. *G.V.*, 744 A.2d at 142 (holding inappropriate admittance of prior bad acts evidence was a reversible error prior to the notification requirement in *State v. Rose*).

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404(b) evidence under an "abuse of discretion" standard.[29] The reviewing court gives great deference to the trial court because of the intimate knowledge of the facts surrounding the case, provided they have completed the proper analysis.[30] When prior bad acts evidence has been introduced and allowed, the Court must give an adequate limiting instruction to the jury that will "narrowly focus the jury's attention on the specific use," of the prior bad acts evidence and not simply restate the language used in Rule 404(b).[31]

III. WHAT CONSTITUTES SUFFICIENT NOTICE UNDER THE FEDERAL RULES OF EVIDENCE

What is not clear in New Jersey is how much notice is required and what form the notice must take. As an initial matter, we note that the federal rule requires an affirmative request by the defendant that such notice be given.[32] A "'reasonable' request for notification" must be made by the defendant and "must be sufficiently clear and particular, in an objective sense, fairly to alert the prosecution that the defense is requesting pretrial notification of the general nature of any Rule 404(b)

29. Green v. N.J. Mfrs. Ins. Co., 734 A.2d 1147, 1153–54 (N.J. 1999) (holding "[t]he trial court is granted broad discretion in determining both the relevance of the evidence to be presented and whether its probative value is substantially outweighed by its prejudicial nature" and "[d]eterminations pursuant to N.J.R.E. 403 should not be overturned on appeal 'unless it can be shown that the trial court palpably abused its discretion, that is, that its finding was so wide off the mark that a manifest denial of justice resulted'") (quoting State v. Carter, 449 A.2d 1280, 1291 (N.J. 1982)).

30. State v. Atkins, 396 A.2d 1122, 1126 (N.J. 1979) (refusing to reverse admission of prior convictions where trial judge balanced probative value against potential for prejudice and noting that "particularly in view of his feel of the case, we do not find [that the trial judge's] judgment constituted an abuse of the discretion vested in him"); *see also* State v. Frisco, 645 A.2d 734, 767 (N.J. 1994) (noting that "[w]e accord trial judges broad discretion in applying the balancing test")

31. State v. Cofield, 605 A.2d 230, 236 (N.J. 1992); *see also* State v. Stevens, 558 A.2d 833, 842 (N.J. 1989) (stating that the limiting instruction should "explain precisely the permitted and prohibited purposes of the evidence, with sufficient reference to the factual context of the case" so that the jury may understand "the fine distinction[s] to which it is required to adhere").

32. FED. R. EVID. 404(b)(2) ("*On request by a defendant in a criminal trial*, the prosecutor must: []provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and [] do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice." (emphasis added)).

evidence the prosecution intends to introduce."[33] It is unclear whether the New Jersey rule will require a defendant to request the 404(b) evidence, however, if New Jersey were to so require, the defendants would need to state, plainly and clearly, that they are requesting pretrial notification of any 404(b) evidence the prosecution intends to use.

In order to determine what notice would be sufficient, we look to interpretations of the federal rule in federal courts. F.R.E. 404(b) and the committee notes give no indication as to what would be considered "reasonable notice," in order to guide courts in making such determinations. There are, however, some general rules that can be looked to in order to determine the reasonableness of notice. F.R.E. 404(b) was amended to include a notice provision for similar reasons as New Jersey's added notice requirement–to "avoid surprise and promote early resolution on the issue of admissibility"[34]–however, the rule "establishes no minimum time . . . because 'the evidence the government wishes to offer may well change as the proof and possible defenses crystalize.'"[35] Further, "[t]he determination of 'what constitutes a reasonable request or disclosure will depend largely on the circumstances.'"[36] The evidence should, at minimum, be provided "outside of the presence of the jury,"[37] and give the defendant "time

33. United States v. Tuesta-Toro, 29 F.3d 771, 773–775 (1st Cir. 1994) (holding an omnibus request for "confessions, admissions and statements . . . that in any way exculpate, inculpate or refer to the defendant. . ." was overly broad to request notification from the prosecution).

34. United States v. Blount, 502 F.3d 674, 677 (7th Cir. 2007) (quoting FED. R. EVID. 404(b) advisory committee's note (1991)) (citing United States v. Carrasco, 381 F.3d 1237, 1241 (11th Cir. 2004) (per curiam); United States v. Vega, 188 F.3d 1150, 1152–55 (9th Cir. 1999)).

35. United States v. Fennell, 496 F. Supp. 2d 279, 284 (S.D.N.Y. 2007) (noting the government's intention to provide 404(b) evidence two weeks prior to trial was reasonable) (quoting United States v. Matos-Peralta, 691 F. Supp. 780, 791 (S.D.N.Y. 1988)).

36. United States v. Blackwell, 954 F. Supp. 944, 968 (D.N.J. 1997) (quoting United States v. Williams, 792 F. Supp. 1120, 1133–1134 (S.D. Ind. 1992)) (citing United States v. Kern, 12 F.3d 122, 124 (8th Cir. 1993); United States v. Giampa, 904 F. Supp. 235, 283 (D.N.J. 1995); United States v. Evangelista, 813 F. Supp. 294, 302 (D.N.J. 1993); United States v. Alex, 791 F. Supp. 723, 729 (N.D.Ill. 1992)).

37. United States v. VanHoesen, 529 F. Supp. 2d 358, 366 (N.D.N.Y. 2008).

to object to the evidence" while also giving the court, "adequate time to decide such an objection."[38]

A. *When is Notice Reasonable?*

It is obvious that the notice is more likely to be held reasonable if it is received far in advance of trial.[39] Courts have frequently held that a ten to fourteen day notice prior to trial is reasonable,[40] one week has been held reasonable,[41] and, in at least one instance, the District of New Jersey found that three days prior to trial was reasonable.[42] In *United States v. Heatley*, however, the Southern District of New York required notice at least three weeks prior to trial, giving defendants time to move to exclude the evidence, and the court time to hear argument on the admissibility of such evidence, stating that 10 days was insufficient.[43] Future Justice Sotomayor noted that the purpose of advance notice is so defendants and courts can "prepare for trial, prevent unfair surprise, and for the Court

38. United States v. Nachamie, 91 F. Supp. 2d 565, 577 (S.D.N.Y. 2000).

39. United States v. Lindsey, 702 F.3d 1092, 1097–98 (8th Cir. 2013) (holding one month's notice, through formal notification in writing, was timely notice); United States v. Faust, 456 F.3d 1342, 1346–47 (11th Cir.) (holding that a seven-month notice of the intent to offer 404(b) evidence as well as the content of that evidence was clearly sufficient); United States v. Dawson, 243 F. Supp. 2d 780, 781 (N.D. Ill. 2003) (requiring notice of prior bad acts evidence thirty days before trial); United States v. Cook, 348 F Supp. 2d 22, 31 (S.D.N.Y. 2004) (granting a request that the government give notice of use of any 404(b) evidence thirty days prior to trial); United States v. Bryant, 420 F. Supp. 2d 873 (875) (N.D. Ill. 2006) (requiring that the government provide notice of any intended 404(b) evidence "no later than three weeks prior to trial"); United States v. Stein, 424 F. Supp. 2d 720, 728 (S.D.N.Y. 2006) (requiring notice to be given "no later than thirty days prior to trial").

40. United States v. Tavarez, 518 F Supp. 2d 600, 604 (S.D.N.Y. 2007) (holding that less than ten days' notice is reasonable); United States v. Morales, 280 F Supp. 2d 262, 275 (S.D.N.Y. 2003) (requiring the government to provide notice of all 404(b) evidence not later than fourteen days before trial); United States v. Aparo, 221 F Supp. 2d 359, 366 (E.D.N.Y. 2002) (holding two weeks to be reasonable notice); United States v. Richardson, 837 F. Supp. 570, 575–76 (S.D.N.Y. 1993) (holding notice at least ten days prior to trial was reasonable notice); United States v. Evangelista, 813 F. Supp. 294 (D.N.J. 1993) (holding ten days prior to trial reasonable); United States v. Williams, 792 F. Supp. 1120, 1133–34 (S.D. Ind. 1992) (creating a presumption that the government must disclose 404(b) evidence at least ten days prior to trial).

41. United States v. Green, 275 F.3d 694, 701–02 (8th Cir. 2001) (holding one week's notice reasonable).

42. United States v. Blackwell, 954 F. Supp. 944, 968 (D.N.J. 1997) (holding that the government's position that it would provide all 404(b) evidence "at least three days before trial" was reasonable).

43. 994 F. Supp. 483, 491 (S.D.N.Y. 1998).

to rule upon the admissibility of such evidence," and therefore notice must give adequate time to do so.[44] The court noted that under 404(b), while three weeks was reasonable, the prosecution may be excused from notification by a showing of "good cause," as new disclosures may become necessary during the course of a trial.[45]

"Good cause" for late notice can be shown effectively if the government gives notice of the evidence when it becomes available.[46] This is true even if the evidence becomes available once the trial has already begun. For example, in *United States v. Smith*, the Eighth Circuit held that notice was held reasonable when it was given "promptly," or immediately upon discovery of its relevance during trial, to a criminal defendant, notwithstanding the fact that the admission of this evidence required the defendant "choose between continuing with his theory of the case and attempting to minimize the damage" from the testimony due to the timing of its admission.[47] The defendant argued that the notice was unreasonable because it required that they change their trial strategy and theory of the case halfway through the trial; the court acknowledged this hardship but otherwise concluded that "[i]n a perfect world, the government would have been aware of, and would have disclosed, [the testimony] earlier. But we do not live in a perfect world, and a criminal defendant is not guaranteed a perfect trial, just a fair one."[48] That a criminal defendant is faced with "some difficult strategic decisions," during his trial "does not necessarily require the exclusion of the evidence."[49]

The Eighth Circuit has implemented a three-part test to determine whether notice was reasonable when given so late into trial preparation: "(1) when the government could have learned . . . of the evidence through

44. *Id.* However, some courts have held that motions in limine and other determinations of admissibility should be made during trial. *See Blackwell*, 954 F. Supp. at 968 (D.N.J. 1997) ("[O]bjections as to the admissibility of prior bad acts under Rule 404(b) are properly asserted during trial, not at the pretrial stage.") (citing Luce v. United States, 469 U.S. 38, 41 (1984); United States v. Eisenberg, 773 F. Supp. 662, 685 (D.N.J. 1991)).

45. *Heatley*, 994 F. Supp. at 491.

46. United States v. Preciado, 336 F.3d 739, 745 (8th Cir. 2003) (holding notice of a few days reasonable because prosecution gave notice as soon as they became aware of the evidence); United States v. Valenti, 60 F.3d 941, 945 (2d Cir. 1995) (holding four days' notice "reasonable notice in advance of trial" because the prosecution received the document's which constituted the 404(b) evidence only four days before trial)).

47. 383 F.3d 700, 706–07 (8th Cir. 2004).

48. *Id.* at 707 (citing United States v. Flores, 73 F.3d 826, 832–33 (8th Cir. 1996)).

49. *Id.* (citing United States v. Spence,125 F.3d 1192, 1194 (8th Cir. 1997)).

timely preparation for trial; (2) . . . prejudice to [the] defendant from lack of time to prepare; and (3) how significant the evidence is to the government's case."[50] The Eleventh Circuit has similarly developed a nearly identical three part test: "(1) When the Government, through timely preparation for trial, could have learned of the availability of the witness; (2) The extent of prejudice to the opponent of the evidence from a lack of time to prepare; and (3) How significant the evidence is to the prosecution's case."[51] These factors are aimed towards "protect[ing] defendants from 'trial by ambush,'" and require that the government prepare their case diligently in order to give notification "that a timely and reasonable preparation for trial would have revealed," noting that "mere negligence" which resulted in the failure to uncover 404(b) evidence would not excuse a prosecutor's failure to give notice.[52]

B. What Form Must Notice Take?

The form of the notice is not specified within the rule. Written notice is not required for notice to be sufficient;[53] notice can be verbal, so long as it gives the defendant the opportunity to defend against the evidence's use.[54] Additionally, the notice does not need to be exact, it must be sufficient to allow defendant the knowledge to defend against the nature of the evidence.[55] It is important to note that "the Rules of Evidence are not rules of discovery," and therefore notice of the evidence does not

50. United States v. Lindsey, 702 F.3d 1092, 1097–98 (8th Cir. 2013) (quoting United States v. Green, 275 F.3d 694, 701 (8th Cir. 2001)).

51. United States v. Perez-Tosta, 36 F.3d 1552, 1562 (11th Cir. 1994) (holding notice six days prior to trial was reasonable because the prosecution gave notice as soon as they became aware of the evidence and timely preparation would not have revealed the evidence sooner).

52. *Id.* at 1561.

53. United States v. Heard, 709 F.3d 413, 431–32 (5th Cir. 2013).

54. United States v. Gorman, 312 F.3d 1159, 1163 (10th Cir. 2002) (holding that notice is reasonable when defendant had verbal notice of the intent to use the 404(b) evidence, as shown by defendant's motion in limine to exclude the evidence at issue); United States v. Singleton, 922 F. Supp. 1522, 1533 (D. Kan. 1996) (noting that courts "'need not provide precise details regarding the date, time, and place of the prior acts,' but it must characterize the prior conduct to a degree that fairly apprises the defendant of its general nature") (quoting United States v. Long, 814 F. Supp. 72, 74 (D. Kan. 1993)).

55. United States v. Padron, 527 F.3d 1156, 1160 (11th Cir. 2008) (holding notice sufficient despite a minor error concerning the date of the prior bad act).

require disclosure of the materials to be used, it needs to merely be notice "sufficient to indicate the general nature of the evidence."[56]

In *United States v. Blount*, the Seventh Circuit held that the government gave notice as to the general nature of the evidence to be presented when it gave defendant's notice that a witness would testify to numerous drug deals under a variety of circumstances, some of which included the carrying of a fire arm.[57] This, combined with the government's use of an expert to testify to "the extensive use of firearms in furtherance of narcotics trafficking crimes," was sufficient to allow him to prepare for the type of evidence that was to be proffered at trial and defend against it.[58] "Rule 404(b) notice needn't take any particular form, and these other indicators, combined with the 404(b) message, likely provided actual notice of what was coming."[59] In *United States v. Heard*, however, notice simply that evidence of bankruptcy would be used was not sufficient to put the defendant on notice that it would be used to show

56. United States v. Williams, 792 F. Supp. 1120, 1134 (S.D. Ind. 1992); *see also* United States v. Watt, 911 F. Supp. 538, 556–57 (D.D.C. 1995) (noting that 404(b) "indicates that the government need only describe the 'general nature' of the evidence it intends to introduce" and that a particularity requirement was specifically rejected by the Advisory Committee); United States v. Richardson, 837 F. Supp. 570, 575–76 (S.D.N.Y. 1993) (requiring the government to give notice only of the "'general nature' of the extrinsic acts evidence" under the "specific language" of FRE 404(b).

57. 502 F.3d 674, 677–78 (7th Cir. 2007).

58. *Id.* at 678.

59. *Id.* (citing FED. R. EVID. 404(b) Note of Advisory Committee (1991); United States v. Gorman, 312 F.3d 1159, 1163 (10th Cir. 2002); United States v. Tringali, 71 F.3d 1375, 1382 (7th Cir. 1995)); *see also* United States v. Robinson, 110 F.3d 1320, 1325–26 (8th Cir. 1997) (holding that notice of government's intent to introduce evidence of prior instances of possession of cocaine in distributable quantities was sufficient notice that the evidence would be used to argue distribution); United States v. Russell, 109 F.3d 1503, 1507 (10th Cir. 1997) (holding that a government's notice that it "might offer 'prior and subsequent conduct involving the distribution of controlled substances'" was sufficient as it described the general nature of the evidence).

that the bankruptcy was also fraudulent, and therefore was insufficient to give the defendant an opportunity to defend against such evidence.[60]

IV. CONCLUSION

F.R.E. 404(b) has been interpreted slightly differently between the circuits, but there are some consistencies that can serve as guideposts for notifying defendants about the use of 404(b) evidence. Because the purpose underlying this rule is to allow both the parties and the courts the opportunity to determine the proper use of this testimony, "reasonable notice" should ideally be pre-trial notice. The notice should be sufficient to allow the defense to prepare to rebut it; it should also come with sufficient time to allow a defendant to challenge the use of the evidence at trial, outside of the ear of the jury, and give courts sufficient time to make thoughtful determinations as to its admissibility and, if necessary, craft sufficient limiting instructions.

This does not require a specific time frame be articulated; in fact, on a case-by-case basis, a specific time frame would be impractical as the availability of evidence and the ability to respond to evidence will vary depending on the circumstances of both the case and the court. For instances where pretrial notification is impossible, balancing the three factors, as outlined by the Eighth and Eleventh Circuits, can serve as a

60. 709 F.3d 413, 431–32 (5th Cir. 2013) (holding the error harmless as a result of the remaining evidence of defendant's guilt); *see also* United States v. Birch, 39 F.3d 1089, 1093-94 (10th Cir. 1994) (holding that the government's failure to "articulate 'the relevant purpose and specific inferences to be drawn from . . . [the] evidence of other acts,'" constituted insufficient notice, however, the error was harmless and did not require reversal); United States v. VanHoesen, 529 F. Supp. 2d 358, 366 (N.D.N.Y. 2008) (stating that prior bad acts evidence will be limited to "evidence of conduct" which was part of the criminal activity or "conduct admissible under Federal Rule of Evidence 404(b)" is "overly vague and does not provide reasonable notice"); United States v. Singleton, 922 F. Supp. 1522, 1533 (D. Kan. 1996) (holding that notice that the government "might offer prior and subsequent conduct that involves the manufacture and distribution of counterfeit payroll checks or that relates to false statements" was "too vague and indefinite" to satisfy the generalized notification requirement because it "offers no change of a pretrial resolution of the issue of admissibility"); United States v. Long, 814 F. Supp. 72, 73-74 (D. Kan. 1993) (holding that notice that a particular individual would testify to prior bad acts, without any more information as to what those acts may be, was unreasonable due to incompleteness because it did not indicate the general nature of the testimony).

guide for examining good cause: 1) Could the government, through diligent preparation, have learned of the evidence earlier? 2) To what extent does the defendant suffer prejudice from a lack of time to prepare to respond to the evidence? and 3) How significant is the evidence to the government's case? Because N.J.R.E. 404(b) serves much the same purpose as its federal counterpart, as indicated by the official comments to the rule, with the added note by the New Jersey Supreme Court that it ought to allow courts the opportunity to review the evidence as well, the procedure outlined in this commentary would allow for a proper determination of the admissibility of prior bad acts evidence under the New Jersey rule's notification requirement.